No. 15-

IN THE

Supreme Court of the United States

RAYMOND PFEIL, MICHAEL KAMMER,
ANDREW GENOVA, RICHARD WILMOT, JR. AND
DONALD SECEN (ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED),

Petitioners,

v.

STATE STREET BANK AND TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: March 22, 2016

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QUESTIONS PRESENTED

This case presents important questions raised by the Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) – questions that have led to conflict and confusion in the lower courts and that have serious and far-reaching implications for tens of millions of U.S. employees who hold the vast majority of their retirement savings in defined contribution plans governed by the Employee Retirement Income Securities Act of 1974 ("ERISA"):

1. Whether this Court's decision in *Dudenhoeffer* affords fiduciaries for employee stock ownership plans ("ESOPs") *per se* immunity from fiduciary liability whenever the underlying company stock investment in the ESOP trades in an "efficient market," no matter how speculative the stock has become or how close the company is to filing bankruptcy.

2. Whether ERISA's duty of prudence requires a plan fiduciary simply to monitor plan investments, or whether it also has a substantive component that requires fiduciaries to remove investments from the plan that are objectively imprudent – *i.e.*, investments that are too risky to hold in a plan based on objective characteristics.

PARTIES TO THE PROCEEDINGS

Petitioners are Raymond Pfeil, Michael Kammer, Andrew Genova, Richard Wilmot, Jr. and Donald Secen (on behalf of themselves and all others similarly situated) (collectively, "Petitioners"), who are participants in the General Motors Personal Savings Plan for Hourly Rate Employees or the GM Savings-Stock Purchase Program for Salaried Employees (collectively, the "Plans").

Respondent is State Street Bank and Trust Company, the fiduciary for the GM $1-2/3 Par Value Common Stock Fund (the "GM Stock Fund" or the "Fund"), which is one of the investment options in the Plans.

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Petitioners Raymond Pfeil, Michael Kammer, Andrew Genova, Richard Wilmot, Jr. and Donald Secen, on behalf of themselves and all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The Sixth Circuit's opinion (Pet. App. 67a-92a) is published at 806 F.3d 377. The opinion of the U.S. District Court for the Eastern District of Michigan (Pet. App. 33a-66a) is published at 2014 WL 1405404.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its decision on November 10, 2015. Pet. App. 67a-92a. On January 14, 2016, the Court of Appeals denied a timely petition for rehearing en banc. Pet. App. 93a-94a. This Petition invokes the Court's jurisdiction under 28 U.S.C. § 1254(c). Pursuant to 28 U.S.C. § 1331, the District Court had jurisdiction over Petitioners' claim under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(a)(1)(B).

STATUTORY PROVISIONS INVOLVED

The Appendix to the Petition includes the ERISA provision at issue in this suit, 29 U.S.C. § 1104(a)(1)(B). Pet. App. 95a-99a.

STATEMENT OF THE CASE

This case presents important questions arising from this Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), which eliminated the presumption of prudence for fiduciaries of employee stock ownership plans ("ESOPs"). The Sixth Circuit misinterpreted this Court's decision in *Dudenhoeffer* as providing that an ESOP fiduciary's decision to invest in company stock is *per se* prudent any time the stock trades in an "efficient market," absent the showing of special circumstances to defeat the efficient market presumption. Pet. App. 81a-84a (Op. at 9-10). The Sixth Circuit's misreading of *Dudenhoeffer* will have profound implications for tens of millions of U.S. employees who hold the vast majority of their retirement savings in ESOPs. In practical terms, the Sixth Circuit's rule will confer categorical immunity on fiduciaries regarding virtually any stock traded on a public exchange, such as the defendant's stock in *Dudenhoeffer* (which traded on NASDAQ). There would have been no need for the presumption of prudence (which this Court *rejected* in *Dudenhoeffer*) if the defendant already enjoyed the immunity conferred by the Sixth Circuit's rule. In other words, the Sixth Circuit's decision threatens to make *Dudenhoeffer* a practical nullity. This Court should grant review to address the Sixth Circuit's misinterpretation of *Dudenhoeffer.*

Review is also warranted for a second reason. The Sixth Circuit concluded that an ESOP fiduciary is entitled to immunity from ERISA's duty of prudence if it follows a prudent decision-making *process*, even in those cases, as here, in which the underlying investment decision is *substantively* and

objectively imprudent and patently unsound. Pet. App. 86a-88a. (Op. at 12-13). This aspect of the Sixth Circuit's decision conflicts with this Court's decision in *Tibble v. Edison Intern.*, 135 S. Ct. 1823 (2015), which held that "the duty of prudence involves a continuing duty to monitor investments *and remove imprudent ones*." *Id.* at 1829 (emphasis added).[1] The Sixth Circuit's decision also conflicts with *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part), and with numerous cases in other circuits. Certiorari is amply warranted.

1. Background.

Petitioners and Class members are participants and beneficiaries of the Plans who acquired and held shares of the GM $1-2/3 Par Value Common Stock Fund (the "GM Stock Fund" or the "Fund") in their Plan accounts. (Complaint, ¶¶1-8). The GM Stock Fund was an investment option in the Plans that was entirely invested in GM common stock, except for a small portion invested in cash for liquidity purposes. (*Id.*, ¶14). During the Class Period, the Fund held between 13%-14% of GM's outstanding shares, a high percentage for a company stock fund. (*Id.*, ¶8).

On June 30, 2006, GM hired State Street to serve as independent fiduciary, named fiduciary, and investment manager for the Fund. Pursuant to its Engagement Agreement, State Street's nine-member

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[1] Unless otherwise noted, emphasis is added and internal citations are omitted.

Independent Fiduciary Committee ("IFC") had the exclusive authority to determine whether GM stock continued to be a prudent investment option under ERISA. (*Id.*, ¶¶12, 25). Petitioners contend that GM stock became an imprudent investment to hold in the Fund as early as July 15, 2008, but no later than December 12, 2008,[2] as GM teetered on the brink of bankruptcy in the midst of the financial crisis. However, State Street did not begin divesting the Fund's holding of GM stock until March 31, 2009, after it had lost most of its value (*id.*, ¶¶77-78), causing catastrophic losses to the Plans. (*Id.*, ¶¶79-88).

In this regard, by early November 2008, GM had warned that: (i) its *auditors could have "substantial doubt[s]" about GM's "ability to continue as a going concern*";[3] (ii) it did "not currently expect [GM's] operations to generate sufficient cash flow to fund [its] obligations as they come due" and did "not have other traditional sources of liquidity available to fund these obligations"; and (iii) in the first two quarters of 2009, GM believed its "estimated liquidity [would] fall significantly short of the minimum required to operate [its] business." (*Id.*, ¶55) (emphasis in

[2] The Sixth Circuit previously held that to prevail on their claims, Plaintiffs "need not ultimately prove that July 15, 2008 was the actual date on which it was no longer reasonable to continue holding GM stock, only that the 'imprudent date' for GM stock occurred prior to March 31, 2009." *See* Pet. App. 21a.

[3] "A 'going concern' opinion is a most serious qualification on a financial statement because it generally indicates the auditor's opinion that a company is faced with a serious risk of bankruptcy." *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 755 F.2d 293, 299 (2d Cir. 1985).

original). In response to this news, State Street investment analyst, Jonathan Worraker warned State Street investment officer Susan Curtis on November 10, 2008 that "GM [was] very nearly insolvent" and that he believed GM would "go bankrupt in the coming months, if not within weeks, if the US Government [did] not step in and bail it out." (*Id.*, ¶56). Even then, Worraker stated that he agreed with the views of "*an increasing number of sell-side equity research analysts [who were] saying that GM's equity [was] nonetheless pretty much worthless under that scenario.*" (*Id.*) (emphasis in original).

Although the foregoing was more than ample evidence that GM stock was an imprudent investment to hold in the Fund, on December 12, 2008, the IFC's financial adviser, Stout Risius Ross ("SRR") provided a report that left no doubt. Specifically, SRR informed the IFC that: (1) GM could not access the credit or equity markets to provide capital to sustain its operations; (2) a government bail-out was possible, but the impact on GM stockholders in the form of dilution was likely going to be significant; (3) it was also likely that GM would have to restructure its balance sheet, which would result in further dilution to the current common shareholders; (4) GM bonds were selling at approximately 10 cents on the dollar, which indicated "significant solvency risk"; and (5) GM had hired Weil Gotshal & Manges LLP, a prominent bankruptcy firm. (Complaint, ¶¶67-68, 72).

Upon receiving this report at a 9:00 a.m. meeting on December 12, 2008, the IFC determined that a GM bankruptcy was "imminent," and concluded that continuing to hold GM stock was "not

consistent with ERISA." (*Id.*, ¶¶69-70). Accordingly, the IFC voted to begin selling the GM stock in the GM Stock Fund. (*Id.*). A mere 90 minutes later, however, the IFC reversed itself based on nothing more than a statement from the White House that it was "considering" using funds from the TARP program as a stop-gap measure to temporarily keep GM out of bankruptcy. (*Id.*, ¶¶73-74). As SRR had informed the IFC (and Worraker had warned Curtis a month earlier), the potential for a government loan did not alter the fact that GM stock would be rendered worthless if the company received government assistance. (*Id.*, ¶76).[4]

Notwithstanding the overwhelming evidence summarized above demonstrating that, by late Fall 2008, the risk of holding GM stock far outweighed any potential upside, State Street did not begin divesting the GM stock in the Fund until March 31, 2009 (Complaint, ¶77), long after the stock had become an imprudent investment for the Fund and Petitioners and Class members had suffered hundreds of millions of dollars in losses. (*Id.*, ¶¶79-88).

2. The District Court's Decision.

Following full merits and expert discovery, the parties filed cross motions for summary judgment in

[4] The Sixth Circuit previously held that whether the possibility of government intervention rendered it reasonable for State Street to continue to hold GM stock in the Fund was an issue of fact. *See* Pet. App. 12a-15a. The undisputed evidence presented to the District Court demonstrated that the potential of federal intervention plainly rendered State Street's decision unreasonable. (R.43 at 24-26).

April 2013. (R.84, R.92).[5] On April 11, 2014, the District Court granted State Street's motion for summary judgment and denied Petitioners' cross motion for summary judgment after applying a "highly deferential" presumption of reasonableness to State Street's decisions to purchase and hold GM stock in the Fund. (R.156). While the case was pending on appeal, this Court issued its decision in *Dudenhoeffer*, holding that ESOP fiduciaries are not entitled to a presumption of prudence or reasonableness when investing in company stock, and the fiduciary's investment decision should be reviewed using a de novo standard of review.

3. The Decision Below.

A divided panel of the Sixth Circuit affirmed the District Court's grant of summary judgment, over Judge White's dissent. The Sixth Circuit recognized that "*Dudenhoeffer* prevents us from affirming the judgment of the court below on presumption-of-prudence grounds." Pet. App. 79a. But the Court of Appeals advanced an alternative basis for its affirmance: that this Court's decision in *Dudenhoeffer* confers a broad immunity on fiduciaries holding publicly traded securities, absent special circumstances. The Sixth Circuit pointed to this Court's observation that "a fiduciary usually is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him." Pet. App. 82a (quoting *Dudenhoeffer*, 134 S. Ct. at 2471).

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[5] All references to "R._" are to the docket entries in the originating case, *Pfeil v. State Street Bank and Trust Co.*, Case No. 2:09-cv-12229, E.D. Mich.

From these and similar statements, the Sixth Circuit fashioned a broad rule of virtually categorical immunity for fiduciaries: "We interpret this to mean, and now hold, that a plaintiff claiming that an ESOP's investment in a publicly traded security was imprudent must show special circumstances to survive a motion to dismiss." Pet. App. 83a. The Sixth Circuit noted a district court decision adopting a similar standard. *Id.* ("Another court recently considered the implication of this language, observing that the 'excessively risky' character of investing ESOP funds in stock of a company experiencing serious threats to its business in 2008 'is accounted for in the market price, and the Supreme Court held that fiduciaries may rely on the market price, absent any special circumstances affecting the reliability of the market price.'") (quoting *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 615 (S.D.N.Y. 2015)). The Sixth Circuit further explained that "[t]his rule accords with Modern Portfolio Theory (MPT). MPT 'rests on the understanding that organized securities markets are so efficient at discounting securities prices that the current market price of a security is highly likely already to impound the information that is known or knowable about the future prospects of that security." *Id.* at 83a.

Next, the Sixth Circuit adopted a second principle of immunity: that an ESOP fiduciary is entitled to immunity from ERISA's duty of prudence if it follows a prudent decision-making *process*, even in those cases, as here, in which the underlying investment decision is objectively imprudent and patently unsound. Pet. App. 80a. The Sixth Circuit limited its inquiry to *process*: "We evaluate State Street's actions according to a *prudent-process*

standard. 'The test for determining whether a fiduciary has satisfied his duty of prudence is whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate *methods* to investigate the merits of the investment and to structure the investment.'" *Id.* (emphases added and quoting *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 723 (6th Cir. 2000) (internal quotation marks omitted)). The Sixth Circuit opined that "summary judgment to State Street was appropriate if [Petitioners] failed to demonstrate a genuine issue of material fact concerning the methods of State Street's investigation of the merits of investing in GM, or the appropriateness of those methods." *Id.*

Judge White dissented. She criticized the panel majority for adopting a rule "that effectively immunizes fiduciaries from imprudence claims relating to publicly traded securities in the absence of special circumstances." *Id.* at 89a. She acknowledged "the Supreme Court's observation in *Dudenhoeffer* that the market price of a publicly traded security is highly likely to reflect the risk and future prospects of the company," *id.*, but she correctly reasoned that this observation did not support the categorical rule of immunity created by the Sixth Circuit. Judge White explained that "Plaintiffs here do not assert that the market did not reflect the true value of the GM stock," and they "do not claim that State Street should have discerned something the market did not." *Id.* Rather, as Judge White noted, Petitioners' claim was that, based on the risk tolerance of the ESOP beneficiaries, the fiduciaries' decision not to divest from GM stock was substantively imprudent – *even if the market was accurately pricing that stock*:

> One can concede that the market is generally efficient in pricing stocks without concluding that all decisions to buy, sell or hold are therefore prudent. The market includes participants with various levels of risk tolerance and various types of portfolios. What is prudent for one type of investor and one type of portfolio may be imprudent for others. Further, the fact that a stock's price accurately reflects the company's risk of failing does not mean that it is prudent to retain the stock as that possibility becomes more and more certain and buyers are willing to pay less and less for a stake in the upside potential.

Pet. App. 90a.

Judge White further observed that "[t]he majority also concludes that the process employed by State Street was prudent as a matter of law," *id.*, and she dissented on this point as well. She noted that State Street defended its actions on the ground it was simply following the instructions of the ESOP plan documents. "However, *Dudenhoeffer* made clear that 'the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary.'" *Id.* at 91a (quoting *Dudenhoeffer*, 134 S. Ct. at 2468).

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT MISINTERPRETED *DUDENHOEFFER* AS PROVIDING ESOP FIDUCIARIES WITH *PER SE* IMMUNITY ANY TIME THE COMPANY STOCK TRADES IN AN EFFICIENT MARKET.

A. The Sixth Circuit's *Per Se* Immunity Rule Is in Direct Conflict with *Dudenhoeffer* and Renders ERISA's Duty of Prudence Meaningless.

The Sixth Circuit's holding that an ESOP fiduciary is entitled to *per se* immunity any time the underlying investment trades in an efficient market is an issue of exceptional importance that warrants certiorari review – both because it directly conflicts with this Court's opinion in *Dudenhoeffer* and because it presents an important question of federal law. Indeed, it misconstrues ERISA and the applicable regulations in a way that would render ERISA's fiduciary duty of prudence meaningless.

ERISA imposes a strict duty of prudence on plan fiduciaries. It provides, in a section entitled "Fiduciary duties," that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . 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." 29 U.S.C. § 1104(a)(1)(B).

In *Dudenhoeffer*, this Court reaffirmed that ERISA imposes "strict standards of trustee conduct . . . derived from the common law of trusts—most prominently, a standard of loyalty and a standard of care." 134 S. Ct. at 2465 (quoting *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)). *Dudenhoeffer* rejected the argument that ESOP fiduciaries are entitled to a "presumption" favoring their purchase of employer stock and held that determining whether a fiduciary's decision was objectively prudent can only be "accomplished through careful, context-sensitive scrutiny" of the circumstances at the time the investment was made. *Dudenhoeffer*, 134 S. Ct. at 2470-71.

The Sixth Circuit's rule would stand *Dudenhoeffer* on its head and eviscerate ERISA's statutory and regulatory duties. Instead of the "careful, context-sensitive scrutiny" commanded by *Dudenhoeffer*, the Sixth Circuit would substitute a categorical rule that an ESOP fiduciary's decision to invest in company stock is *per se* prudent any time the stock trades in an "efficient market," absent the showing of special circumstances to defeat the efficient market presumption.

The Sixth Circuit's approach would allow a plan fiduciary to defer to market valuations of efficiently traded stock, regardless of the risk tolerance of ESOP beneficiaries. This case is a perfect illustration of why the Sixth Circuit's rule flies in the face of *Dudenhoeffer* and basic ERISA principles. Petitioners did not claim that GM stock was artificially inflated or mispriced by the market, but rather that it was too risky and speculative to hold, even if appropriately priced. Here, careful,

context-specific scrutiny of the facts and circumstances available to State Street, including the possibility of bankruptcy or government intervention that would render GM's existing shares worthless, should have led ineluctably to the conclusion that GM stock was an unduly risky and, therefore, imprudent investment to hold in the Plans.

As Judge White noted, a fiduciary's decision to hold risky stock can be substantively imprudent – even if the market accurately prices that stock:

> One can concede that the market is generally efficient in pricing stocks without concluding that all decisions to buy, sell or hold are therefore prudent. The market includes participants with various levels of risk tolerance and various types of portfolios. What is prudent for one type of investor and one type of portfolio may be imprudent for others. Further, the fact that a stock's price accurately reflects the company's risk of failing does not mean that it is prudent to retain the stock as that possibility becomes more and more certain and buyers are willing to pay less and less for a stake in the upside potential.

Pet. App. 90a. The market can price two stocks identically, even with radically different risk profiles. *See, e.g.*, *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 891 (E.D. Mich. 2008) (describing Stock A (high probability of small gain) and Stock B (low probability of either skyrocketing

or crashing) which the market could give identical prices).

Under the Sixth Circuit's rule, ESOP fiduciaries would have no duty under ERISA to consider their plan beneficiaries' level of risk tolerance. Their only duty would be to ensure that nothing was impeding the public market mechanisms from accurately pricing the stock. Such an approach would transform the strict ERISA duty of prudence into a largely illusory exercise of investing in publicly traded securities markets.

Regulations implementing ERISA provide that, to satisfy the statutory duties, a fiduciary must (among other things) "tak[e] into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action." 29 C.F.R. § 2550.404a–1(b). Yet the Sixth Circuit's rule would entail no examination of these factors, so long as ESOP fiduciaries invested in efficient markets. This result would be contrary not only to common sense but also to the statutory scheme and this Court's decision in *Dudenhoeffer.*

The Sixth Circuit pointed to language in *Dudenhoeffer* referring to stock market valuations in efficient markets, but the Court of Appeals fundamentally misunderstood the import of this Court's discussion. In *Dudenhoeffer*, this Court observed:

> [W]here a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was

> over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. . . .
>
> In other words, a fiduciary usually "is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him."

134 S. Ct. at 2471.

The Sixth Circuit was wrong to interpret *Dudenhoeffer* as supplanting the presumption of prudence with an efficient market presumption. Nothing in *Dudenhoeffer* indicates that ESOP fiduciaries are categorically immune from prudence claims so long as the ESOP holds stock that trades in an efficient market. Rather, the quoted passage from *Dudenhoeffer* arose in the specific context of the plaintiffs' particular claims in *Dudenhoeffer*, which (unlike the claims here) rested on the allegation that Fifth Third stock was artificially inflated and mispriced by the market. *Dudenhoeffer* involved a fundamentally different theory of liability from the one at issue in this case. In *Dudenhoeffer*, plaintiffs' complaint alleged that "by July 2007, the fiduciaries knew or should have known that Fifth Third's stock *was overvalued* and excessively risky" (134 S. Ct. at 2464), based on public information relating to Fifth Third's exposure to subprime lending as well as non-public information known to Fifth Third insiders, including plan fiduciaries, regarding Fifth Third's financial prospects. As the Sixth Circuit dissent recognized, here, in contrast, Petitioners "do not claim that State Street should

have discerned something the market did not." Pet. App. 89a-90a. (Op. at 14).[6] Rather, Petitioners allege that a prudent and loyal fiduciary would have made a different investment decision than the decision State Street actually made. Specifically, Petitioners contend that a prudent and loyal fiduciary would have divested GM stock by late Fall 2008, at the latest, after GM had warned that its auditors could issue a going concern opinion and a large number of securities analysts, including State Street's own Jonathan Worraker, had concluded that its existing equity was worthless irrespective of whether the company could avoid bankruptcy through a government bailout.

In short, nothing in *Dudenhoeffer* converts an ESOP fiduciary's duty of prudence into a duty to determine market efficiency. In fact, *Dudenhoeffer*, 134 S. Ct. at 2466, abrogated the decision in *White v. Marshall & Ilsley Corp.*, 714 F.3d 980 (7th Cir. 2013), which had opined, "[i]f the market is efficient, it is hard to see how ERISA could find a fiduciary imprudent for valuing a stock at its current market price." *Id.* at 993.

This Court should grant review because the Sixth Circuit's decision conflicts with *Dudenhoeffer* and implicates an important question of federal law with important implications for tens of millions of ESOP beneficiaries.

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[6] The Sixth Circuit majority erred in stating that Petitioners alleged that State Street's process was imprudent because it did not recognize "'that the market was over- or undervaluing' GM common stock." Pet. App. 84a (quoting *Dudenhoeffer*, 134 S. Ct. at 2471). No such allegation appears in the complaint or was urged on summary judgment.

B. The Sixth Circuit's Decision Warrants Review Because It Reflects Confusion and Conflict in the Lower Courts Regarding Important ERISA Principles.

Other circuits have rejected the Sixth Circuit's *per se* rule regarding the duty of prudence and explained why such a rule based on the efficient market hypothesis is flawed. The First Circuit has adhered to the view that there are no *per se* rules regarding the duty of prudence. Ironically, in *Bunch v. W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009), State Street itself prevailed on a motion for summary judgment by arguing successfully, and correctly, that ERISA's duty of prudence, *not whether company stock traded in the efficient market*, was the standard by which its conduct as an ERISA fiduciary should be measured. *Id.* at 6. The First Circuit's decision in *Bunch* (555 F.3d at 10) cited and reaffirmed *LaLonde v. Textron, Inc.*, 369 F.3d 1, 6-7 (1st Cir. 2004) ("Because the important and complex area of law implicated by plaintiffs' claims is neither mature nor uniform … we believe that we would run a very high risk of error were we to lay down a hard-and-fast rule ….").

The Sixth Circuit's decision also conflicts with Seventh Circuit precedent. The Seventh Circuit has recognized that price is only one consideration in the prudence analysis: risk is also a critical question. *See Steinman v. Hicks*, 352 F.3d 1101, 1104 (7th Cir. 2003) (Posner, J.) ("[A]ssuming that the plan's participants were risk averse, a truncated distribution of expected returns would have been preferable ... even if the average of those returns would be no higher or even somewhat lower."). The Seventh Circuit has recognized that employees in an

ESOP are even more risk-sensitive with respect to holdings of their employers' stock, because the employers' financial fortunes will affect not just the value of its employees' retirement accounts but their expected future wages as well. *See Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 409 (7th Cir. 2006) (Posner, J.).

The Sixth Circuit majority's reliance on the "modern portfolio theory" when holding that ESOP fiduciaries are entitled to *per se* immunity also reflects confusion that warrants this Court's review. As the Fourth Circuit has recognized, modern portfolio theory does not shield a fiduciary from liability where the fiduciary has continued to hold an investment that is excessively risky for an employee retirement plan. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423-24 (4th Cir. 2007) (explaining that the district court "overstated the appropriate relevance of modern portfolio theory to this case. Standing alone, it cannot provide a defense to the claimed breach of the 'prudent man' duties here.").

Indeed, even the district court opinion in *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599 (S.D.N.Y. 2015), *appeal pending*, which the Sixth Circuit majority cited, recognized that *Dudenhoeffer* does not shield a fiduciary from liability when a company whose stock is held in an ESOP is on the brink of collapse. *Citigroup*, 104 F. Supp. 3d at 616 n.12 (citing *Gedek v. Perez*, 66 F. Supp. 3d 368, 378-79 (W.D.N.Y. 2014) (breach of duty of prudence by ESOP fiduciary alleged where company "was widely viewed among knowledgeable investors and analysts as headed toward default, bankruptcy, or worse, yet defendants chose to remain invested in [company] stock.")).

The need for this Court's review is apparent, because other lower courts are beginning to rely on the Sixth Circuit's faulty reasoning to dismiss ERISA claims. In *Rinehart v. Lehman Bros. Holdings Inc.*, --- F.3d ----, 2016 WL 1077009 (2d Cir. Mar. 18, 2016) (*per curiam*), the Second Circuit applied *Dudenhoeffer* to affirm the dismissal of duty-of-prudence claims against the fiduciaries of the Lehman Brothers ESOP. Like the Sixth Circuit, the Second Circuit misconstrued this Court's decision in *Dudenhoeffer* as incorporating an "efficient market" principle that would immunize fiduciaries for holding virtually any stock traded in an efficient market: "viewing this rule as applicable to *all* allegations of imprudence based upon public information—regardless of whether the allegations are framed in terms of market value or excessive risk—is consistent with the efficient market hypothesis that risk is accounted for in the market price of a security." *Id.* at *4 (emphasis in original). *See also Coburn v. Evercore Trust Co., N.A.*, No. 15-49 (RBW), 2016 WL 632180, at *6 (D.D.C. Feb. 17, 2016) (citing the Sixth Circuit's decision in this case to dismiss ERISA claim).

This Court's recent GVR order in *Amgen, Inc. v. Harris*, No. 15-278 (Jan. 25, 2016), also reflects ongoing confusion in the lower courts that warrants this Court's review. Although the Sixth Circuit in this case did not commit the same error as the Ninth Circuit in *Amgen*, both circuits manifested confusion regarding basic ERISA principles. The need for this Court's further guidance and clarification of *Dudenhoeffer* is apparent.

This case presents an excellent vehicle for such clarification. While *Dudenhoeffer* arose on a

motion to dismiss, and thus is a decision about pleading standards, the instant case involves a much fuller factual record that was compiled through cross-motions for summary judgment. Indeed, Petitioner's complaint had survived a motion to dismiss predicated on the now-rejected presumption of prudence at both the district court and Sixth Circuit level. Accordingly, the instant case presents an even better vehicle for this Court's review than *Dudenhoeffer* itself.

II. THE SIXTH CIRCUIT'S RULE OF "PROCEDURAL" PRUDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Sixth Circuit's holding raises another issue of exceptional importance that warrants certiorari review – *i.e.*, whether employing a so-called "prudent process" alone is enough to satisfy ERISA's duty of prudence, even when, as in this case, the fiduciary has made an objectively imprudent investment as evidenced by the facts and circumstances available to the fiduciary *at the time the investment decision was made.*

The Sixth Circuit's holding on this point conflicts with this Court's decision in *Tibble v. Edison Intern.*, 135 S. Ct. 1823 (2015), which established that an ERISA trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor trust investments and divest from those that have become imprudent. *Tibble* stressed that "the duty of prudence involves a continuing duty to monitor investments *and remove imprudent ones*." 135 S. Ct. at 1829. This Court added that "the

trustee must 'systematic[ally] conside[r] all the investments of the trust at regular intervals' to ensure that they are appropriate." *Id.* at 1828. This Court noted the position of the United States that "[t]he duty of prudence under ERISA, as under trust law, requires plan fiduciaries with investment responsibility to examine periodically the prudence of existing investments and to remove imprudent investments within a reasonable period of time." *Id.* at 1829. This Court cited approvingly to a decision holding that a "trustee was required to take action to 'protect the rights of the beneficiaries' when the value of trust assets declined." *Id.* at 1828.

This Court's decision in *Tibble* recognizes the duty of an ERISA fiduciary to assess the objective prudence of an investment and to remove imprudent ones. The Sixth Circuit's rule cannot be reconciled with those duties.

The Sixth Circuit's decision also conflicts with *Fink*, which reversed the dismissal of an ERISA claim and held that co-fiduciaries of an ERISA trust fund could be held liable for all breaches of fiduciary duty for which the trustee was liable if it could be shown that they knowingly participated in or knowingly concealed the acts and omissions of the trustee. Writing separately, then-Judge Scalia opined: "I know of no case in which a trustee who has made (or held) patently unsound investments has been excused from liability because his objectively imprudent action was preceded by careful investigation and evaluation." *Id.* at 962 (Scalia, J., concurring in part and dissenting in part). He explained that "there are two related but distinct duties imposed upon a trustee: to investigate and evaluate investments, and to invest prudently.

Neither does the faithful discharge of the first satisfy the second, nor does breach of the first constitute breach of the second." *Id.* Then-Judge Scalia added that, while "the extent of the trustee's investigation and evaluation is often the focus of inquiry in imprudent-investment suits . . . that is because the determination of whether an investment was objectively imprudent is made on the basis of what the trustee knew *or should have known*." *Id.* (emphasis in original).

Indeed, every Circuit has recognized that the duty of prudence requires an ESOP fiduciary to sell an investment when, *based on objective characteristics*, it has become too risky and therefore an imprudent investment. For example, *Edgar v. Avaya, Inc.*, 503 F.3d 340, 348–49 (3d Cir. 2007), recognized that stock declines could render an ESOP investment imprudent and explained that a plaintiff need not necessarily prove that a company is "on the brink of bankruptcy." *Id.* at 349 n.13. The Second Circuit has explained that plaintiffs need not plead the company's "impending collapse" if they have alleged a "dire situation." *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140–41 (2d Cir. 2011). The Ninth Circuit has opined that a plaintiff may demonstrate objective imprudence by showing facts that "'clearly implicate the company's viability as an ongoing concern' or show 'a precipitous decline in the employer's stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement.'" *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (brackets omitted).

Indeed, State Street's own counsel conceded before the district court that process alone was not

enough. (R.160, 7/19/2013 Hearing Tr.; PgID#6528) ("Let me start by saying as emphatically as I can, State Street's position is not that we had a prudent process and therefore it doesn't matter that this was an imprudent investment. That is a complete strawman.").

This Court should grant certiorari to review the Sixth Circuit's rule that process alone may shield an ESOP fiduciary from liability, even where the investment was substantively too risky and speculative to hold in an employee retirement plan.[7]

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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[7] The evidence in this case overwhelmingly showed that State Street engaged in a procedurally *imprudent* process when deciding whether to continue to hold GM stock in the GM retirement plans, as the Sixth Circuit dissent correctly observed. Pet. App. 89a-92a.

Respectfully submitted,

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Dated: March 22, 2016

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 12a0048p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND M. PFEIL and MICHAEL KAMMER, Individually and on behalf of all others similarly situated, No. 10-2302

Plaintiffs-Appellants,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 09-12229—Denise Page Hood, District Judge.

Argued: October 7, 2011
Decided and Filed: February 22, 2012

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

COUNSEL

ARGUED: Geoffrey M. Johnson, SCOTT & SCOTT, LLP, Cleveland Heights, Ohio, for Appellants.

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

Wilber H. Boies, McDERMOTT WILL & EMERY LLP, Chicago, Illinois, for Appellee. **ON BRIEF:** Geoffrey M. Johnson, SCOTT & SCOTT, LLP, Cleveland Heights, Ohio, for Appellants. Wilber H. Boies, Nancy G. Ross, McDERMOTT WILL & EMERY LLP, Chicago, Illinois, Chris C. Scheithauer, McDERMOTT WILL & EMERY LLP, Irvine, California, James D. VandeWyngearde, PEPPER HAMILTON LLP, Southfield, Michigan, for Appellee. Elizabeth S. Goldberg, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., Kent A. Mason, DAVIS & HARMAN LLP, Washington, D.C., for Amici Curiae.

OPINION

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

I. BACKGROUND

A. Factual Background

General Motors offered separate defined contribution 401(k) profit-sharing plans to its salaried and hourly employees. The plans maintained individual accounts for each participant. A participant's benefits were based on the amount of contributions and the investment performance of the contributions. According to the complaint, the plans offered participants several investment options, including mutual funds, non-mutual fund investments, and the subject of this litigation: the General Motors Common Stock Fund.

Participants had control over how their funds were invested. The plans imposed no restrictions on the participant's allocation of assets among the investment options and gave participants the discretion to change their allocation in any investment on any business day. The plans invested each participant's funds by default in the Pyramis Strategic Balanced Fund, and not the General Motors Common Stock Fund.

The plan documents explain that the purpose of the General Motors Common Stock Fund was "to enable Participants to acquire an ownership interest in General Motors and is intended to be a basic design feature" of the plans. The complaint alleges that the plans invested between $1.45 billion and $1.9 billion in plan assets in General Motors stock during the class period. The plan documents provide that this fund "shall be invested exclusively in [General Motors] $1-2/3 par value common stock without regard to" diversification of assets, the risk profile of the investment, the amount of income

provided by the stock, or fluctuations in the market value of the stock. However, the plans state that these restrictions do not apply if State Street, acting as the independent fiduciary:

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

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

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

plaintiff contend was a "potential disaster for shareholders." The complaint alleges that on August 1, 2008, General Motors announced a third quarter net loss of $15.5 billion. These bleak reports forced the company to acknowledge in its November 7, 2008 third-quarter financials that it would exhaust cash reserves by mid-2009. Three days later, General Motors filed its Form 10-Q for third quarter 2008, disclosing that its auditors had "substantial doubt" regarding the company's "ability to continue as a going concern." The plaintiffs allege that under these circumstances, State Street should have recognized as early as July 15, 2008, that General Motors was bound for bankruptcy and that GM stock was no longer a prudent investment for the plans.

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

B. Procedural History

The plaintiffs filed their putative class action on June 9, 2009, alleging State Street's breach of fiduciary duty in violation of ERISA § 409(a), 29 U.S.C. § 1109(a). Specifically, the complaint alleged that State Street had failed to prudently manage the

plan's assets thereby breaching its fiduciary duty defined in ERISA § 404. The named plaintiffs brought this action on behalf of themselves and a class of individuals defined as: "All persons who were participants in or beneficiaries of the [General Motors 401(k) Plans] at any time between July 15, 2008 and April 24, 2009 (the 'Class Period') and whose accounts included investments in General Motors Stock." State Street filed a motion to dismiss the complaint for failure to state a claim, which the district court granted on September 30, 2010. The district court held that the plaintiffs had sufficiently pleaded a breach of State Street's fiduciary duty by alleging that State Street continued to operate the General Motors Common Stock Fund after public information raised serious questions about General Motors' short-term viability as a going concern without resort to bankruptcy. However, the district court concluded that the plaintiffs had not plausibly alleged that State Street's breach proximately caused losses to the plans. The district court emphasized that plan participants had a menu of investment options from which to choose and that participants retained control over the allocation of assets in their accounts at all times. Because the participants could have elected to move their funds from the General Motors Common Stock Fund to one of the other investments offered in the plan, the court reasoned, State Street could not be liable for losses to the plan. Therefore, the district court granted State Street's motion to dismiss. The plaintiffs' timely appeal followed.

II. ANALYSIS

A. Standard of Review

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

B. Duty of a Fiduciary under ERISA

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

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (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.

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

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

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

However, an ESOP fiduciary may be liable for failing to diversify plan assets even where the plan required that an ESOP invest primarily in company stock. *Id.* at 1459. We have explained that ERISA's statutory exemptions for ESOPs

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

Id. at 1458 (citations omitted).

ESOP fiduciaries "wear two hats" as they "are expected to administer ESOP investments consistent with the provisions of both a specific employee benefits plan and ERISA." *Id.* (quoting *Moench v. Robertson,* 62 F.3d 553, 569 (3d Cir. 1995) (internal quotation marks omitted)). Put another way, an ESOP fiduciary must follow the plan documents but only insofar as such documents and instruments are consistent with the provisions of ERISA. *Id.* at 1457. In recognition of an ESOP fiduciary's "two hats," we have adopted an abuse-of-discretion standard of review for an ESOP fiduciary's decision to invest in employer securities. *Id.* at 1459. A fiduciary's decision to remain invested in employer securities is presumed to be reasonable, the so-called *Kuper* or *Moench* presumption. *Id.* A plaintiff may rebut the presumption "by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Id.*; *accord Quan v. Computer Sciences Corp.*, 623 F.3d 870, 881–82 (9th Cir. 2010); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254-56 (5th Cir. 2008).

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

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

We find no error in the district court's holding that, accepting the allegations of the complaint as true, the plaintiffs have pleaded facts to overcome the presumption. The plaintiffs have alleged that State Street failed to follow the terms of the plans themselves, which required State Street to divest the plans' holdings in company stock if "there is a serious question concerning [General Motors'] short-term viability as a going concern without resort to bankruptcy proceedings." According to the complaint, on July 15, 2008, General Motors announced a restructuring plan designed to improve cash flow and save the company. By November 10, 2008, GM disclosed that its auditors had "substantial doubt" regarding the company's "ability

to continue as a going concern." Nevertheless, State Street did not begin to divest the plan of its GM common stock holdings until March 31, 2009. Based on these allegations, the plaintiffs have sufficiently pleaded that "a prudent fiduciary acting under similar circumstances would have made a different investment decision" and thereby overcome the presumption of reasonableness.

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

Today, we hold that the presumption of reasonableness adopted in *Kuper* is not an additional pleading requirement and thus does not apply at the motion to dismiss stage. Our holding derives from the plain language of *Kuper* itself where we explained that an ESOP plaintiff could

"rebut this presumption of reasonableness by *showing* that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper*, 66 F.3d at 1459 (emphasis added). The presumption of reasonableness in *Kuper* was cast as an evidentiary presumption, and not a pleading requirement. *Cf. In re Citigroup ERISA Litig.*, 662 F.3d 128, 129 (2d Cir. 2011) ("The 'presumption' is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary."). We also highlight that in *Kuper* we applied the presumption to a fully developed evidentiary record, and not merely the pleadings. As such, a plaintiff need not plead enough facts to overcome the presumption in order to survive a motion to dismiss.[1] *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (holding that a plaintiff was not required to plead all of the prima facie elements of the *McDonnell Douglas* evidentiary framework in order to survive a motion to dismiss).

Our holding is consistent with the standard of review for motions to dismiss generally. Courts are

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[1] We also note that many district courts in this Circuit have reached a similar conclusion. *See e.g. Sims v. First Horizon Nat'l Corp.*, No. 08-2293, 2009 WL 3241689, at *24 (W.D. Tenn. Sept. 30, 2009); *In re Diebold ERISA Litig.*, No. 06-cv-170, 2008 WL 2225712, at * 9 (N.D. Ohio May 28, 2008); *In re Goodyear Tire & Rubber Co. ERISA Litig.*, 438 F. Supp. 2d 783, 793 (N.D. Ohio 2006); *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 860 (N.D. Ohio 2006); *In re CMS Energy ERISA Litig.,* 312 F. Supp. 2d 898, 914 (E.D. Mich. 2004); *Rankin v. Rots,* 278 F. Supp. 2d 853, 866 (E.D. Mich. 2003); *see also Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 681 (6th Cir. 2008) (rejecting heightened pleading requirements in ERISA cases that "would elevate form over substance").

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

For example, State Street contends that the district court erred in concluding that the facts alleged in the complaint were sufficient to rebut the presumption. Specifically, State Street argues that there was a widely publicized expectation of government intervention on GM's behalf, and therefore, it was not unreasonable for the plans to continue to hold GM stock during the class period. State Street also asserts that holding GM stock continued to be reasonable until the White House "with all of its resources and expertise" determined on March 31, 2009, that GM's "viability as a going concern was in serious doubt." Appellee's Br. 42. State Street maintains that no amount of discovery will change these asserted facts. The possibility of federal intervention and its effect on the reasonableness of holding company stock, however, present questions of fact inappropriate for resolution

on a motion to dismiss. State Street's argument about a possible bailout does nothing to establish that the numerous, detailed factual averments in the complaint fail to plausibly allege that General Motors was on the road to bankruptcy and thus had ceased to be a prudent investment for the plans. Short of converting the motion to dismiss into a motion for summary judgment, such an approach also invites courts to consider facts and evidence that have not been tested in formal discovery.[2] Therefore, it would be improper for a court to weigh these factual assertions against the facts pleaded in the plaintiffs' complaint in order to determine whether the plaintiffs had overcome the presumption of reasonableness.

Finally, we recognize that sister circuits have reached the opposite conclusion and held that the *Kuper* presumption should be considered at the pleadings stage. State Street cites this authority in support of its assertion that the plaintiffs must plead facts to overcome the presumption in order to state a plausible claim. We find these decisions distinguishable because these circuits have adopted more narrowly-defined tests for rebutting the

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

presumption than the test this Court announced in *Kuper*. For instance, the Third Circuit in *Edgar v. Avaya* affirmed the dismissal of a complaint, holding that the pleadings failed to allege facts demonstrating that the fiduciary abused its discretion by not divesting the plans of their holdings in company stock. 503 F.3d 340, 348-49 (3d Cir. 2007). Concerning the kinds of facts required to overcome the presumption of reasonableness, the Third Circuit explained that a plaintiff need not necessarily prove that a company is "on the brink of bankruptcy" but must demonstrate more than possible fraud or corporate wrongdoing in order to rebut the presumption. *Id.* at 349 n.13. The Third Circuit declined to find that corporate developments likely to have a negative effect on earnings, "or the corresponding drop in stock price [from $10.69 to $8.01], created the type of dire situation which would require defendants to disobey the terms of the Plans by not offering the Avaya Stock Fund as an investment option, or by divesting the Plans of Avaya securities." *Id.* at 348. The Third Circuit expressly rejected the plaintiff's contention that application of the presumption at the motion to dismiss stage was inconsistent with liberal notice-pleading standards. *Id.* at 349. The Third Circuit held that the allegations themselves affirmatively showed that the company was far from the sort of deteriorating financial circumstances that would permit the presumption to be rebutted, commenting that "'[m]ere stock fluctuations, even those that trend downward significantly, [were] insufficient to establish the requisite imprudence to rebut the *Moench* presumption.'" *Id.* (quoting *Wright v. Oregon*

Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004)) (alterations in original).

The Second Circuit recently reached a similar conclusion that courts should apply the presumption of reasonableness when analyzing the plausibility of the pleadings on a motion to dismiss. *In re Citigroup ERISA Litig.*, 662 F.3d at 140–41. The plaintiffs in *Citigroup* alleged that the bank had made "ill-advised investments in the subprimemortgage market while hiding the extent of those investments from Plan participants and the public." *Id.* at 140. As a result of the investments, the company suffered $30 billion in losses, and Citigroup stock lost significant value. *Id.* The Second Circuit explained that in order to rebut the presumption of reasonableness, plaintiffs might not necessarily have to plead the company's "impending collapse" but must allege a "dire situation." *Id.* at 140–41. The Second Circuit affirmed the district court's dismissal of the prudence claim under Rule 12(b)(6), holding that "plaintiffs fail to allege facts sufficient to show that defendants either knew or should have known that Citigroup was in the sort of dire situation that required them to override Plan terms in order to limit participants' investments in Citigroup stock." *Id.* at 141. The Second Circuit stressed that even had the fiduciary investigated Citigroup's exposure to the sub-prime mortgage market, the company's losses and "the dire situation" in which it found itself during the class period were not foreseeable. *Id.*

We note that in addition to the Second and Third Circuits, the Fifth and Ninth Circuits have also adopted a rebuttal standard in cases involving the presumption of reasonableness, in which plaintiffs are required to come forward with some

proof of "dire circumstances" or the "impending collapse" of the company. *Quan*, 623 F.3d at 882 (holding that a plaintiff must prove facts that "clearly implicate the company's viability as an ongoing concern or show a precipitous decline in the employer's stock combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement") (internal quotations marks, citations, and ellipsis omitted); *Kirschbaum*, 526 F.3d at 255 (affirming summary judgment in fiduciary's favor in absence of evidence that company's "viability as a going concern was ever threatened" or that the company's stock "was in danger of becoming essentially worthless"). The Fifth and Ninth Circuits have also commented that the strength of the presumption depends on other factors such as the amount of discretion given to the fiduciary under the terms of the plan and any conflicts of interest the fiduciary may have. *Quan*, 623 F.3d at 883 ("A guiding principle, however, is that the burden to rebut the presumption varies directly with the strength of a plan's requirement that fiduciaries invest in employer stock.") (citing *Kirschbaum,* 526 F.3d at 255 & n. 9). Unlike the Second and Third Circuits, however, the Fifth and Ninth Circuits have not addressed whether a plaintiff must plead enough facts to rebut the presumption of reasonableness to survive a motion to dismiss.

In contrast to our sister circuits, we have not adopted a specific rebuttal standard that requires proof that the company faced a "dire situation," something short of "the brink of bankruptcy" or an "impending collapse." The rebuttal standard adopted in this Circuit, and the one which we are bound to

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

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

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

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

The district court granted State Street's motion to dismiss based on its conclusion that the plaintiffs had failed to plausibly plead a causal connection between State Street's alleged breach of duty and losses to the plan. The district court concluded that because plan participants could direct their investments by choosing from a menu of investment options and had the discretion to avoid GM stock altogether, State Street should not be held liable for the plaintiffs' decisions to stay invested in the General Motors Common Stock Fund. In other words, "State Street cannot be held liable for actions which Plaintiffs controlled." We disagree.

While it is true that the plaintiffs must eventually prove causation to prevail on their claims, *see Kuper*, 66 F.3d at 1459, the plaintiffs have plausibly pleaded causation to survive State Street's motion to dismiss. In order to establish a causal connection between State Street's alleged breach of duty and losses to the plan, the plaintiffs need only show "a causal link between the [breach of duty] and the harm suffered by the plan," meaning "that an adequate investigation would have revealed to a

reasonable fiduciary that the investment [in GM stock] was improvident." *Id.* at 1459-60 (internal quotations and citations omitted). The plaintiffs allege that State Street allowed the plans to continue to hold GM stock well after it became imprudent to do so and thereby breached its duty to the plan. *See* Compl. ¶¶ 7-10, 71-72. According to the pleadings, GM stock ceased to be a prudent investment on July 15, 2008, the date on which GM announced its restructuring plan in response to its "significant" second quarter losses. State Street did not make the decision to divest the plans of their GM stock holdings until March 31, 2009. The plaintiffs allege that the plan suffered hundreds of millions of dollars in losses as a result of State Street's delay.[3] Based on these allegations, the complaint has sufficiently pleaded a causal link between State Street's breach and losses to the plans.

The district court erroneously relied on the fact that the plaintiffs had the ability to divest their 401(k) accounts of the GM stock on any given business day and held that State Street's alleged breach did not cause the losses to the plan. We hold that as a fiduciary, State Street was obligated to exercise prudence when designating and monitoring the menu of different investment options that would

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

be offered to plan participants. *See Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir.), *cert. denied sub nom. Lingis v. Dorazil*, 132 S. Ct. 96 (2011); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007); *Langbecker v. Elec. Data. Sys. Corp.*, 476 F.3d 299, 312 (5th Cir. 2007). As the Seventh Circuit explained, "[t]he choice of which investments will be presented in the menu that the plan sponsor adopts is not within the participant's power. It is instead a core decision relating to the administration of the plan and the benefits that will be offered to participants." *Howell*, 633 F.3d at 567. Therefore, "[i]t is . . . the fiduciary's responsibility . . . to screen investment alternatives and to ensure that imprudent options are not offered to plan participants." *Id.*; *see also Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009) (rejecting the notion that a fiduciary "can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them"); *accord Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (holding that allegations that better investment options existed were sufficient to state a claim for breach of fiduciary duty).

Here State Street had a fiduciary duty to select and maintain only prudent investment options in the plans. Indeed, State Street's engagement letter with GM vested State Street with the "exclusive authority under each Plan and Trust to determine whether the Company Stock Fund continue[d] to be a prudent investment option under [ERISA]." Despite State Street's fiduciary duty to protect plan assets, the district court focused on the

fact that plan participants had the power to reallocate their funds among a variety of options, only one of which was the General Motors Common Stock Fund. A fiduciary cannot avoid liability for offering imprudent investments merely by including them alongside a larger menu of prudent investment options. Much as one bad apple spoils the bunch, the fiduciary's designation of a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty, both the duty to act as a prudent person would in a similar situation with single-minded devotion to the plan participants and beneficiaries, as well as the duty to act for the exclusive purpose of providing benefits to plan participants and beneficiaries. *Gregg*, 343 F.3d at 840. Therefore, we reject the district court's approach because it would insulate the fiduciary from liability for selecting and monitoring the menu of plan offerings so long as some of the investment options were prudent.

State Street also cannot escape its duty simply by asserting at the pleadings stage that the plaintiffs themselves caused the losses to the plans by choosing to invest in the General Motors Common Stock Fund. Such a rule would improperly shift the duty of prudence to monitor the menu of plan investments to plan participants. The Seventh Circuit opined that such a standard "would place an unreasonable burden on unsophisticated plan participants who do not have the resources to pre-screen investment alternatives." *Hecker*, 569 F.3d at 711. While some plan participants undoubtedly possess greater sophistication than others in these matters, the fact remains ERISA charges fiduciaries

like State Street with "the highest duty known to the law," *Kuper*, 66 F.3d at 1458, which includes the duty to prudently select investment options and the duty to act in the best interests of the plans. For this reason, we reject State Street's argument that plan participants, who enjoyed access to all of the same publicly-available information about GM's woes during the class period as State Street, caused the plan losses. Aside from being an untested assertion of fact, we disagree that plaintiff participants should be held to the same standard of care as an ERISA fiduciary, particularly in a matter that pertains to plan administration. If the rule were otherwise, a fiduciary administering any 401(k) where participants direct their own investments could always argue that the participant's decision to hold the imprudent investment was an intervening cause and avoid any liability. Therefore, we conclude that the plaintiffs have pleaded enough facts to make plausible their claim of a causal link between State Street's conduct and the losses to the plan.

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

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

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

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

9 U.S.C. § 1104(c) (emphasis added).

The following example illustrates the policy rationale for the section 404(c) safe harbor defense. "If an individual account is self-directed, then it would make no sense to blame the fiduciary for the participant's decision to invest 40% of her assets in Fund A and 60% in Fund B, rather than splitting assets somehow among four different funds, emphasizing A rather than B, or taking any other decision." *Howell*, 633 F.3d at 567. The safe harbor then "ensures that the fiduciary will not be held responsible for decisions over which it had no control." *Id.* (citing *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993)).

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

regulations, accordingly, include particularly stringent protections with respect to stock funds.

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

Moreover, even if the plans satisfied the regulations to qualify as section 404(c) plans, we hold that the safe harbor defense does not apply under the circumstances because it does not relieve fiduciaries of the responsibility to screen

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

investments. The Seventh Circuit recently held that "the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach, and that the [section 404(c)] safe harbor is not available for such acts." *Howell*, 633 F.3d at 567; *DiFelice*, 497 F.3d at 418 n.3 (holding that "although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance").

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

This holding is also consistent both with the position taken by the Secretary of Labor in her amicus curiae brief in this appeal and with the preamble to the regulations implementing the safe harbor. *See* Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404() Plans), 57 Fed. Reg. 46,906, 46,924 n.27 (Oct.

13, 1992) (explaining that "the act of designating investment alternatives . . . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable"). We add that the Department of Labor began a notice and comment rule-making proceeding in 2010 to revise its regulations and "reiterate [the Department's] long held position that relief afforded by section 404(c) and the regulation thereunder does not extend to a fiduciary's duty to prudently select and monitor . . . designated investment alternatives under the plan." Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg. 43,014, 43,018 (proposed July 23, 2008). The amended text of the 404(c) regulation also provides that the safe harbor provision "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,946 (Oct. 20, 2010) (to be codified at 29 C.F.R. § 2550.404c-1(d)(2)(iv)). Although the proposed amendment to the regulation is not binding or even owed any deference in this case, it does provide additional, relevant support for the result we reach.

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

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

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

F. Whether the Plaintiffs are Collaterally Estopped

State Street argues that the plaintiffs are collaterally estopped from bringing this action

because the issues raised are "virtually identical" to issues decided by the Second Circuit in *Young v. General Motors Investment Management Corp.*, 325 F. App'x 31 (2d Cir. 2009). In order to establish preclusion, State Street must show

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

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

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

hold that the plaintiffs are not collaterally estopped from bringing this action.

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

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RAYMOND M. PFEIL AND
MICHAEL KAMMER,
Individually And On Behalf Of
All Others Similarly Situated,

CASE NO. 09-CV-12229

Plaintiffs,

HON. DENISE PAGE HOOD

v.

STATE STREET BANK AND TRUST
COMPANY,

Defendant.
_______________________________________/

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and DISMISSING ACTION

I. BACKGROUND/FACTS

This matter is on remand from the Sixth Circuit Court of Appeals pursuant to an opinion issued on February 22, 2012. *Pfeil v. State Street Bank and Trust Co.,* 671 F.3d 585 (6th Cir. 2012). The mandate issued on April 5, 2012. The Sixth Circuit reversed the Court's September 30, 2010

judgment and order granting Defendant State Street Bank and Trust Company's ("State Street") Motion to Dismiss. (Doc. Nos. 39, 40)

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

The Plans are defined contribution profit sharing plans, referred to as 401(k) plans. The benefits each participant receives are based on the amount of contributions in the participant's account and the investment performance of those contributions. (Complaint, ¶¶ 1, 3-4) The Plans offered several investment options, including mutual funds, non-mutual fund investments and the GM Common Stock Fund. (Salaried Plan, Art. I, § 5; Hourly Plan Art. VII, § 7.01(a)) Contributions to the Plan are invested "in accordance with the Employee's election." *Id.* If an employee does not elect an option, the investments are placed in the Pyramis Strategic Balanced Fund, not the GM Stock Fund. (Salaried Plan, Art. 1, §§ 5(C), (D) and 6; Hourly Plan, Art. VII, § 7.01(a)) Plan participants

may change the allocation of the assets in their Plan accounts between several options "on any Business Day of the month" up to "100%." (Salaried Plan, Art. I, § 8(B); Hourly Plan, Art. VII, § 7.01(d)(ii)).

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

On June 30, 2006, State Street and GM entered into an engagement letter which allowed State Street to be the Fiduciary and Investment Manager for the Company Stock Fund. (Complaint, ¶ 2) Under the Agreement, State Street was responsible to exercise its judgment and discretion to determine whether to continue offering the Company Stock Fund investment option. The Agreement states, "State Street will exercise independent discretionary judgment in the performance of its obligations hereunder in accordance with the fiduciary requirements set forth in ... ERISA, subject to the statement of Company Intent in Section 4 hereof." (Agreement, pp. 2-3) Section 4 provides:

> The Company confirms to State Street that it is the Company's intent in its

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

(Agreement, p. 3)

Plaintiffs claim that on June 30, 2006 when State Street became the Fiduciary, GM was already in serious financial trouble. (Complaint, ¶ 23) By the time State Street assumed fiduciary responsibility for the GM stock in the Plans, numerous securities analysis and experts were already discussing a possible GM bankruptcy filing. *Id.* GM's financial condition continued to deteriorate throughout 2007 and the first Quarter of 2008 with a $39 billion Third Quarter 2007 loss. *Id., ¶¶* 28, 30. On July 15, 2008, GM Chief Executive Officer Rick Wagner announced that GM needed to implement a restructuring plan to combat Second Quarter 2008 losses that he described as "significant" and to stem an impending

liquidity crisis. *Id.,* ¶ 34. GM's financial condition continued to spiral out of control and on August 1, 2008, GM announced a Third Quarter 2008 net loss of $15.5 billion. *Id.*, ¶ 38. Analysts projected that GM was on track to run out of cash by the First Quarter of 2009. *Id.,* ¶ 39. In its November 10, 2008 Form 10-Q for the Third Quarter of 2008, GM acknowledged that its auditors had "substantial doubt" regarding GM's "ability to continue as a going concern." *Id.,* 46. In a November 2, 2008 notice to participants and beneficiaries, State Street temporarily suspended the purchases of the GM Common Stock Fund until further notice noting that "it is not appropriate at this time to allow additional investments by participants." *Id.*, ¶ 49. It was not until March 31, 2009 that State Street decided to divest the GM stock held in the fund, with the process completed by April 24, 2009. *Id.,* ¶ 51. Plaintiffs claim that State Street breached its fiduciary duty by failing to act in the face of an onslaught of red flags clearly indicating that GM stock was an imprudent investment causing the people who rely on the assets in the Plans to fund their retirement, to suffer hundreds of millions of dollars in losses. *Id.,* ¶ 52.

In its Opinion, the Sixth Circuit held that the presumption of reasonableness adopted in *Kuper v. Iovenko,* 66 F.3d 1447 (6th Cir. 1995) does not apply at the pleading stage and that Plaintiffs need not plead facts in their Complaint to overcome the presumption.[1] *Pfeil,* 671 F.3d at 592-93. The Sixth

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[1] The Supreme Court granted certiorari in a case from the Sixth Circuit, *Dudenhoeffer v. Fifth Third Bancorp.,* 692 F.3d 410 (6th Cir. 2012), on the issue of whether a plaintiff must allege facts in a complaint that a fiduciary abused its discretion by remaining invested in employer stock in order to

Circuit noted that the complaint must plead facts to plausibly allege a fiduciary breached its duty to the plan, but that the complaint need not overcome the presumption of reasonableness in order to survive a motion to dismiss and that the presumption may be considered in the context of the record. *Id.* at 596. The Sixth Circuit also held that Plaintiffs pleaded sufficient facts to make plausible their claim of a causal link between State Street's conduct and the losses to the plan and that State Street cannot escape its duty simply by asserting at the pleadings stage that the plaintiffs themselves caused the losses to the plans by choosing to invest in the General Motors Common Stock Fund. *Id.* at 597-98. In addition, the Sixth Circuit held that Section 404(c) of ERISA, the safe harbor provision, an affirmative defense, may be raised as a defense on an individual basis at a later stage in the case, such as the class certification stage, but not on a motion to dismiss. *Id.* at 601 The Sixth Circuit noted that Section 404(c), however, does not provide a defense to the selection of the menu of investment options that the plan will offer. *Id.* Finally, the Sixth Circuit held that Plaintiffs were not collaterally estopped from bringing the action based on the Second Circuit case, *Young v. General Motors Investment Management Corp.,* 325 Fed. Appx. 31 (2d Cir. 2009) because State Street failed to show that the precise issue raised in the instant case was raised and actually litigated in the *Young* case. *Id.* at 601.

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overcome the presumption that the fiduciary's decision to invest in employer stock was reasonable. *Fifth Third Bancorp. v. Dudenhoeffer,* 134 S.Ct. 822 (2013); Heard on April 2, 2014.

On remand, the parties agreed to certify the class. (Doc. No. 81) The Class Period in this case extends from July 15, 2008 to March 31, 2009.

The parties have now filed various motions, including cross-summary judgment motions. Responses and replies have been filed and a hearing held on the matter.

II. ANALYSIS

A. Standard of Review

Section 1132 is the civil enforcement provision of ERISA which states, "[a] civil action may be brought ... by a participant or beneficiary ... to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). In *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609 (6th Cir. 1998), pursuant to a majority decision, the panel set forth "Suggested Guidelines" to adjudicate ERISA actions. The Sixth Circuit stated that the Rule 56 Summary Judgment procedure is "inapposite to the adjudication of an ERISA action" because of the Circuit's "precedents [which] preclude an ERISA action from being heard by the district court as a regular bench trial." *Wilkins*, 150 F.3d at 619.[2] "[I]t makes little sense to deal with such an action by engaging a procedure designed solely to determine 'whether there is a genuine issue for trial.'" *Id.* The district court should use neither the summary judgment nor the bench trial procedures in

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[2] An ERISA claim is equitable in nature and is not eligible for a *jury* trial. *Wilkins*, 150 F.3d at 616, *citing Bair v. General Motors Corp.*, 895 F.2d 1094, 1096 (6th Cir. 1990).

deciding ERISA actions. *Id.* at 620. As to the merits of the case, the district court should conduct a review based solely upon the administrative record and render findings of fact and conclusions of law. *Id.* at 619. The discovery phase in an ERISA action will only cover the exchange of administrative record, and, if there is a procedural due process claim against the administrator, discovery is limited to evidence related to procedural challenges. *Id.*

B Fiduciary Duty Standard

The main issue in this case is whether State Street's actions were consistent with its duties under ERISA. Section 404(a)(1)(B) requires a retirement plan fiduciary to discharge his duties with respect to the plan with care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. 29 U.S.C. § 1104(a)(1). The Sixth Circuit noted that the fiduciary duties in Section 404 have three components. *Pfeil,* 671 F.3d at 590-91. 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.* at 591. 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.* And third, ERISA fiduciaries must act for the exclusive purpose of providing benefits to plan participants and beneficiaries. *Id.* Such duties charged to an ERISA fiduciary are the highest known to the law. *Id.* 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. *Id.* In an ESOP plan, such as this case, an ESOP fiduciary may be liable for failing to diversify plan assets even where the plan required that an ESOP invest primarily in company stock. *Id.* at 591.

The Sixth Circuit has noted:

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

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

> [A] proper balance between the purpose of ERISA and the nature of ESOPs requires ... a review [of] an ESOP fiduciary's decision to invest in employer securities for an abuse of discretion. In this regard, we will presume that a fiduciary's decision to remain invested in employer securities was reasonable.

Id. at 1459 (adopting the standard set forth in *Moench v. Robertson,* 62 F.3d 553, 571 (3rd Cir. 1995)). A plaintiff may rebut the "presumption of reasonableness" by showing "that a prudent

fiduciary acting under similar circumstances would have made a different investment decision." *Id.* It will not be enough to prove that the stock was an unwise investment or that defendants ignored a decline in stock price. *In re General Motors ERISA Lit.,* 2006 WL 897444, *11 (E.D. Mich. Apr. 6, 2006).

To rebut this presumption, a plaintiff must show that the ERISA fiduciary could not have reasonably believed that the plan's drafters would have intended under the circumstances that the fiduciary continue to comply with the ESOP's direction that the fiduciary invest exclusively in employer securities. *Kuper,* 66 F.3d at 1459. "In determining whether the plaintiff has overcome the presumption, the courts must recognize that if the fiduciary, in what it regards as an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution, particularly if the employer's securities thrive." *Id.* (citation omitted). A proper balance between the purpose of ERISA and the nature of ESOPs requires that an ESOP fiduciary's decision to invest in employer securities be reviewed for an abuse of discretion and that the fiduciary's decision to remain invested in employer securities is presumed reasonable. *Id.*

A fiduciary may breach its duties to plan beneficiaries by failing to investigate and evaluate the merits of its investment decisions. *Id.* The presumption of reasonableness is not rebutted if the defendant shows evidence that the stock fluctuated during a certain period and that several investment advisors recommended holding the stock. *Id.* at 1460. A fiduciary breaches its duty if it fails to impartially investigate the options by obtaining the impartial

guidance of a disinterested outside advisor to the plan, apart from fiduciaries who also double as directors of the corporation. *Moench,* 62 F.3d at 572. Stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence to rebut the ESOP fiduciary presumption of reasonableness. *In re General Motors ERISA Litigation,* 2006 WL 897444 at 10 (citing *Wright v. Oregon Mettalurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004)).

This Court must then determine how a "hypothetical prudent fiduciary" would have reacted if faced with the circumstances presented in this case. *Kuper v. Quantum Chemicals Corp.,* 852 F. Supp. 1389, 1397 (S.D. Ohio 1994). The prudent person standard is not concerned with results. *Id.* The Court must evaluate the fiduciary's action "from the perspective of the 'time of the investment decision' rather than from 'the vantage of hindsight'." *Id.* (citations omitted). A fiduciary meets ERISA's duty of prudence where the fiduciary utilized proper methods to investigate, evaluate and structure the investment, acted in a manner as would others familiar with such matters, and exercised independent judgment when making the investment decisions, at the time of the transaction. *In re Iron Workers Local 25 Pension Fund,* 811 F. Supp. 2d 1295, 1317 (E.D. Mich. 2011). Such a review of fiduciary actions is "highly deferential." *Kuper,* 852 F. Supp. at 1397 (citations omitted).

C. Whether Plaintiffs rebutted the *Kuper/Moench* Presumption

The Sixth Circuit noted that Plaintiffs need not ultimately prove that July 15, 2008 was the

actual date on which it was no longer reasonable to continue holding GM stock, only that the "imprudent date" for investment in GM stock occurred prior to March 15, 2009. *See Pfeil,* 671 F.3d at 596, n. 3. Plaintiffs identify four dates on which they claim it was an imprudent investment to continue to hold GM stock: July 15, 2008, September 22, 2008, November 21, 2008 and December 12, 2008. (Doc. No. 92, Pg ID 2943)

Plaintiffs raise two reasons why Defendant breached its fiduciary duties: 1) State Street continued to hold GM stock long past the point when there was overwhelming evidence in the public domain raising serious question concerning GM's short-term viability as a going concern without resort to bankruptcy proceedings, which rendered GM stock imprudent to hold as an investment in the Plans; and 2) State Street kept the GM Stock Fund invested in GM stock even though there was overwhelming evidence in the public domain raising a serious risk that GM's existing equity would be substantially diluted and stockholders' shares would be rendered essentially worthless even if GM received assistance from the federal government. Plaintiffs assert there is no genuine issue of material fact with respect to either of these issues and as such, Plaintiffs are entitled to judgment in their favor. Plaintiffs' citation to facts in their brief is from their "Rule 56 Statement of Undisputed Facts in Support of Their Motion for Summary Judgment." (Doc. No. 92, Ex. 1)

State Street argues that Plaintiffs failed to rebut the presumption that its retention of GM stock was reasonable until its decision to sell the GM stock on March 31, 2009. State Street claims that

Plaintiffs' arguments are full of general statements about fiduciary duty and negative quotes from stock analyst reports, but say nothing about the weight courts give to a fiduciary's prudent process or about the sophisticated fiduciary process State Street followed with great care in this case. State Street claims that Plaintiffs' argument that the circumstances surrounding GM were "more significantly dire here than in other cases where it was held that the alleged circumstances were sufficient to rebut the presumption" and if these circumstances are not sufficiently dire to overcome the presumption, "it is not clear what would be sufficient," is more "rhetoric" than based on facts. State Street argues that Plaintiffs' arguments, based on sufficiency of pleadings of a Rule 12(b)(6) motion, not the facts, fail to rebut the presumption that State Street's actions were reasonable in this summary judgment motion.

1. July 15, 2008

Plaintiffs assert that it was imprudent for State Street to continue to hold GM stock in the Plans as of July 15, 2008 when GM's then-CEO Wagoner, announced that GM intended to implement a comprehensive restructuring plan in response to second quarter 2008 losses which Wagoner described "significant," and to stem "an impending liquidity crisis at GM." (Doc. No. 92, Ex. 1, ¶ 26) The restructuring plan was designed to bolster liquidity by $15 billion by the end of 2009. It included the elimination of GM's dividends, and a 20% reduction in its salaried workforce, and significantly reduced truck and large vehicle production. (*Id.*, ¶ 27) As of July 15, 2008, Plaintiffs claim that GM's liabilities already exceeded its

assets by $56 billion and its restructuring plan was predicated on the improbable assumption that a company with a credit rating deep in junk territory would be able to raise another $4-7 billion through a combination of capital raising activities and asset sales in the midst of the deepening financial crises. (*Id.*, ¶¶ 27, 35)

Plaintiffs further assert that financial analysts viewed this announcement as a red flag that GM was facing serious liquidity crisis that was turning into a "potential disaster for existing shareholders." (Doc. No. 92, Ex. 1, ¶ 28) Merrill Lynch noted that even if the plans succeed, the value of the stock had little chance of accruing to existing equity holders that will be crowded out or diluted over time. (*Id.*) Merrill Lynch further noted that some refer to the confluence of negative factors as the perfect storm or the 100 year flood, a potential disaster for existing shareholders. (*Id.*) A Deutsche Bank analyst expressed skepticism regarding GM's plans stating that the plans "overlook many factors that threaten the company's viability." (Doc. No. 92, Ex. 1, ¶ 29) Moody's warned that it might cut GM's already low Caa1 senior unsecured debt rating and Professor Edward Alman, the creator of Z-scores, a widely accepted predictor of corporate default, warned that GM's Z-score showed it was "on the verge of bankruptcy." (Doc. No. 92, Ex. 1, ¶ 30) Lehman Brothers also recognized that raising capital in the amount needed to stem GM's liquidity crisis "would lead to significant dilution for existing shareholders." (Doc. No. 92, Ex. 1, ¶34)

Plaintiffs claim that State Street's own internal analysis demonstrated that there was a "serious question" concerning GM's short-term

viability as a going concern as early as July 15, 2008. Plaintiffs claim that State Street's proprietary risk assessment model gave GM a score of 147.08 on a scale of 50 to 150, with 50 representing the least risk and 150 representing the most. (Doc. No. 92, Ex. 1, ¶¶ 31-33) Plaintiffs noted that Scott Roy, State Street's investment officer, freely admitted that GM's liquidity issues threatened its financial viability. (Doc. No. 92, Ex. 1, ¶ 33)

State Street argues that the notion that ERISA requires an ESOP fiduciary to liquidate company stock holdings based on a company's financial difficulties has been soundly rejected in comparable stock drop cases, citing *DiFelice v. U.S. Airways, Inc.,* 436 F. Supp. 2d 756, 784 (E.D. Va. 2006); *Summers v. UAL Corp.,* 2005 WL 2648670, *5 (N.D. Ill. Oct. 12, 2005). State Street cites the congressional record in support of its argument that the very reason Congress provided special statutory treatment of ESOP plans in ERISA was to relieve ERISA fiduciaries from being forced to close out the company stock fund in this sort of situation–"the goal is to create a plan which invests in employer securities for employees, not a plan which speculates in those securities–buying in order to sell and then selling in order to buy." 132 Cong. Rec. S7892-02, 1986 WL 776243 (Senator Russell Long, the primary Congressional proponent of ESOPS) (daily ed. June 19, 1986).

In addition to this important public policy, State Street asserts that Plaintiffs ignore the publicly known facts concerning GM available at the time, which were at worst mixed and certainly did not compel a singular conclusion about GM's stock's future prospects. State Street claims that in the days

following the July 15, 2008 turnaround plan announcement, GM's stock price increased, 55.8% on July 23, 2008 from its July 14, 2008 closing price, and 48.6% increase from its July 15, 2008 closing price. (Doc. No. 90, Ex. A, Lehn Report, ¶ 15) State Street argues that had it liquidated the Plans' GM stock on July 15, 2008 as argued by Plaintiffs, plan participants would have lost out on the ability to share in this increase.

State Street asserts that analyst reviews after GM's turnaround plan was announced were mixed throughout July and August. In July, there was one buy, seven hold and six sell recommendations. (Doc. No. 85, Sisk Decl., Ex. A-17) In August, there was one buy, six hold, and five sell recommendations. (Doc. No. 85, Sisk Decl., Ex. A-18) State Street notes that pension plans and large institutional investors continued to invest in GM stock. (Doc. No. 90, Ex. A, Lehn Report, ¶¶ 11-14) During the third quarter of 2008, investment banks Credit Suisse and Morgan Stanley purchased approximately 15 million and 4 million shares of GM stock, respectively. (Doc. No. 90, Ex. A, Lehn Report, ¶ 13) State Street claims that at least one named plaintiff in this action increased his GM stock holdings during this period. (Doc. No. 92, Ex. 1, ¶ 1) State Street argues that the evidence of up and down share prices, mixed analyst recommendations and continued participant investment is insufficient to overcome the presumption of prudence.

Courts have found that negative earnings or analyst reports, and restructuring efforts are insufficient to rebut the presumption of prudence. *See In re WorldCom, Inc. ERISA Litigation,* 354 F. Supp. 2d 423, 449 (S.D. N.Y. 2005); *DiFelice,* 463 F.

Supp. 2d at 784. Evidence of peaks and plateaus in stock prices, even if small and temporary, gives a fiduciary some objective indication that the stock may rebound sufficiently to recover at least some portion of ESOP losses. *Kuper*, 852 F. Supp. At 1397. Careful monitoring of the market performance of a stock would not have compelled a prudent investor to sell the stock at any particular point in time, so as to absorb the short-term losses rather than await a possible recovery. *Id.* Evidence of established and other impartial investment advisor reports issued during the relevant time periods encouraging investors to either buy or to continue to hold a stock would not compel reasonable persons to a singular conclusion about a stock's future prospects. *Id.* at 1398. A fiduciary cannot be said to have been objectively imprudent for having acted in the same manner as other impartial observers had recommended. *Id.* Evidence that at least a named plaintiff held the stock throughout the relevant time period, without attempting to liquidate or otherwise diversify his holdings over which they had some measure of control, is evidence that an adequate investigation conducted at that time would not have compelled a hypothetical prudent fiduciary to liquidate or diversity the stock held in a plaintiff's ESOP account. *Id.*

Plaintiffs in this case submitted evidence as to GM's restructuring plan, that certain analysts' comments that GM's actions would lead to significant dilution for existing shareholders, and that there was serious question as to GM's short-term viability. State Street submitted evidence that the GM stock at least increased in the next couple of months after the plan was announced and other

analysts had mixed reviews of the stock. State Street also submitted evidence that at least one named plaintiff purchased GM stock after the plan was announced. Given the overall circumstances on July 15, 2008, that GM stock prices increased shortly after the restructure plan announcement and that analysts were mixed in their recommendations, Plaintiffs have not carried their high burden to overcome the presumption that a hypothetical prudent fiduciary's decision not to liquidate the ESOP assets at that time was reasonable.

2. September 22, 2008

Plaintiffs claim that GM's short-term viability as a going concern was more pronounced on September 22, 2008 after GM announced that it had drawn down the remaining $3.9 billion of its secured $4.5 billion credit facility. (Doc. No. 92, Ex. 1, ¶ 41) Plaintiffs assert that State Street's own expert, Martin Zimmerman, testified that once Lehman Brothers filed for bankruptcy on September 15, 2008, the capital raising and asset sales contemplated by GM's July 15, 2008 restructuring plan were no longer possible, and obtaining some form of assistance from the federal government was GM's only hope for survival. (*Id.*) Plaintiffs assert that these events followed a dismal month in August for GM which began with an announcement on August 1, 2008 of a second quarter 2008 net loss of $15.5 billion. (*Id.* at ¶ 37) Plaintiffs claim that analysts began noting that GM was on track to run out of cash by the first quarter of 2009. Plaintiffs note that State Street's own senior credit analyst, Jonathan Worraker, noted that it was estimated that GM would run out of money to conduct its operations in 2009. (*Id.* at ¶ 48) Two weeks later on

October 23, 2008, Worraker reiterated his concern. (*Id.* at ¶ 49) Susan Curtis, Investment Officer of State Street, noted that the "perfect storm" existed. (*Id.* at ¶ 50)

Plaintiffs indicate that following the second quarter 2008 earnings release, investors in Credit Default Swaps began pricing GM's probability of default at over 90 percent in the coming five years, noting that GM was going to file for bankruptcy. (*Id.* at ¶ 38) Plaintiffs claim that based on this evidence, no reasonably prudent fiduciary would have continued to hold GM stock on September 22, 2008. State Street responds that through selective quotes from analyst reports that express concern over GM's future prospects, Plaintiffs attempt to distort the true picture of investor outlook on GM stock in the Fall of 2008. State Street claims that throughout this period, analyst outlook on GM remained neutral. The September 25, 2008 analyst reports included one buy, eight hold and four sell recommendations. (Doc. No. 85, Sisk. Decl., Ex. A-19) State Street asserts that market participants, including institutional investors and pension plans, continued to display confidence in GM. State Street claims that as of September 30, 2008, mutual funds continued to hold GM stock, including Dodge and Cox (53.3 million shares) and Brandes Investment Partners (36.8 million shares), along with investment banks of Credit Suisse (34.4 million shares) and Barclays Banks (25.7 million shares), among the five largest holders of GM stock. (Doc. No. 90, Ex. A, Lehn Report, ¶ 12) State Street also claims that some of the largest public pension funds continued to hold GM stock, such as the New York State Common Retirement System (3 million

shares), the College Retirement Equities Fund (2.4 million shares) and the New York State Teachers' Retirement System (1.6 million shares). (Doc. No. 90, Ex. A, Lehn Report, ¶ 12) The Court finds that based on the overall circumstances as of September 22, 2008, it cannot be said that a reasonable prudent fiduciary should have liquidated the ESOP at this date. State Street has submitted evidence of impartial investment advisor recommendations to hold, sell or buy and large investors continuing to hold GM stock. The evidence submitted by the parties does not show that there was a singular conclusion that holding GM stock was imprudent. Plaintiffs have not carried their burden that State Street's failure to liquidate the GM stock on September 22, 2008 was not a reasonable prudent fiduciary decision.

3. November 21, 2008

Plaintiffs assert that no later than November 21, 2008, a reasonable prudent fiduciary would have concluded that there was a serious question concerning GM's short-term viability as a going concern without resort to bankruptcy proceedings and that the information available to State Street "is nothing short of overwhelming" to support such a conclusion. Plaintiffs claim that the annual automotive sales figures in October and November 2008 fell to just 10 million units, a level which it had not been seen since the early 1980s and far below the 14 million unit annual sales figure that had served as the foundation of GM's July 15, 2008 restructuring plan. (Doc. No. 92, Ex. 1, ¶ 52) Plaintiffs further claim that on November 7, 2008, GM announced its third quarter 2008 financial report of $4.2 billion quarterly loss and warned that

GM's estimated liquidity during the remainder of 2008 would approach the minimum amount necessary to operate its business. (Doc. No. 92, Ex. 1, ¶ 54) In its third quarter 2008 Form 10-Q (Doc. No. 92, Ex. 1, ¶ 33) filing, GM indicated that its auditors had substantial doubts about GM's ability to continue as a going concern and that during the first two quarters of 2009, GM's estimated liquidity would fall significantly short of the minimum requirement to operate its business. (Doc. No. 92, Ex. 1, ¶ 55). Plaintiffs point to State Street analyst Worraker's email to Curtis on November 10, 2008 indicating that GM was very nearly insolvent. Worraker noted GM's CFO's statements that unless GM gains access to capital markets or other forms of financing or government funding or a combination of these actions, during the first two quarters of 2009, GM's liquidity would fall short of the amount necessary to operate its business. (Doc. No. 92, Ex. 1, ¶ 56) Worraker further noted that it believed GM would file chapter 11 bankruptcy in the coming weeks or months if there is no government bailout. Even if GM received such a bail out, noting a lot of people indicated it would, Worraker stated that an increasing number of sell-side equity research analysts opined that GM's equity would be worthless under that scenario. (Doc. No. 92, Ex. 1, ¶ 56)

Plaintiffs assert that State Street itself finally drew the only reasonable conclusion from "this crescendo of bad news" when the Independent Fiduciary Committee voted to restrict new investment into the GM Stock Fund. (Doc. No. 92, Ex. 1, ¶ 59) Plaintiffs argue that State Street's decision not to offer plan participants new investment of GM stock also meant that by

definition, GM stock was not a prudent investment to continue to hold. Plaintiffs claim that by holding GM stock after November 21, 1008, State Street breached its fiduciary duties in two separate and independent ways: first, because GM's short-term viability as a going concern without resort to bankruptcy was indisputably in question, and second, because there was a serious risk that the value of GM's existing equity would be substantially diluted and rendered worthless even if GM received government aid.

State Streets argues that Plaintiffs' reliance on Worraker's email is unwarranted because it was an "informal" opinion and a single analyst's opinion cannot establish GM's stock was an imprudent investment. State Street claims that Worraker's email was not related to the Independent Fiduciary Committee's November 21, 2008 decision to stop offering GM stock. State Street asserts that Worraker's email was raised out of context. Worraker's comments were similar to many other analysts at that time that GM was experiencing financial difficulties, but also recognized that a government intervention could alleviate many of the temporary issues facing GM. At his deposition, Worraker testified that his statement was limited to a scenario in which GM did not obtain government loans. (Doc. No. 100, Ex. XX, pp. 38, 108) State Street claims one analyst's recommendation does not represent reliable information regarding a company's viability. State Street notes that as of November 21, 2008, the average IBES numeric rating on GM stock was 3.80, which is more closely aligned with a "hold" rating than with a "sell" rating. (Doc. No. 90, Ex. A, Lehn Report, ¶ 18) Analyst

reports at that time were: one buy, eight holds, and four sells. (Doc. No. 85, Sisk Decl., Ex. A-22) State Street notes that in November 2008, actual large investors increased their positions in GM stock. The State Retirement System of Ohio increased its holdings by 1.1 million shares, Vanguard increased its holdings by 6.2 million and Goldman Sachs increased its holdings by 3.2 million shares. (Doc. No. 85, Sisk Decl., Ex. A-22) State Street further notes that at least one pension fund, the Canadian Pension Plan Investment Board, initiated a new position to begin investing pension funds in GM stock during the fourth quarter of 2008. (Doc. No. 85, Sisk Decl., Ex. A-22)

Although GM's future without government intervention appeared bleak in November 2008 based on the submissions by Plaintiffs, it cannot be said that a reasonable prudent fiduciary should have liquidated the ESOP on November 21, 2008. State Street submitted evidence of impartial investment advisor recommendations to hold, sell or buy and large investors increasing their holdings of GM stock. Plaintiffs have not carried their burden that State Street's failure to liquidate the GM stock on November 21, 2008 was not a reasonable prudent fiduciary decision in light of the evidence submitted by the parties.

4. December 12, 2008

Plaintiffs assert that it is unassailable that GM stock was an imprudent investment to hold in the fund by December 12, 2008 when State Street received a GM "business and liquidity" analysis from Stout Risius and Ross ("SRR"), its financial adviser. SRR indicated that GM was faced with significant

solvency risk and could not access the credit markets or equity market to provide the necessary capital to sustain its operations. SRR further indicated that even with a government bail out, the impact on GM stockholders in the form of dilution was likely going to be significant and that GM would also likely restructure its balance sheet, which would lead to further dilution to the current common shareholders. GM's common stock had declined 80% over the last year, in addition to GM's publicly traded debt priced at approximately 20% of its par value. (Doc. No. 92, Ex. 1, ¶ 72)

Plaintiffs noted that on the morning of December 12, 2008, State Street's Independent Fiduciary Committee voted to begin selling the GM stock with the minutes indicating that GM bonds were selling at 10 cents on the dollar. (Doc. No. 92, Ex. 1, ¶¶ 70, 74) Ninety minutes later, the Independent Fiduciary Committee reversed itself based on a statement from the White House that it was considering using funds from the Troubled Asset Relief Program ("TARP") as a stop-gap measure to temporarily keep GM out of bankruptcy. (Doc. No. 92, Ex. 1, ¶¶ 73-74) Plaintiffs claim that State Street's decision to reverse its decision to sell the GM stock without reading the SSR report and based on the White House's statement was imprudent. Plaintiffs argue that this was borne out by a Credit Suise analysis in a December 22, 2008 report indicating that even with concessions from the Union and bondholders, GM may still end up in bankruptcy and the equity value of less than one dollar per share. (Doc. No. 92, Ex. 1, ¶ 76)

State Street claims that Plaintiffs' assertion it was imprudent that State Street did not review the

SRR report when it made its decision to reverse its earlier decision to sell the GM stock on December 12, 2008 is without merit because the author of the SRR report was present at both of its meeting held that day. State Street further claims that the SRR report was irrelevant because State Street was monitoring on that day the issue of whether the government would provide interim support for GM. After the SRR report was drafted, the White House delivered a statement of its intent to support the automakers. State Street argues that Plaintiffs' criticism of its reliance on the White House statement when it reversed its decision to sell GM stock is also without merit since State Street claims that the statement demonstrated a clear policy by the White House favoring government support of the automakers over bankruptcy. The White House indicated that it was disappointed that Congress failed to pass legislation to assist and restructure troubled automakers and although under normal economic conditions the White House preferred that markets determine the ultimate fate of private firms, it would consider other options, including the use of TARP funds to prevent the collapse of troubled automakers. (Doc. No. 122, citing http://georgewbush-whitehouse. archives.gov/news/ releases/2008/12/20081212.html; Doc. No. 90, Ex. D, Zimmerman Report, ¶ 27) State Street asserts that its decision to rely on the White House statement turned out to be correct in that on December 19, 2008, President George W. Bush authorized TARP fund loans to the automakers. GM obtained a commitment for $13.4 billion in government bridge loans and GM's stock experienced sizeable gains. (Doc. No. 90, Ex. D, Zimmerman Report, ¶ 29; Doc. No. 85, Sisk Decl., Ex. A-52) State

Street claims that had it not reversed its decision from selling the GM stock on December 12, 2008, the ESOP would not have benefitted from the increase in the stock price and, perhaps State Street would have instead be defending a lawsuit by the same plaintiffs for liquidating the ESOP.

Based on the evidence submitted by the parties, the Court finds that Plaintiffs have not carried their burden to show that State Street's decision to reverse its decision from selling GM stock on December 12, 2008 was not reasonably prudent. As noted by the Sixth Circuit in *Kuper*, courts must recognize when determining whether a plaintiff has overcome the presumption that if a fiduciary does not maintain the investment in the employer's securities, it may face liability from the same plaintiffs if the employer's securities thrive. *Kuper*, 66 F.3d at 1459. It is this type of catch-22 situation that the Sixth Circuit directed the court to consider in weighing whether a fiduciary's decision to hold onto an employer's stock in an ESOP was prudent. On December 12, 2008, State Street reversed its decision to liquidate the ESOP of GM stock after it determined that based on the White House announcement it appeared that the White House's policy would use other means, such as TARP funds, to prevent the automakers from failing as Congress had failed to pass legislation to assist the automakers. A reasonable prudent fiduciary faced with this same circumstances may have made the same decision as State Street. Plaintiffs have not carried their burden that a reasonable prudent fiduciary would have liquidated the GM stock in light of the White House policy announcement that it would assist the automakers despite Congress'

failure to pass legislation that could have assisted the automakers.

5. March 31, 2009/Process

Plaintiffs argue that State Street's failure to divest the GM stock until March 31, 2009 was imprudent. Plaintiffs assert that State Street should have sold the GM stock well before the March 31, 2009 date, noting the four dates above. Plaintiffs claim that State Street's reliance on "procedural prudence" argument is not a relevant inquiry because State Street's duty of prudence required it to sell the GM stock when it became imprudent to hold the stock, which in this case was when GM stock became at risk of becoming worthless in a restructuring plan. Plaintiffs assert that no matter how many meetings the Independent Fiduciary Committee held, it was required to divest under the terms of the engagement agreement. Plaintiffs claim that the members of the Independent Fiduciary Committee did not expend the time and effort necessary to learn their responsibilities under the Plans because each were responsible for monitoring approximately 75 stocks, including the GM stock. (Doc. No. 114, Ex. 10, Driscoll Tr., pp. 121-22) Plaintiffs assert that the Independent Fiduciary Committee used the wrong standard as to the GM stock. The terms of the Plans documents required State Street to determine whether there was a "serious question" concerning GM's short-term viability and if so, to divest the stock. (Doc. No. 92, Ex. 1, ¶¶ 14-17) Instead, Plaintiffs claim the Independent Fiduciary Committee required bankruptcy to be "certain," "clear," or "imminent" in order for State Street to divest. (Doc. No. 114, Exs. 34-36) Plaintiffs claim that by substituting a far

higher standard for divesting GM stock than the standard set forth in the Plan documents, State Street breached its fiduciary duty and exposed the participants in the Plans to far more risk than was prudent or contractually allowed.

State Street asserts that its decision to hold onto the GM stock until March 31, 2009 was not unreasonable. As a condition of the TARP fund loans of $17.4 billion for both GM and Chrysler authorized by President Bush, GM and Chrysler agreed to present revised restructuring plans to the Treasury by February 17, 2009. (Doc. No. 90, Ex. D, Zimmerman Report, ¶¶ 25-29) Between December 31, 2008 and January 14, 2009, GM's stock price had climbed 21%. (Doc. No. 85, Sisk Decl., Ex. A-52) On February 15, 2009, President Barack Obama established the Presidential Task Force on the Auto Industry to review the automakers' revised restructuring plans. GM submitted its plan on February 17, 2009. The Independent Fiduciary Committee met on February 18, 20 and 23 to discuss the GM plan. (Doc. No. 85, Sisk Decl., Exs. A-56, A-58, A-59) The GM plan indicated that bankruptcy would present significant systemic risk to the auto industry and would cost the government much more than the requested $30 billion in government aid. The GM plan did not contemplate bankruptcy and did not propose elimination of outstanding common stock of GM. GM instead assumed a 3 to 1 debt-equity swap with the bondholders and a funding of 50% of a Voluntary Employee Beneficiary Association Trust ("VEBA") to finance union retiree benefits with GM stock. (Doc. No. 90, Ex. D, Zimmerman Report, ¶¶30-35) The Independent Fiduciary Committee after reviewing GM's plan

noted that GM showed significant progress in meeting the objectives set by the Treasury Department. (Doc. No. 85, Sisk Decl., Ex. A-56)

The Independent Fiduciary Committee met on March 5, 2009 after GM filed its annual 10-K with the Securities and Exchange Commission and again on March 12, 2009 after GM announced it would not need the requested $2 billion loan installment for March. (Doc. No. 85, Sisk Decl, Exs. A-63, A-64) SRR presented its analysis of GM's February 17, 2009 restructuring plan which was discussed by the Independent Fiduciary Committee on March 18 and 25, 2009. (Doc. No. 85, Sisk Decl., Exs. A-65-A-67) The SRR report noted that if the GM plan was implemented, GM stock would not be eliminated and could be valued at $.40 to $1.00 per share. (Doc. No. 85, Sisk Decl., Ex. A-66)

On March 30, 2009, the Auto Task Force released its evaluation of the GM restructuring plan which the Task Force found to be incomplete and, for the first time, raised the possibility of a bankruptcy filing to resolve the issues with GM bondholders and the UAW who had not agreed with GM on the terms of restructuring. (Doc. No. 85, Sisk Decl., Ex. A-68) The Independent Fiduciary Committee met twice that day. At the first meeting, the Independent Fiduciary Committee was informed that the Task Force did not find GM's restructuring plan viable, giving GM 60 days to develop a different plan. (Doc. No. 85, Sisk Decl., Ex. A-69) The Independent Fiduciary Committee later met that day to discuss the market price for the GM stock, which was currently at $2.70 per share and although some members thought that a GM bankruptcy was not imminent based on the price, the rejection of GM's

plan increased the likelihood of bankruptcy. (Doc. No. 85, Sisk Decl., Ex. A-69) The Independent Fiduciary Committee agreed to meet the next day, March 31, 2009 to continue its discussion. At that meeting, the Independent Fiduciary Committee concluded that the government rejection of the GM restructuring plan presented sufficient information that GM stock was no longer a prudent investment for the ESOP. (Doc. No. 85, Sisk Decl., Ex. A-71)

The Independent Fiduciary Committee then instructed the Company Stock Group to begin selling the GM stock held in the Plans and such sale was completed on April 24, 2009. GM filed for bankruptcy on June 1, 2009.

State Street argues that it discharged its fiduciary responsibilities through a three tier decision making process. (Doc. No. 85, Sisk Decl., ¶ 2) The first level of the process includes the Company Stock Group monitoring and reviewing all employer securities in its clients' accounts daily based on established objective criteria and appropriate facts and circumstances. The Company Stock Group identifies employer securities for additional review by the Stock Review Committee, which is the second level of monitoring and review. An investment officer presents a written report to the Stock Review Committee on the latest developments at least once a month and more frequently as necessary. Both the Stock Review Committee and the Company Stock Group provide the due diligence, analysis, review and investment input to the Independent Fiduciary Committee–the third level of fiduciary monitoring. The Independent Fiduciary Committee makes the final fiduciary

decisions pertaining to investment management assignments. (Doc. No. 85, Sisk Decl., ¶¶ 3-6)

State Street notes that courts who have reviewed its process have concluded that its monitoring process satisfies ERISA's requirements and that State Street has fulfilled all of its obligations and understood its fiduciary duties, citing *In re Delphi Corp.,* 602 F. Supp. 2d at 815-16 (granting summary judgment for State Street with a discussion of State Street's monitoring process), *Bunch v. W.R. Grace & Co.,* 555 F.3d 1, 9-10 (1st Cir. 2009)(affirming summary judgment for State Street and finding that its process left little doubt that the employer's corporate health was thoroughly studied by the experts); and *Summers v. UAL Corp.,* 2005 WL 2648670, at *6 (N.D. Ill. Oct. 12, 2005)(the evidence showed that State Street fulfilled all of its obligations and understood its fiduciary duties).

State Street claims that it followed the monitoring process all throughout the Class Period. The Company Stock Group monitored GM on a daily basis and regularly reported to the Stock Review Committee, including monthly written reports. As issues concerning the GM stock increased, the responsibility for exercising oversight over the GM stock was elevated to the Independent Fiduciary Committee. The Independent Fiduciary Committee held 43 meetings during the Class Period to discuss the GM stock and whether to retain the stock. In addition to internal State Street advisors, the Independent Fiduciary Committee obtained written and oral advice from outside legal and financial advisors. State Street asserts that the contemporaneous reports and volumes of meeting minutes demonstrate that State Street did exactly

what ERISA required of a prudent fiduciary. (Doc. No. 85, Sisk Decl., ¶¶ 7-8)

Based on this monitoring process during the Class Period, the Independent Fiduciary Committee decided to continue the suspension of further purchases of GM stock on November 11, 2008, liquidate the ESOP's holdings in GM stock on the morning of December 12, 2008 when available public information indicated there would be no government aid to support GM, reverse its decision later on December 12, 2008 in light of statements by the White House and the Treasury Department regarding government support, and sell the ESOP's GM stock holdings on March 31, 2009 based on public information that day. State Street argues that it did not fall asleep at the wheel during the Class Period, but that the evidence shows it was focused on GM and its stock as required by ERISA. State Street argues that an ERISA fiduciary is required to follow a prudent process, not a certain outcome. State Street claims it did not abuse its discretion when it held on to the stock until March 31, 2009. State Street argues that Plaintiffs failed to carry their high burden to overcome the presumption that State Street's decision was prudent.

State Street argues that Plaintiffs would like the Court to ignore the importance of its process because they cannot rebut the evidence of State Street's thorough and careful process as a fiduciary. State Street claims it did not use the wrong standard as argued by Plaintiffs because the Fiduciary Services portion fo the Agreement states that State Street had the "exclusive authority" to determine if GM company stock "continues to be a prudent investment." (Doc. No. 85, Sisk Decl., Ex. A-3)

As this Court noted above, a fiduciary's decision in an ESOP case is presumed to be reasonable; a plaintiff may rebut the "presumption of reasonableness" by showing "that a prudent fiduciary acting under similar circumstances would have made a different investment decision." The Agreement between GM and State Street gave State Street the exclusive authority to determine whether GM stock continued to be a prudent investment. Reviewing the arguments and documents submitted by the parties, this Court is unable to conclude that State Street's decision not to divest the stock until March 31, 2009 was an imprudent decision in light of the presumption of reasonableness standard. Plaintiffs have not carried their burden to rebut this presumption. Although Plaintiffs make light of State Street's "procedural process" in reviewing the status of GM stock, the evidence submitted, including the number of meetings the Independent Fiduciary Committee held during the Class Period shows that State Street was prudent and deliberate in its decision making. Analysts during the Class Period were mixed as to whether to buy, hold or sell the GM stock. Large investors during the Class Period continued to hold GM stock and, in some instances, increased their holdings of GM stock. It was not until March 31, 2009 that State Street determined that there were no other options, other than bankruptcy, in order for GM to move forward as a going concern. State Street's decision on March 31, 2009 to begin divesting the GM stock came after the Auto Task Force and the White House rejected GM's restructuring plan on March 30, 2009, was that of a reasonable prudent fiduciary. Summary judgment

must be entered in favor of Defendant State Street and against Plaintiffs.

III. CONCLUSION

For the reasons set forth above, IT IS ORDERED that Defendant State Street's Motion for Summary Judgment **(Doc. No. 84)** is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment **(Doc. No. 92)** is DENIED.

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

Dated: April 11, 2014 S/Denise Page Hood
Denise Page Hood
United States District Judge

I hereby certify that a copy of the foregoing document was served upon counsel of record on April 11, 2014, by electronic and/or ordinary mail.

S/Julie Owens for LaShawn R. Saulsberry
Case Manager

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
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Re: Case No. 14-1491*, Pfeil, et al v. State Street Bank and Trust Co* Originating Case No. : 2:09-cv-12229

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. David J. Weaver

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0274p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND M. PFEIL and MICHAEL KAMMER, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

No. 14-1491

STATE STREET BANK AND TRUST COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:09-cv-12229—Denise Page Hood, District Judge.

Argued: April 29, 2015

Decided and Filed: November 10, 2015

Before: BOGGS, SUHRHEINRICH, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Deborah Clark-Weintraub, SCOTT+SCOTT, LLP, New York, New York, for Appellants. Wilber H. Boies, MCDERMOTT WILL & EMERY LLP, Chicago, Illinois, for Appellee. **ON BRIEF:** Deborah Clark-Weintraub, SCOTT+SCOTT,

LLP, New York, New York, Geoffrey M. Johnson, SCOTT+SCOTT, LLP, Cleveland Heights, Ohio, for Appellants. Wilber H. Boies, Michael S. Yellin, Jennifer Aronoff, MCDERMOTT WILL & EMERY LLP, Chicago, Illinois, James D. VandeWyngearde, PEPPER HAMILTON LLP, Southfield, Michigan, for Appellee.

BOGGS, J., delivered the opinion of the court in which SUHRHEINRICH, J., joined. WHITE, J. (pp. 14–16), delivered a separate dissenting opinion.

OPINION

BOGGS, Circuit Judge. This case requires us to apply recent developments in the law of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. ERISA subjects plan fiduciaries to a duty of prudence. 29 U.S.C. § 1104(a)(1). This generally requires diversification. But to "solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees," *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2466 (2014), Congress established a special kind of ERISA plan called an Employee Stock Ownership Plan (ESOP). ESOPs are "designed to invest primarily in qualifying *employer* securities," 29 U.S.C. § 1107(d)(6)(A) (emphasis added), rather than to diversify across securities of many companies. In 1995, the Third Circuit adopted a presumption that an ESOP fiduciary's decision to remain invested in employer securities is prudent. *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995), *overruled by Dudenhoeffer*, 134 S. Ct. 2459.

We adopted that presumption of prudence later that year. *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995), *overruled by Dudenhoeffer*, 134 S. Ct. 2459.

This case concerns an ESOP for employees of General Motors (GM). In 2008, GM faced severe business problems that resulted, ultimately, in its bankruptcy. *Cf. Int'l Union, UAW v. GM*, 2015 WL 2239507, at*1–4 (6th Cir. May 14, 2015) (reciting the history of certain GM business problems). Those events gave rise to this case. Plaintiffs-Appellants Raymond M. Pfeil and Michael Kammer (Pfeil) were GM employees who, prior to GM's most recent financial difficulties, elected to invest in the GM ESOP. Defendant-Appellee State Street Bank (State Street) served as fiduciary of certain pension plans, including the Common Stock Plan, for employees of GM.

The Common Stock Plan lost money in 2008. But State Street declined to stop buying GM stock until November 8, 2008, and did not divest the fund of (i.e., sell) GM stock until March 31, 2009. Just over a week later, Pfeil filed this suit against State Street, claiming that its investment decisions to continue to buy and also to decline to sell GM common stock during certain dates in 2008 were actionably imprudent under ERISA. In 2010, the district court dismissed the suit on State Street's motion, applying the presumption of prudence to the behavior of ESOP fiduciaries. On February 22, 2012, we reversed, holding that the presumption of prudence did not apply earlier than the summary-judgment stage of proceedings. *Pfeil v. State Street Bank and Trust Co.*, 671 F.3d 585 (6th Cir. 2012), *overruled by Dudenhoeffer*, 134 S. Ct. 2459. On remand, the parties agreed to certify a class. RE 81.

The Class Period extended from July 15, 2008 to March 31, 2009. After class certification, State Street moved for summary judgment. The district court, applying the presumption of prudence at the summary-judgment stage, granted State Street's motion. Pfeil timely appealed.

After *Pfeil*'s first appearance before us, but before the district court's grant of summary judgment, we applied in a similar case the rule that *Pfeil* had announced, reversing a district court's grant of a motion to dismiss on presumption-of-prudence grounds. *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410, 418 (6th Cir. 2012). The Defendant-Appellee fiduciary in that case petitioned for certiorari. The Supreme Court granted the petition and, reversing our judgment, abrogated the "presumption of prudence" doctrine altogether. *Dudenhoeffer*, 134 S. Ct. at 2467.[1]**1** The Supreme Court remanded the case. That case is currently pending in our court.

Here, we affirm the district court's grant of summary judgment. During the class period, State Street's managers repeatedly discussed at length whether to continue the investments in GM that are at issue in this case. Given the prudent process in which State Street engaged, Pfeil failed to demonstrate a genuine issue about whether State Street satisfied its statutory duty of prudence.

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[1] John Dudenhoefer the plaintiff-appellant named in our case. The Supreme Court caption suggests that the respondent's last name is Dudenhoeffer. We cite our opinion as *Dudenhoefer* and the Supreme Court's opinion as *Dudenhoeffer*.

I

The purpose of the GM Common Stock Fund was to enable Participants to acquire an ownership interest in General Motors. The investment was to be without regard to the risk profile. Only if a GM employee opted to invest in the GM Common Stock Fund were his or her investments placed in that fund; if an employee did not elect an option, the investments were placed in a different fund.

The GM Common Stock Fund's fiduciary was State Street, which served in that capacity for many similar funds. State Street employs a formal, three-tiered structure and process for the exclusive purpose of monitoring and evaluating company stock funds. The first tier is the Company Stock Group, which, through daily monitoring and ongoing research and analysis to maintain awareness of the financial environment impacting a company stock, has a comprehensive process to determine if a company stock requires additional monitoring. The second tier, the Stock Review Committee, provides the aforementioned additional monitoring, which includes monthly meetings at which a Company Stock Group officer provides a detailed company-specific report including at least nine specific pieces of information. Based on a review of the facts and circumstances, the Stock Review Committee determines if a company stock should be elevated for further review and action by the Independent Fiduciary Committee, the third tier of the company stock process. Together, these three committees discussed GM stock, in relation to the GM company stock fund, fifty-eight times between January 2008 and March 31, 2009.

On March 12, 2008, the Independent Fiduciary Committee met to discuss a number of companies in which State Street's funds had invested. At that meeting, Sydney Marzeotti and Denise Sisk, Vice Presidents, presented information on the performance of General Motors stock and business factors that might have influenced that performance. Between that meeting and the end of July, the Stock Review Committee met five times. These meetings were substantial. For example, at least fourteen people attended the meeting on June 26, according to State Street records, including Marzeotti and Sisk. The minutes and materials of that meeting recited, among other details, when and why State Street added GM to the Stock Review List, details of GM's business situation and analysis thereof, GM's debt rating, a description of GM's business, performance information of GM and its stock, State Street's role, and litigation pending against GM.

Events in 2008 imperiled GM's ability to continue as a going concern.

> On July 15, 2008, GM Chief Executive Officer Rick Wagner announced that GM needed to implement a restructuring plan to combat Second Quarter 2008 losses that he described as "significant" and to stem an impending liquidity crisis. . . . [O]n August 1, 2008, GM announced a Third Quarter 2008 net loss of $15.5 billion. Analysts projected that GM was on track to run out of cash by the First Quarter of 2009.

Op. and Order, R. 156 at 4–5 (citations omitted). The Stock Review Committee met again on August 28, considered the August 1 announcement, and voted in favor of the recommendation to retain GM Common Stock on the Stock Review list. The Stock Review Committee met twice in September. On October 30, the Stock Review Committee met again, voting again in favor of the recommendation to retain GM stock on the Stock Review List. In other words, the committee actively decided not to stop buying, let alone to sell, but also decided to maintain a level of internal scrutiny on the investment.

Ultimately, State Street did change its buying behavior. In a November 2, 2008, notice to participants and beneficiaries, State Street temporarily suspended the purchases of the GM Common Stock Fund until further notice, observing that "it is not appropriate at this time to allow additional investments by participants." On November 5, 2008, the Independent Fiduciary Committee met on the subject of its Quarterly Review of Public Company Stocks. Twelve people attended. Minutes from that meeting reflect that "General Motors was presented [sic]. . . . Current GM's cash burn is approximately $1 billion a month. Sales are at worst level since 1983. [Monet] Ewing [of State Street] described the relationship with General Motors."

GM's business situation continued to worsen. By November 10, 2008, GM acknowledged that its auditors had substantial doubt regarding GM's ability to continue as a going concern. Thereafter, perhaps not surprisingly, the Independent Fiduciary Committee met about GM much more frequently. Between November 10, 2008 and March 31, 2009,

the Independent Fiduciary Committee met in person or via conference call forty-one times to discuss GM; the Stock Review Committee also met. On March 31, 2009, State Street decided to divest the GM stock held in the fund, with the process completed by April 24, 2009.

On June 9, 2009, Pfeil filed this suit under Section 502 of ERISA individually and on behalf of plan participants in and beneficiaries of General Motor Corporation's main 401(k) plans. The one-count complaint alleges a breach of fiduciary duty by State Street, as an independent fiduciary, for failure to manage the Plan's assets prudently, in violation of Section 404 of ERISA.

II

ERISA "requires the fiduciary of a pension plan to act prudently in managing the plan's assets." *Dudenhoeffer*, 134 S. Ct. at 2463. *See also* 29 U.S.C. § 1104(a).[2] [ERISA] "imposes a 'prudent person'

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[2] 29 U.S.C. § 1104(a)(1) provides that, subject to other federal provisions,

> 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;

standard by which to measure fiduciaries' investment decisions and disposition of assets" and also imposes other obligations. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985). A fiduciary's investments are prudent if he "[h]as given appropriate consideration to those facts and circumstances that . . . are relevant to the particular investment . . . involved . . . and [h]as acted accordingly." 29 C.F.R. § 2550.404a-1(b)(1). "Appropriate consideration" includes "[a] determination by the fiduciary that the particular investment . . . is reasonably designed . . . to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain," *id.* (b)(2)(i), in addition to consideration of the portfolio's diversification, liquidity, and projected return relative to the plan's funding objectives, *id.* (b)(2)(ii). In addition, "under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828–29 (2015). As a general matter, prudence requires "diversifying the investments of the plan so as to minimize the risk of large losses . . . ." 29 U.S.C. § 1104(a)(1)(C).

To accommodate Congress's endorsement of corporate employees owning corporate stock, we adopted a presumption that an ESOP "fiduciary's decision to remain invested in employer securities

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(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(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.

was reasonable." *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) (adopting the standard set forth in *Moench v. Roberston*, 62 F.3d 553, 571 (3d Cir. 1995)).

Here, Pfeil

> raise[d] two reasons why Defendant breached its fiduciary duties [of prudence]: 1) State Street continued to hold GM stock long past the point when there was overwhelming evidence in the public domain raising serious question concerning GM's short-term viability as a going concern without resort to bankruptcy proceedings, which rendered GM stock imprudent to hold as an investment . . . ; and 2) State Street kept the GM Stock Fund invested in GM stock even though there was overwhelming evidence in the public domain raising a serious risk that GM's existing equity would be substantially diluted and stockholders' shares would be rendered essentially worthless even if GM received assistance from the federal government.

Op. and Order, R. 156 at 13. The district court observed that "the evidence submitted, including the number of meetings the Independent Fiduciary Committee held during the Class Period, shows that State Street was prudent and deliberate in its decision making. . . . Large investors during the Class Period continued to hold GM stock and, in some instances, increased their holdings . . . ." Because Pfeil failed to rebut the presumption that

State Street satisfied its duty of prudence, the district court granted State Street's motion for summary judgment. On appeal, we reversed and remanded, holding that the presumption of prudence applied only at summary judgment and beyond, not at the motion-to-dismiss stage of proceedings, and that the presumption only required the plaintiff to establish that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Pfeil*, 671 F.3d at 592–96.[3]

Thereafter, we applied our rule to a similar case, reversing a district court's grant of the motion to dismiss of another ESOP fiduciary. *Dudenhoefer*, 692 F.3d at 418. The Supreme Court granted that other fiduciary's petition for certiorari and abrogated the "presumption of prudence" doctrine. *Dudenhoeffer*, 134 S. Ct. 2459. The *Dudenhoeffer* Court held that "the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under *no duty* to diversify the ESOP's holdings." *Id.* at 2467 (emphasis added).

Dudenhoeffer prevents us from affirming the judgment of the court below on presumption-of-prudence grounds. But "because a grant of summary judgment is reviewed *de novo*, [we] may affirm the judgment of the district court on any grounds supported by the record, even if they are different from those relied upon by the district court." *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir. 2000); *see also Jennings v. Stephens*, 135 S.

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[3] This holding brought us into conflict with other courts of appeals. *See, e.g.*, *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011), *overruled by Dudenhoeffer*, 124 S. Ct. 2459.

Ct. 793, 799 (2015) (observing that "federal appellate courts . . . review lower courts' . . . *judgments*").

We evaluate State Street's actions according to a prudent-process standard. "The test for determining whether a fiduciary has satisfied his duty of prudence is whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 723 (6th Cir. 2000) (internal quotation marks omitted). In other words, we must "focus . . . on whether the fiduciary engaged in a reasoned decision[-]making *process*, consistent with that of a prudent man acting in [a] like capacity." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014) (emphasis added) (internal quotation marks omitted) (emphasis added). "[C]ourts have readily determined that fiduciaries who act reasonably—i.e., who appropriately *investigate the merits of an investment decision* prior to acting—easily clear this bar." *Id.* at 358 (emphasis added) (holding imprudent a decision made "with virtually *no* discussion or analysis" (emphasis added)); *see id.* at 360 (observing that the brief of the fiduciary in that case did not "grappl[e] with its failure to conduct *any* investigation"). Here, summary judgment to State Street was appropriate if Pfeil failed to demonstrate a genuine issue of material fact concerning the methods of State Street's investigation of the merits of investing in GM, or the appropriateness of those methods.

III

A

Even after *Dudenhoeffer*, the duty of prudence "do[es] not prohibit a plan trustee from holding single-stock investments as an option in a plan that includes a portfolio of diversified funds." *Tatum*, 761 F.3d at 356. And while courts no longer may *presume* that ESOP fiduciaries are prudent, the *Dudenhoeffer* court suggested that a correct "understanding of the prudence of relying on market prices" may lead courts to a very similar result. *Dudenhoeffer*, 134 S. Ct. at 2472. The *Dudenhoeffer* Court instructed us as follows:

> [T]he motion to dismiss for failure to state a claim. . . . which gave rise to the lower court decisions at issue here, requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently. Because the content of the duty of prudence turns on the circumstances . . . prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific.
>
> The District Court in this case granted petitioners' motion to dismiss the complaint because it held that respondents could not overcome the presumption of prudence. The Court of Appeals, by contrast, concluded that no presumption applied. And we agree with that conclusion. The Court of Appeals, however, went on to hold that

respondents had stated a plausible duty-of-prudence claim. The arguments made here, along with our review of the record, convince us that the judgment of the Court of Appeals should be vacated and the case remanded. On remand, the Court of Appeals should apply the pleading standard . . . in light of the following considerations.

. . . .

In our view, where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. . . .

In other words, a fiduciary usually is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him. . . .

. . . [T]he Court of Appeals held that the complaint stated a claim because respondents allege[d] that [the fiduciary was] aware of the risks of [investing in the company's business], and that such risks made [the] stock an imprudent investment. The Court of Appeals did not point to any special circumstance rendering reliance on the market price imprudent. The court's decision to deny dismissal therefore appears to have been based on an

> erroneous understanding of the prudence of relying on market prices.

Dudenhoeffer, 134 S. Ct. at 2471–72 (internal quotation marks and citations omitted). Another court recently considered the implication of this language, observing that the "excessively risky" character of investing ESOP funds in stock of a company experiencing serious threats to its business in 2008 "is accounted for in the market price, and the Supreme Court held that fiduciaries may rely on the market price, absent any special circumstances affecting the reliability of the market price." *In re Citigroup ERISA Litig.*, No. 11 CV 7672 JGK, 2015 WL 2226291, at *14 (S.D.N.Y. May 13, 2015).

We interpret this to mean, and now hold, that a plaintiff claiming that an ESOP's investment in a publicly traded security was imprudent must show special circumstances to survive a motion to dismiss. *Cf. Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 706 (7th Cir. 2008) (cautioning against the "assertion that pension fiduciaries have a duty to outsmart the stock market") (Easterbrook, J.). This rule accords with Modern Portfolio Theory (MPT). MPT "rests on the understanding that organized securities markets are so efficient at discounting securities prices that the current market price of a security is highly likely already to impound the information that is known or knowable about the future prospects of that security." John H. Langbein et al., Pension and Employee Benefit Law 634. "[C]ourts have increasingly come to the view that the prudence norm in trust law and in ERISA has absorbed the main precepts of MPT." *Ibid.*; *cf. Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313 (5th Cir. 1999). We do not now

decide whether a fiduciary's complete failure to investigate a publicly traded investment might constitute a circumstance sufficiently special for a claim of imprudence to survive a motion to dismiss; the amount of investigation here takes this case out of that realm.

B

Pfeil alleges that, in response only to various *public announcements* about GM's future, State Street's investment strategy failed to function as a prudent process if it did not recognize "that the market was over- or undervaluing" GM common stock. *Cf. Dudenhoeffer*, 134 S. Ct. at 2471. This allegation is implausible. *Ibid.* Pfeil failed to show a special circumstance such that State Street should not have relied on market pricing.

Pfeil argues that State Street knew or should have known circumstances about GM's business and financial condition on each of four dates in 2008:

> (1) July 15 (State Street internally assessed GM as a risky investment);
>
> (2) September 22 (GM no longer could access capital markets);
>
> (3) November 21 (State Street ceased purchasing GM Common Stock, but continued maintain the Fund's existing holdings); and
>
> (4) December 12 (State Street's financial advisors observed that, without federal assistance, GM would run out of cash by the end of the year,

> and that with it, GM's existing equity will be substantially diluted).

Pfeil's argument, stripped of its particulars, rests on a sleight of hand: on each of these dates, it would have been prudent, in hindsight, for State Street to decide to sell, and that decision would have resulted in less loss; State Street did not make such a prudent decision; therefore, what State Street did was imprudent. But State Street's decisions were not imprudent or unreasonable simply because it could have made a different decision in response to GM's financial difficulties. *See Hunter*, 220 F.3d at 722 (6th Cir. 2000). We must evaluate the prudence or imprudence of State Street's conduct as of "the time it occurred," not "post facto." *Ibid.* (citing *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984), and *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)).

Pfeil's argument runs into another logical problem. The "decision" that he criticizes was State Street's decision *not* to act on each of four dates. But why stop at four? In a sense, an ESOP plan fiduciary is always deciding not to divest. Pfeil does not explicitly claim that the ESOP fiduciary must go through constant processes to ensure that these decisions not to divest are prudent. But Pfeil does not offer a legal reason why the four events he has chosen suffice to trigger a particular reevaluation process. To the extent that he relies on internal State Street communications, his implied command would intolerably bind ESOP fiduciaries: if they discuss internally the impact of an event on a fund's holdings, they trigger a requirement that they engage in a formal process. To the extent that Pfeil instead relies on the observation that, after the four events it picked, GM's stock decreased in value, Pfeil

invites us to engage in precisely the sort of post-hoc inquiry that the doctrine rightly forbids.

We agree with the dissent's suggestion that, although "a stock's price accurately reflects the company's risk of failing," an investor can expect, at any given time, that the value of the cash for which he can sell a particular stock may be less volatile than the same of the stock itself. *Post*, at 14. We also agree that, "The market includes participants with various levels of risk tolerance and various types of portfolios. What is prudent for one type of investor and one type of portfolio may be imprudent for others." *Ibid.* But an ESOP's investment goals are to maintain, within reason, ownership of a particular employer's security. Whatever evils the dissent identifies are endemic to the ESOP form established by Congress. A benefit of employees investing in their employer is that when the employer does well, the employees do well. A risk is that when the employer goes bankrupt, the employees do poorly.

IV

Congress has exempted ESOP fiduciaries from the duty to diversify; indeed, Congress created ESOPs so that they would *not* diversify. The Supreme Court coupled its recent judgment that ESOPs are not entitled to a special presumption of prudence with a reminder that, absent extraordinary circumstances, public markets for stocks like GM incorporate all of the public information about those companies.

Another court, evaluating a case similar to this one, recently observed that

> [t]he defendant fiduciaries . . . were between the "rock and a hard place" discussed in *Dudenhoeffer:* If [fiduciaries] keep[ ] investing and the stock goes down, the fiduciaries may be sued for acting imprudently in violation of § 1104(a)(1)(B), as was the case here. [B]ut if [the fiduciaries] stop investing and the stock goes up, . . . the fiduciaries may be sued for disobeying the plan documents in violation of § 1104(a)(1)(D). Although the Supreme Court deemed a presumption of prudence too broad a response to these concerns, these concerns underlie the reasoning behind the general rule rendering suits implausible when they allege that the fiduciaries should have been able to beat the market.

In re Citigroup ERISA Litig., 2015 WL 2226291, at *14 (internal quotation marks and citations omitted). State Street served as the fiduciary that planned to invest only in GM common stock. Pfeil chose to invest in this fund, although others were available.

The doctrine requires us to evaluate State Street's conduct at the time it occurred, so the mere fact that GM's stock value decreased after certain dates does not affect our judgment. To fulfill its responsibilities, State Street discussed GM stock scores of times during the class period. State Street's managers repeatedly discussed at length whether to continue the investments in GM that are at issue in this case. State Street's Independent Fiduciary Committee held more than forty meetings during the

Class Period of less than nine months to discuss whether to retain GM stock. At those meetings, State Street employees discussed the performance of General Motors, both its stock and its business, and factors that may have affected that performance. Meetings often culminated in decisive votes, ultimately to divest the fund of GM stocks. It was advised by outside legal and financial advisors. In documents filed with the district court, State Street's experts opined that State Street's process for monitoring GM (and other) stock was prudent. And other experts—fiduciaries of other pension plans and non-pension-plan investment funds—decided, like State Street, to hold GM Common Stock on each of the four "imprudent dates" chosen by Pfeil. Given the prudent process in which State Street engaged, Pfeil failed to demonstrate a genuine issue as to whether State Street satisfied its duty of prudence. We hold that State Street's actual processes demonstrated prudence, and the decision of other expert professionals both to invest and not to divest on or near the dates that State Street made those decisions demonstrates the reasonable nature of those decisions.

The record here presents no factual questions material to the outcome of this case. And, to the extent the district court enjoys an advantage over us in evaluating the merits of Pfeil's case under the correct legal standard, the benefit of judicial economy outweighs that advantage. Even viewed in the light most favorable to Pfeil, State Street's actions were not actionably imprudent.

We AFFIRM the judgment of the district court.

DISSENT

HELENE N. WHITE, dissenting. I respectfully dissent. The majority recognizes that the district court applied the presumption of prudence rejected in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), but determines that its own analysis justifies affirmance.

The majority first adopts a rule derived from *In re Citigroup ERISA Litigation*, No. 11 CV 7672 JGK, 2015 WL 2226291, at *14 (S.D.N.Y. May 13, 2015), and the Modern Portfolio Theory (MPT) that effectively immunizes fiduciaries from imprudence claims relating to publicly traded securities in the absence of special circumstances, including, perhaps, the complete failure to investigate. The foundation for this holding is the Supreme Court's observation in *Dudenhoeffer* that the market price of a publicly traded security is highly likely to reflect the risk and future prospects of the company. But, Plaintiffs here do not assert that the market did not reflect the true value of the GM stock, and it is unclear how this new holding applies. I assume the majority concludes that because any transaction, either executed or eschewed, would be at the market price, at any given point in time, the ESOP was in the same position it would have been had the transaction been executed; it either had cash or stock of the same value. Further, if GM's situation was so dire at any of the times asserted by Plaintiffs, it would have been reflected in the price of the stock. But, Plaintiffs do not challenge either of these propositions and do not

claim that State Street should have discerned something the market did not.

One can concede that the market is generally efficient in pricing stocks without concluding that all decisions to buy, sell or hold are therefore prudent. The market includes participants with various levels of risk tolerance and various types of portfolios. What is prudent for one type of investor and one type of portfolio may be imprudent for others. Further, the fact that a stock's price accurately reflects the company's risk of failing does not mean that it is prudent to retain the stock as that possibility becomes more and more certain and buyers are willing to pay less and less for a stake in the upside potential. In short, I think the MPT is inapplicable here.

The majority also concludes that the process employed by State Street was prudent as a matter of law. I might agree were it not for the fact that Plaintiffs presented evidence that the decision makers were operating under an incorrect standard. A necessary part of a prudent decision-making process is the yardstick applied to the information yielded by prudent investigation and consideration. Here, members of the Independent Fiduciary Committee (IFC) testified that State Street was required, per its Engagement Agreement,[1] to hold

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[1] The engagement agreement stated that the Fund was to

> continue to be invested exclusively in Company Stock . . . without regard to (A) the diversification of assets of each Plan and Trust, (B) the risk profile of Company Stock, (C) the amount of income provided by Company Stock, or (D) the fluctuation in the fair market value of

GM stock until a GM bankruptcy was "imminent," (Brandhorst Deposition, PID 5712), or State Street reached a "clear conclusion" that GM would file for bankruptcy (Blake Deposition, PID 5697). However, *Dudenhoeffer* made clear that

> the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary. See also § 1110(a) (With irrelevant exceptions, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility . . . for any . . . duty under this part shall be void as against public policy"). This rule would make little sense if, as petitioners argue, the duty of prudence is defined by the aims of the particular plan as set out in the plan documents, since in that case the duty of prudence could never conflict with a plan document.

Dudenhoeffer, 134 S. Ct. at 2468. Therefore, State Street's reliance on the plan documents, rather than the fiduciary duty of prudence under the

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> the company stock, unless State Street, using an abuse of discretion standard, determines from reliable public information that (i) there is a serious question concerning the Company's short term viability as a going concern without resort to bankruptcy proceedings; or (ii) there is no possibility in the short term of recouping any substantial proceeds from the sale of stock in bankruptcy proceedings.

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circumstances, was misplaced, regardless whether its interpretation of the documents was correct.

Finally, State Street and the majority rely on the actions of other pension-fund fiduciaries who continued to buy or hold GM stock as evidence that the stock remained a prudent investment at the relevant times. However, the record does not establish that the fiduciary decisions were made in a similar context. ERISA excuses fiduciaries of ESOP plans from any duty to diversify, but nevertheless imposes a duty of prudence under the circumstances. "Under the circumstances" is not an empty phrase; the Supreme Court explained in *Dudenhoeffer* that "the appropriate inquiry will necessarily be context specific. *Id.* at 2471. Here, the circumstances involved an ESOP; the nature of these other portfolios and the measures taken to mitigate risk are unknown. Thus, that other plans retained GM stock in their portfolios is not dispositive. There is at least a question of fact whether State Street satisfied its duty of prudence under the circumstances.

I would reverse and remand for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-1491

RAYMOND M. PFEIL and MICHAEL KAMMER, Individually and on behalf of all others similarly situated,

Plaintiffs - Appellants,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant - Appellee.

Before: BOGGS, SUHRHEINRICH, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

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 is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND M. PFEIL, AND MICHAEL KAMMER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

STATE STREET BANK AND TRUST COMPANY,
Defendant-Appellee.

ORDER

BEFORE: BOGGS, SUHRHEINRICH, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has 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. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge White would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX E

chapter III of this chapter made by an employer to a plan by a mistake of fact, and by an employer to a multiemployer plan by a mistake of fact or law, for provisions relating to contributions made by an employer by a mistake of fact.

Subsec. (c)(4). Pub. L. 96–364, § 310(2), added par. (4).

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–280 applicable to plan years beginning after 2007, see section 108(e) of Pub. L. 109–280, set out as a note under section 1021 of this title.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106–170 applicable to qualified transfers occurring after Dec. 17, 1999, see section 535(c)(1) of Pub. L. 106–170, set out as a note under section 420 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–508 applicable to qualified transfers under section 420 of title 26 made after Nov. 5, 1990, see section 12012(e) of Pub. L. 101–508, set out as a note under section 1021 of this title.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by section 7881(k) of Pub. L. 101–239 effective, except as otherwise provided, as if included in the provision of the Pension Protection Act, Pub. L. 100–203, §§ 9302–9346, to which such amendment relates, see section 7882 of Pub. L. 101–

239, set out as a note under section 401 of Title 26, Internal Revenue Code.

Amendment by section 7891(a)(1) of Pub. L. 101–239 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 7891(f) of Pub. L. 101–239, set out as a note under section 1002 of this title.

Section 7894(e)(1)(B) of Pub. L. 101–239 provided that:
"The amendments made by subparagraph (A) [amending this section] shall take effect as if included in section 410 of the Multiemployer Pension Plan Amendments Act of 1980 [Pub. L. 96–364]."

Amendment by section 7894(e)(3) of Pub. L. 101–239 effective, except as otherwise provided, as if originally included in the provision of the Employee Retirement Income Security Act of 1974, Pub. L. 93–406, to which such amendment relates, see section 7894(i) of Pub. L. 101–239, set out as a note under section 1002 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–364 effective Sept. 26, 1980, except as specifically provided, see section 1461(e) of this title.

Amendment by section 410(a) of Pub. L. 96–364 effective Jan. 1, 1975, except with respect to contributions received by a collectively bargained plan maintained by more than one employer before Sept. 26, 1980, see section 410(c) of Pub. L. 96–364, set out as a note under section 401 of Title 26, Internal Revenue Code.

REGULATIONS

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this part call for the promulgation of regulations, see sections 1031 and 1114 of this title.

APPLICABILITY OF AMENDMENTS BY SUBTITLES A AND B OF TITLE I OF PUB. L. 109–280

For special rules on applicability of amendments by subtitles A (§§ 101–108) and B (§§ 111–116) of title I of Pub. L. 109–280 to certain eligible cooperative plans, PBGC settlement plans, and eligible government contractor plans, see sections 104, 105, and 106 of Pub. L. 109–280, set out as notes under section 401 of Title 26, Internal Revenue Code.

§ 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.