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No. 12-751

IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,

Petitioners,

v.

JOHN DUDENHOEFFER, et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* KEYCORP IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.................................. 2

ARGUMENT 6

I. THE SIXTH CIRCUIT'S APPLICATION OF THE PRESUMPTION OF PRUDENCE IGNORES ERISA'S DIVERSIFICATION EXEMPTION FOR ESOP FIDUCIARIES. 6

II. THE SIXTH CIRCUIT'S STANDARD THREATENS CONGRESS'S EMPLOYEE OWNERSHIP GOALS BY SUBJECTING ESOP FIDUCIARIES TO WASTEFUL AND MERITLESS LITIGATION 12

CONCLUSION... 20

TABLE OF AUTHORITIES

Page(s)

CASES

Banks v. Healthways, Inc.,
2009 WL 211137 (M.D. Tenn. Jan. 28, 2009) 12

Benitez v. Humana, Inc.,
2009 WL 3166651 (W.D. Ky. Sept. 30, 2009) 13

Brown v. Medtronic, Inc.,
628 F.3d 451 (8th Cir. 2010) 18

Bunch v. W.R. Grace & Co.,
555 F.3d 1 (1st Cir. 2009) 18

Conkright v. Frommert,
559 U.S. 506 (2010) 19

Dudenhoeffer v. Fifth Third Bancorp,
757 F. Supp. 2d 753 (S.D. Ohio 2010) 13

Dudenhoeffer v. Fifth Third Bancorp,
692 F.3d 410 (6th Cir. 2012) 13

Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007) 3, 18

Fulton Cnty. Emp. Ret. Sys. v. MGIC Inv. Corp.,
675 F.3d 1047 (7th Cir. 2012) 10

Griffin v. Flagstar Bancorp, Inc.,
2011 WL 1261196 (E.D. Mich. Mar. 31, 2011) 13

Griffin v. Flagstar Bancorp, Inc.,
492 Fed. Appx. 598 (6th Cir. 2012) 13

In re AEP ERISA Litig.,
327 F. Supp. 2d 812 (S.D. Ohio 2004) 13

In re Cardinal Health, Inc. ERISA Litig.,
424 F. Supp. 2d 1002 (S.D. Ohio 2006) 5, 12

In re CMS Energy ERISA Litig.,
312 F. Supp. 2d 898 (E.D. Mich. 2004) 13

In re Computer Scis. Corp. ERISA Litig.,
635 F. Supp. 2d 1128 (C.D. Cal. 2009) 18

In re Diebold ERISA Litig.,
2008 WL 2225712 (N.D. Ohio May 28, 2008) 12

In re Ferro Corp. ERISA Litig.,
422 F. Supp. 2d 850 (N.D. Ohio 2006) 13

In re Ford Motor Co. ERISA Litig.,
590 F. Supp. 2d 883 (E.D. Mich. 2008) .. 5, 12, 14

In re General Motors ERISA Litig.,
2006 WL 897444 (E.D. Mich. Apr. 6, 2008) . 5, 12

In re Huntington Bancshares Inc. ERISA Litig.,
620 F. Supp. 2d 842 (S.D. Ohio 2009) 13

In re Regions Morgan Keegan ERISA Litig.,
692 F. Supp. 2d 944 (W.D. Tenn. 2010) 12

In re The Goodyear Tire & Rubber Co. ERISA Litig.,
438 F. Supp. 2d 783 (N.D. Ohio 2006) 5, 12

Katyle v. Penn Nat'l Gaming, Inc.,
637 F.3d 462 (4th Cir. 2011)............................. 10

Kiobel v. Royal Dutch Petroleum Co.,
642 F.3d 268 (2d Cir. 2011) 15

Kirschbaum v. Reliant Energy Inc.,
526 F.3d 243 (5th Cir. 2008)......................*passim*

Lanfear v. Home Depot, Inc.,
679 F.3d 1267 (11th Cir. 2012)....................... 3, 7

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,
547 U.S. 71 (2006)... 9

Metyk v. KeyCorp,
2013 WL 331122 (N.D. Ohio Jan. 29, 2013) 10

Pfeil v. State Street Bank & Trust Co.,
2010 WL 3937165 (E.D. Mich. Sept. 30, 2010)... 13

Pfeil v. State Street Bank & Trust Co., 671 F.3d 585 (6th Cir. 2012)................................... 13

Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010).. 17, 18

Rankin v. Rots,
278 F. Supp. 2d 853 (E.D. Mich. 2003) 13

Shanehchian v. Macy's, Inc.,
2009 WL 2524562 (S.D. Ohio Aug. 14, 2009) 5, 12, 14

Sherrill v. Federal-Mogul Corp. Ret. Programs Comm.,
413 F. Supp. 2d 842 (E.D. Mich. 2006) 13

Shirk v. Fifth Third Bancorp,
2007 WL 1100429 (S.D. Ohio Apr. 10, 2007) 12

Shirk v. Fifth Third Bancorp,
2009 WL 692124 (S.D. Ohio Jan. 29, 2009) 16

Sims v. First Horizon Nat'l Corp.,
2009 WL 3241689 (W.D. Tenn. Sept. 30, 2009) 12

Summers v. State Street Bank & Trust Co.,
453 F.3d 404 (7th Cir. 2006) 7

Tatum v. R.J. Reynolds Tobacco Co.,
392 F.3d 636 (4th Cir. 2004) 19

Taylor v. KeyCorp,
678 F. Supp. 2d 633 (N.D. Ohio 2009) 7, 12

Varity Corp. v. Howe,
516 U.S. 489 (1996) 9

Wright v. Medtronic, Inc.,
2010 WL 1027808 (D. Minn. Mar. 17, 2010) ... 11

Wright v. Oregon Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004)........................ 4, 7

STATUTES

29 U.S.C. § 1104(a)(2) 4, 6

RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

H.R. Conf. Rep. No. 104-369, 1995
U.S.C.C.A.N. 730 (1995) 9, 10

Restatement (Third) of Trusts § 227 7

Stephen P. Utkus & Jean A. Young, *The Evolution of Company Stock in Defined Contribution Plans* at 6 (Vanguard Research, Mar. 2012)....................................... 19

BRIEF OF THE *AMICUS CURIAE*

KeyCorp respectfully submits this brief under Supreme Court Rule 37.3(a) as *amicus curiae* in support of petitioners on writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

KeyCorp is a bank holding company headquartered in Cleveland, Ohio. Approximately 30,000 employees and former employees of KeyCorp and its affiliate entities participate in the company's 401(k) retirement plan. Many of these individuals have chosen to invest a portion of their plan accounts in KeyCorp stock. Since 2008, several former employees have brought alleged class actions against KeyCorp and several of its senior officers based on ERISA theories like those asserted against petitioners here. *See Taylor v. KeyCorp, et al.*, No. 08-cv-1927 (N.D. Ohio, Aug. 11, 2008) (consolidated); *Metyk v. KeyCorp, et al.*, No. 10-cv-2112 (N.D. Ohio, Sept. 22, 2010) (same).

KeyCorp files this *amicus* brief because the Sixth Circuit—in direct conflict with the several other courts of appeals that have addressed these same

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[1] Petitioners and respondents have consented to the filing of this brief. Correspondence reflecting this consent is on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than KeyCorp made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

issues—has made it far too easy for plaintiffs to get a meritless claim under ERISA past a motion to dismiss. This Court should reject the Sixth Circuit's standard and adopt at the pleading stage a demanding presumption of prudence that will protect companies and their ESOP fiduciaries from wasteful and protracted litigation and give effect to ERISA's unambiguous exemption of ESOP fiduciaries from the duty to diversify company stock.

SUMMARY OF ARGUMENT

In the wake of the recent economic crisis, plaintiffs' class action attorneys filed scores of ERISA cases alleging companies and their plan fiduciaries breached their duties merely by providing participants with the option of investing in company stock. The plaintiffs in these ERISA "stock-drop" cases, with the benefit of hindsight, broadly challenge the companies' prior business practices that allegedly caused the stock-price decline. The resulting discovery always threatens to be wide-ranging and expensive. The potential liability is generally daunting as well. For large companies, company stock holdings in 401(k) plans can run into the hundreds of millions of dollars. If stock prices lose value, as happened to the majority of publicly traded companies during the recent economic crisis, these companies become a ready target for substantial class action litigation.

Recognizing that Congress's intent was to encourage employee ownership, not punish it, all but one of the courts of appeals to address the issue presume that an ESOP fiduciary's decision to allow

plan participants to invest in company stock is prudent (the so-called "*Moench* presumption") unless the plaintiff can plausibly allege the company was in dire circumstances. *See* Pet. Br. 22-23. These courts further hold this presumption should be applied at the motion-to-dismiss stage, so as not to require defendants to endure sprawling and wasteful litigation where the plaintiff's claims have no real chance of succeeding. *E.g., Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007).

The Sixth Circuit alone has charted a different course. While purporting to recognize the presumption, the court has refused to adopt a "dire circumstances" test or anything similar to it, instead opting for what it describes as an "unembellished standard" that allows plaintiffs to satisfy the presumption merely by establishing "a prudent fiduciary acting under similar circumstances would have made a different investment decision." Pet. App. 12. Contrary to the other courts of appeals, the Sixth Circuit also has refused to apply even this watered-down standard, or any other version of the *Moench* presumption, on a motion to dismiss. *Id.* at 11-12.

Petitioners have already made a compelling case for rejecting the Sixth Circuit's standard in favor of a demanding presumption of prudence that adequately protects ESOP fiduciaries who allow plan participants to invest in company stock. *See* Pet. Br. at 25-30. *Amicus* KeyCorp respectfully submits an additional argument in support of a strong presumption that flows directly from Congress's

decision to exempt ESOP fiduciaries from the duty to diversify plan assets under ERISA. *See* 29 U.S.C. § 1104(a)(2).

Because ESOP fiduciaries have no duty to prevent participants from holding too much company stock, the real question in these cases is whether the fiduciaries breached their obligations by allowing plan participants to invest in "even one share" of it. *See Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 249 (5th Cir. 2008) (plaintiff alleged "it was imprudent for the Plan to hold even one share of REI stock"); *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) ("If there is no duty to diversify ESOP plan assets under the statute, it logically follows that there can be no claim for breach of fiduciary duty out of a failure to diversify, or in other words, arising out of allowing the plan to become too heavily weighted in company stock.") (quotation omitted).

To prevail on such a claim, plaintiffs must assume an extreme proposition—that the company stock was such a bad investment the fiduciaries had no choice but to override the participants' decision to invest in it and prohibit those participants from buying any additional shares going forward. Pure logic dictates that a fiduciary should not have to take such drastic and risky action unless the company's circumstances are truly dire. Moreover, respondents' allegation that ESOP fiduciaries artificially inflated the stock by misrepresenting or concealing the company's financial condition is an improper end run around the strict pleading requirements Congress has

mandated for the same types of claims under the federal securities laws.

Respondents and the Government nonetheless urge this Court to embrace the Sixth Circuit's lax standard, and they downplay its dangerous consequences. The Government dismisses as "exaggerated" the notion that "ESOP fiduciaries and employers will be met with expensive litigation and extensive discovery every time the employer's stock price fluctuates." U.S. Cert. Br. 12. This is nothing short of turning a blind eye to an obvious reality. KeyCorp and numerous other companies headquartered in this circuit, including petitioner Fifth Third (twice), Ford Motor Company, General Motors Corporation, Cardinal Health, Inc., The Goodyear Tire & Rubber Corporation, and Macy's, Inc. (and many others), all have been subjected to wasteful and expensive ERISA stock-drop class actions in recent years. In each case, defendants were sued for allowing participants to invest in company stock after its market price dropped. And in each case, defendants lost Rule 12(b)(6) motions to dismiss under the same kind of plaintiff-friendly standard of review the Sixth Circuit applied here. *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 889, 893 (E.D. Mich. 2008); *In re General Motors ERISA Litig.*, No. 05-71085, 2006 WL 897444, at *13 (E.D. Mich. Apr. 6, 2008); *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1032-33 (S.D. Ohio 2006); *In re The Goodyear Tire & Rubber Co. ERISA Litig.*, 438 F. Supp. 2d 783, 793 (N.D. Ohio 2006); *Shanehchian v. Macy's, Inc.*, No. 07-cv-828, 2009 WL 2524562, at *6-7 (S.D. Ohio Aug. 14, 2009).

Defendants contending with the Sixth Circuit's standard thus face an unenviable dilemma, where they must either embark on costly, disruptive, and protracted litigation or pay dearly to settle meritless claims. Worse yet, to avoid liability under this standard should the Court adopt it going forward, ESOP fiduciaries will have to consider "playing" the market with ESOP funds by turning the company stock fund switch on and off every time they anticipate the price might be about to rise or fall. In the end, adopting the Sixth Circuit's standard will force companies to seriously contemplate whether to continue offering ESOPs at all. That result is at odds with Congress's decision to encourage employee ownership, not to mention the wishes of the many employees who choose to invest in their employer companies. Accordingly, this Court should reverse the judgment of the court of appeals.

ARGUMENT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE PRESUMPTION OF PRUDENCE IGNORES ERISA'S DIVERSIFICATION EXEMPTION FOR ESOP FIDUCIARIES.

A. As more fully explained in petitioners' brief, ERISA exempts ESOP fiduciaries from any duty to diversify. *See* Pet. Br. 6, 21 (citing 29 U.S.C. § 1104(a)(2)). The purpose of this exemption is plain: to protect ESOP fiduciaries from liability for doing precisely what Congress intended them to do—giving employees the option to invest their plan accounts in company stock. As the Ninth Circuit correctly recognized, "If there is no duty to diversify

ESOP plan assets under the statute, it logically follows that there can be no claim for breach of fiduciary duty out of a failure to diversify, or in other words, arising out of allowing the plan to become too heavily weighted in company stock." *Wright*, 360 F.3d at 1097 (quotation omitted); *see also Kirschbaum*, 526 F.3d at 249 (dismissing claim that plan became "too heavily weighted" in company stock); *Lanfear*, 679 F.3d at 1278 ("ESOP fiduciaries are exempt from the duty to diversify; indeed, they have a duty not to diversify.").

Ordinarily, of course, "[d]iversification is fundamental to the management of risk," and thus "an essential element of prudent investing by a fiduciary." Restatement (Third) of Trusts § 227, cmt. f; *see also Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 406 (7th Cir. 2006) (same). A company stock fund, like any single-stock investment, is inherently a high-risk investment. In most circumstances that risk can be managed through proper diversification with other, more conservative investments. But once the ordinary duty to diversify is removed from the equation—as Congress has mandated in the ESOP context—the only question for the fiduciary is not whether there is too much company stock in the plan, but instead whether the particular stock is so unsafe that a participant should not be permitted to hold even a single share. *See Kirschbaum*, 526 F.3d at 249 (plaintiff alleged "it was imprudent for the Plan to hold even one share of REI stock"); *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 638-39 (N.D. Ohio 2009) ("Plaintiffs admit that their prudence claim is not that Defendants breached

their fiduciary duty by failing to diversify the Plan, but that they breached their fiduciary duty by permitting any participant to have the option of holding or investing in even one share of KeyCorp stock. . . .") (quotation omitted).

Accordingly, to prevail on such a claim, plaintiffs have to prove an extreme proposition—that the company stock had become such a bad investment that the plan fiduciaries had no choice but to override a plan participants' decision to invest in it and prohibit those participants from buying any additional shares going forward. Logically, this could only be the case where the company is facing dire circumstances. Recognizing the drastic nature of such a claim, all the federal courts of appeals to address the issue (except the Sixth Circuit) have held that ESOP fiduciaries cannot be held liable for continuing to invest plan assets in company stock except in the most dire of circumstances. *See* Pet. Br. 22-23.

The Sixth Circuit, however, rejected this approach in favor of a vague and indeterminate standard of liability—that plaintiffs must "prove that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Pet. App. 12. The court justified its "unembellished standard" on the misguided view that ERISA imposes "identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." *Id.* at 12-13 (emphasis in original). But all fiduciaries are *not* identical under ERISA. To the contrary, ERISA exempts ESOP fiduciaries from the duty to diversify that is imposed on all other fiduciaries

under the ERISA legislative scheme. This Court should not adopt a standard that reads this critical exemption out of existence.

B. Respondents' contention that Fifth Third stock was "artificially inflated" does not change this analysis. As petitioners explained in detail in their brief, artificial inflation claims inherently arise from purported misrepresentations or omissions in securities filings, and it is the securities laws, not ERISA, that are designed to provide relief for this alleged misconduct. Pet. Br. 42-44. Indeed, although the Court did not accept this issue for review, most courts of appeals have held that misrepresentations or omissions in securities filings are purely corporate, as opposed to fiduciary, communications, and thus not actionable under ERISA. *See* Pet. 30-32. As this Court held in *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996), an employer does not act in a fiduciary capacity "simply because it ma[kes] statements about its expected financial condition or because an ordinary business decision had an adverse impact on the plan."

In truth, plaintiffs are hoping to make an end run around the strict limitations Congress has placed on alleged securities fraud claims under the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006) (Congress enacted PSLRA to prevent "nuisance filings, targeting of deep-pocket defendants, and manipulation by class action lawyers of the clients whom they purportedly represent") (quotation omitted); *see also* H.R. Conf.

Rep. No. 104-369, 1995 U.S.C.C.A.N. 730, 731 (1995) (PSLRA designed to prevent "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only the faint hope that the discovery process might lead eventually to some plausible cause of action").

Freeing ERISA plaintiffs from the exacting standards that would apply to substantively analogous claims under the PSLRA serves no good purpose. This is illustrated by respondents' self-defeating artificial inflation allegations here, where they proclaim that virtually all the information Fifth Third purportedly misrepresented or concealed regarding its subprime loan portfolio was well known to the market *before the class period even began*. J.A. 48-52, ¶¶ 83-95 ("Published Warnings Place Plan Fiduciaries On Notice of Need to Investigate Risks of Subprime Exposure."); Pet. App. 14 ("The Amended Complaint specifically enumerates and describes these warnings *and public information* of which the Defendants were aware.") (emphasis added). It is self-evident that "if investors already know the truth, false statements won't affect the price." *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir. 2011) (quotation omitted); *see also Fulton Cnty. Emp. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1050 (7th Cir. 2012) ("In July 2007 the whole world knew that firms that had issued, packaged, or insured subprime loans were in distress. Nothing MGIC said, or didn't say, could conceal that fact."); *Metyk v. KeyCorp*, No. 10-cv-

2112, 2013 WL 331122, at *4 (N.D. Ohio Jan. 29, 2013) ("Plaintiffs admit that the alleged misrepresentations about accounting and tax problems involving the leveraged leases and high risk homebuilder loans were known to the market before the class period began.").

This Court should not give ERISA stock-drop plaintiffs a free pass to discovery based upon these types of defectively pleaded allegations of purported artificial inflation. Instead, by applying a rigorous presumption of prudence, this Court can maintain a distinct role under ERISA for alleged imprudent investment claims against ESOP fiduciaries without intruding upon the careful pleading and proof requirements Congress has mandated for these same types of claims in the securities fraud context. *See Kirschbaum*, 526 F.3d at 255-56 (applying *Moench* to all alleged imprudent investment claims because there is "no principled difference between how a fiduciary should respond to 'artificial inflation' of the stock price as opposed to other sorts of negative insider information"); *Wright v. Medtronic, Inc.*, No. 09-cv-443, 2010 WL 1027808, at *8 (D. Minn. Mar. 17, 2010) ("Allowing plaintiffs to evade the *Moench* presumption merely by pleading that the stock was artificially inflated for one reason or another would eviscerate the presumption.").

II. THE SIXTH CIRCUIT'S STANDARD THREATENS CONGRESS'S EMPLOYEE OWNERSHIP GOALS BY SUBJECTING ESOP FIDUCIARIES TO WASTEFUL AND MERITLESS LITIGATION.

A. The Government contends the Court's adoption of this or some similar standard of review will not lead to "expensive litigation and extensive discovery[.]" U.S. Cert. Br. 12. This does not accord with the reality facing public companies headquartered in the Sixth Circuit. At least seventeen different ERISA stock-drop defendants have lost motions to dismiss in this circuit, with some district courts refusing to apply the presumption on a motion to dismiss. *See In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 953-54 (W.D. Tenn. 2010); *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 640 (N.D. Ohio 2009); *Sims v. First Horizon Nat'l Corp.*, No. 08-cv-2293, 2009 WL 3241689, at *24 (W.D. Tenn. Sept. 30, 2009); *Shanehchian*, 2009 WL 2524562, at *6-7; *Banks v. Healthways, Inc.*, No. 08-cv-734, 2009 WL 211137, at *2-3 (M.D. Tenn. Jan. 28, 2009); *In re Diebold ERISA Litig.*, No. 06-cv-170, 2008 WL 2225712, at *8-9 (N.D. Ohio May 28, 2008); *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d at 893, 913; *Shirk v. Fifth Third Bancorp*, No. 05-cv-49, 2007 WL 1100429, at *10 (S.D. Ohio Apr. 10, 2007); *In re Nortel Networks Corp. ERISA Litig.*, No. 03-md-1537, Mem. Op. & Ord., Doc. No. 95, at 8-9 (M.D. Tenn. Oct. 11, 2006); *In re Goodyear Tire & Rubber Co.*, 438 F. Supp. 2d at 793-94; *In re General Motors ERISA Litig.*, 2006 WL 897444, at *12-13; *In re Cardinal Health ERISA Litig.*, 424 F. Supp. 2d at

1033-34; *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 860-61 (N.D. Ohio 2006); *Sherrill v. Federal-Mogul Corp. Ret. Programs Comm.*, 413 F. Supp. 2d 842, 868 (E.D. Mich. 2006); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 828-29 (S.D. Ohio 2004); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 914 (E.D. Mich. 2004); *Rankin v. Rots*, 278 F. Supp. 2d 853, 878-79 (E.D. Mich. 2003).

By contrast, only five ERISA stock-drop defendants in this circuit have won motions to dismiss—and the Sixth Circuit has now reversed three of these decisions on appeal. *Griffin v. Flagstar Bancorp, Inc.*, No. 10-cv-10610, 2011 WL 1261196, at *14 (E.D. Mich. Mar. 31, 2011), *rev'd by* 492 Fed. Appx. 598, 604 (6th Cir. 2012); *Dudenhoeffer v. Fifth Third Bancorp*, 757 F. Supp. 2d 753, 762 (S.D. Ohio 2010), *rev'd by* 692 F.3d 410, 419-20 (6th Cir. 2012); *Pfeil v. State Street Bank & Trust Co.*, No. 09-cv-12229, 2010 WL 3937165, at *4-5 (E.D. Mich. Sept. 30, 2010), *rev'd by* 671 F.3d 585, 592 (6th Cir. 2012); *see also Benitez v. Humana, Inc.*, No. 08-cv-211, 2009 WL 3166651, at *7-8 (W.D. Ky. Sept. 30, 2009), *abrogated on other grounds by Dudenhoeffer*, 692 F.3d at 423; *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 852-53 (S.D. Ohio 2009).

It is not difficult with the benefit of hindsight to allege that a company whose stock price dropped during a general economic decline should have made different business decisions, or that ESOP fiduciaries should not have let plan participants invest in company stock as a result. The Sixth Circuit's lenient standard thus only encourages

plaintiffs to exploit ERISA's provisions to file Monday-morning-quarterback complaints filled with unrestrained second-guessing of business decisions whenever the company's stock price drops.

The cases bear this out. *E.g., In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d at 912-13 (alleging Ford stock was imprudent investment because of company's "failure to design and manufacture products that are competitive in the marketplace," and "to control Ford's liabilities and other obligations in respect of current and future retirees"); *Shanehchian*, 2009 WL 2524562, at *4, 7 (alleging Macy's stock was imprudent investment following company's $11 billion merger with May Department Stores because of "problems with the integration process," as well as "the overall health of the Company as a result of overstated sales").

The complaint against Fifth Third is no different. Here, respondents loosely allege a "variety of circumstances" contributed to the allegedly "unacceptable level of risk borne by Plan participants as a result of the Plan's investment in Fifth Third Stock." J.A. 54-55, ¶ 103. These include, but are not limited to, Fifth Third's alleged "overexposure to loans tied to the declining housing and construction market," alleged "exposure to subprime loans through its ill-timed acquisition of First Charter Corp.," alleged "failure to implement and maintain sufficient risk management control processes," and alleged "failure to properly account for and disclose its exposure to losses tied to its business operations in the subprime market." *Id.* In this one sweeping, conclusory allegation,

respondents have challenged the entirety of Fifth Third's residential and commercial mortgage lending policies, the prudence of a major corporate acquisition, the sufficiency of the bank's risk management controls, and the legitimacy of the bank's accounting practices and public disclosures to the market regarding these issues.

Contrary to the Government's contention, discovery on these kinds of wide-ranging claims would be massive, wasteful, and cost-prohibitive. A weak presumption of prudence that is not even applied on a motion to dismiss, coupled with far-reaching complaints that challenge substantial areas of a company's business activities, allow plaintiffs to exploit the coercive effect of unrestrained and costly discovery even when the litigation has no merit. As Chief Judge Jacobs correctly observed in *Kiobel v. Royal Dutch Petroleum Company*, 642 F.3d 268, 271 (2d Cir. 2011) (concurring in denial of panel rehearing): "[I]nvasive discovery . . . combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero."[2]

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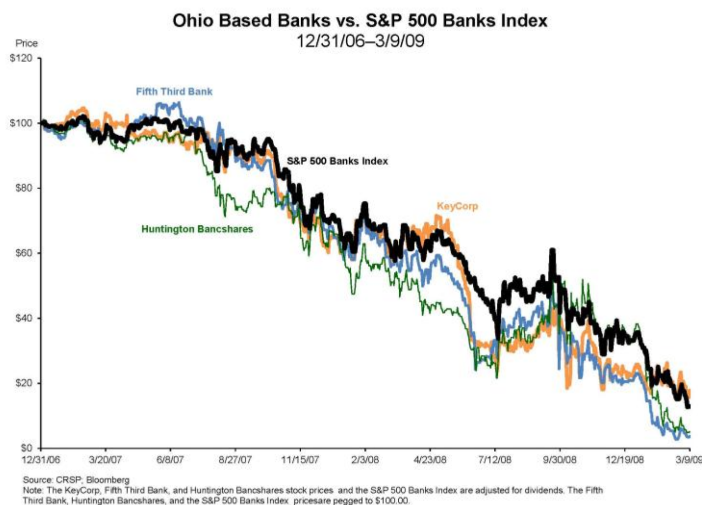
[2] There have already been three settlements following the Sixth Circuit's decision. *In re Regions Morgan Keegan ERISA Litig.*, No. 08-cv-2192, No. 318 (W.D. Tenn., Dec. 18, 2013) (seeking approval of $14.5 million settlement); *Griffin v. Flagstar Bancorp, Inc.*, No 10-cv-10610, No. 54, Op. & Order (E.D. Mich., Dec. 12, 2013) (approving $3 million settlement); *Shanechian v. Macy's, Inc.*, No. 07-cv-828, No. 228, Op. & Order (S.D. Ohio, May 8, 2013) (approving $8.5 million settlement).

In the end, these cases lack merit. It is thus not surprising that of the only two ERISA stock-drop cases that have proceeded to final judgment in the Sixth Circuit, defendants have won both—and neither judgment was appealed. *Shirk v. Fifth Third Bancorp*, No. 05-cv-49, 2009 WL 692124, at *6, 13-14 (S.D. Ohio Jan. 29, 2009) (granting summary judgment where Fifth Third's closing price was higher at the end of the proposed class period than at the beginning); *Benitez v. Humana, Inc.*, 08-cv-211, 2009 WL 3166651, at *7 (W.D. Ky. Sept. 30, 2009) (dismissing ERISA stock-claim filed after 14 percent stock-price drop plaintiffs blamed on alleged "internal control problems" and "old software"). Of course, Fifth Third was promptly sued a second time—this time after a world-wide financial crisis that saw the stock price of many companies drop substantially—and is now before this Court.

The Government downplays the concerns of ERISA stock-drop defendants by arguing that "a plaintiff cannot state a claim [under ERISA] merely because the company or industry was suffering financial difficulties." U.S. Cert. Br. 12. But the experiences of *amicus* KeyCorp, petitioner Fifth Third, and other defendants in the Sixth Circuit prove just the opposite. Fifth Third, KeyCorp, and Huntington Bancshares—three Ohio banks all sued in ERISA stock-drop class actions—were not alone in suffering a sharp decline in the price of their stock during the recent economic crisis. In fact, as the following chart shows, the Ohio banks' stock closely tracked the ups and downs of other national banks during these economically troubled times:



Contrary to the Government's assurances, this chart makes clear that defendants are being sued not because of some unique act of imprudence committed by their ESOP fiduciaries, but instead because of industry-wide problems that affected a multitude of companies during the financial crisis.

B. Faced with the significant risk of litigation every time a company's stock price drops, ESOP fiduciaries will have to contemplate whether to "play" the stock market any time they fear the stock price might be headed for a fall. But as the Fifth and Ninth Circuits have correctly noted, "the long-term horizon of retirement investing requires protecting fiduciaries from pressure to divest when the company's stock drops." *Kirschbaum*, 526 F.3d at 254; *see also Quan v. Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (same).

Moreover, liquidating company stock from an ESOP is fraught with jeopardy. Even if one ignores the fallacy that fiduciaries can predict future stock performance, such a substantial amount of stock could not be dumped on the market without causing a significant drop in its price, thereby harming all the company's shareholders—including the plan participants on whose behalf these cases are purportedly brought. As the Eighth Circuit has stated, it would be "fanciful" to believe ESOP fiduciaries could flood the market in this way "without creating a much more severe impact on stock price than the alleged impact [the company's] actual response caused." *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010) (affirming grant of motion to dismiss stock-drop case).

Similarly, were ESOP fiduciaries to eliminate company stock as an investment option only on a going-forward basis, this too would be a "clarion call to the investment world that the [plan] Committee lacked confidence in the value of its stock," which would have a "catastrophic effect on [its] stock price." *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009), *aff'd by Quan*, 623 F.3d at 882-83.

Moreover, if fiduciaries forcibly liquidate an ESOP and the company's stock price then increases, they would "face liability for that caution." *See Edgar*, 340 F.3d at 349 (quotation omitted). Indeed, fiduciaries have been sued under ERISA for doing exactly that. *See Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 3 (1st Cir. 2009) (fiduciaries sued for divesting company stock at "imprudently low price");

Tatum v. R.J. Reynolds Tobacco Co., 392 F.3d 636, 639 (4th Cir. 2004) (fiduciaries sued for liquidating employer stock fund from plan). The Fifth Circuit correctly concluded this puts ESOP fiduciaries in an "untenable position[.]" *Kirschbaum*, 526 F.3d at 256.

In truth, upholding the Sixth Circuit's standard would so fundamentally undermine the purpose of ESOPs, and place such an unfair and ill-defined burden on fiduciaries, that companies would seriously consider abandoning them altogether. *See* Pet. Br. 41 (Congress did not intend through ERISA to create a system "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.") (quoting *Conkright v. Frommert*, 559 U.S. 506, 517 (2010)). The evidence bears this out. *See* Stephen P. Utkus & Jean A. Young, *The Evolution of Company Stock in Defined Contribution Plans* at 6 (Vanguard Research, Mar. 2012) (analyzing company stock fund closures taken to mitigate fiduciary and litigation risk).

A strong and protective standard—such as "dire circumstances" or "verge of collapse"—provides clear guidelines that allow ESOP fiduciaries to properly perform their role without constant risk of liability as company stock inevitably rises and falls over time. This standard appropriately recognizes ESOP fiduciaries' exemption from the duty to diversify, gives due recognition to Congressional intent favoring employee ownership, and protects the desires of participants who choose to invest in their companies' stock.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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