Nos. 11-3012

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DUDENHOEFFER, ET AL.,
Appellants,

v.

FIFTH THIRD BANCORP, ET AL.,
Respondents.

On Appeal from the United States District Court for the
Southern District of Ohio (Western Division),
Case No. 08-cv-538-SSB (MRA)

BRIEF FOR THE SECRETARY OF LABOR, HILDA L. SOLIS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for
Plan Benefits Security Division

NATHANIEL I. SPILLER
Counsel for Appellate and
Special Litigation

MELISSA MOORE
U.S. Department of Labor
200 Constitution Ave., N.W.
Room N-4611
Washington, D.C. 20210
(202) 693-5281

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of Issues 1

Statement of Interest 1

Statement of the Case 2

Summary of the Argument 5

Argument 6

I. The Presumption Of Prudence Adopted In *Kuper* Does Not Warrant Dismissal In This Case 6

A. The Applicable Legal Framework 6

B. The Presumption Neither Applies To A Fiduciary Who Knowingly Pays An Inflated Price For Employer Stock Nor Requires Allegations of "Dire Financial Predicament" To Rebut It 8

C. The *Kuper* Presumption Does Not Apply At The Pleadings Stage 18

II. Plaintiff Properly Pled Breaches Of ERISA Disclosure Duties 26

Conclusion 30

Certificate of compliance

Certificate of service

TABLE OF AUTHORITIES

Federal Cases:

Ashcroft v. Iqbal,
129 S.Ct. 1937 (2009) 23, 25

Back v. Hall,
537 F.3d 552 (6th Cir. 2008).. 22

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 21

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 23, 25

Bloemker v. Laborers' Local 265 Pension Fund,
605 F.3d 436 (6th Cir. 2010)... 22, 25

Boltz-McCarthy v. Boltz, No. 10-CV-00215,
2011 WL 1361913 (D. Vt. Apr. 11, 2011)... 23

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009)... 22, 25, 25 n.5

Chao v. Hall Holding Co., Inc.,
285 F.3d 415 (6th Cir. 2002).................................... 9, 10, 13, 14, 16, 17

City of Milwaukee v. Illinois and Michigan,
451 U.S. 304 (1981) 15

Crawford-El v. Britton,
523 U.S. 574 (1998) 24

DiFelice v. U.S. Airways, Inc.,
497 F.3d 410 (4th Cir. 2007).. 12

Donovan v. Bierwirth,
754 F.2d 1049 (2d Cir. 1985).. 21 n.4

Federal Cases--(continued):

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983).. 13

Dudenhoeffer v. Fifth Third Bancorp,
757 F.Supp.2d 753 (S.D. Ohio 2010) ....3 & passim

Flacche v. Sun Life Assur. Co. of Canada (U.S.),
958 F.2d 730 (6th Cir. 1992).. 15

Galbraith v. County of Santa Clara,
307 F.3d 1119 (9th Cir. 2002)..21, 22, 23

Goad v. Mitchell,
297 F.3d 497 (6th Cir. 2002).. 25

Gregg v. Transp. Workers of Am. Int'l,
343 F.3d 833 (6th Cir. 2003).. 13

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000) 17

Henry v. Champlain Enterprises, Inc.,
445 F.3d 610 (2d Cir. 2006)... 10

In re Dynegy, Inc. ERISA Litig.,
309 F. Supp. 2d 861 (S.D. Tex. 2004) 28

In re Ford Motor Co. ERISA Litig.,
590 F.Supp.2d 883 (E.D. Mich. 2008).........................11 n.1, 12 n.1, 13

In re Regions Morgan Keegan ERISA Litig.,
741 F. Supp. 2d 844 (W.D. Tenn. 2010)... 23

In re Schering-Plough Corp. ERISA Litig.,
420 F.3d 231 (3d Cir. 2005)... 9

In re Syncor ERISA Litig.,
516 F.3d 1095 (9th Cir. 2008)... 9

Federal Cases--(continued):

In re The Goodyear Tire & Rubber Co. ERISA Litig.,
438 F.Supp.2d 783 (N.D. Ohio 2006) 12, 13

In re Unisys Sav. Plan Litig.,
74 F.3d 420 (3d Cir. 1996) 13

In re Unisys Savings Plan Litig.,
173 F.3d 145 (3d Cir. 1999) 20

James v. Pirelli Armstrong Tire Corp.,
305 F.3d 439 (6th Cir. 2002) 26

Kim v. Fujikawa,
871 F.2d 1427 (9th Cir. 1989) 21 n.4

Krohn v. Huron Memorial Hosp.,
173 F.3d 542 (6th Cir. 1999) 26, 28

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995) .... 1 & passim

Kuper v. Quantum Chemicals Corp.,
852 F. Supp. 1389 (S.D. Ohio 1994) 20

Lindsay v. Yates,
498 F.3d 434 (6th Cir. 2007) 22

Martin v. Feilen,
965 F.2d 660 (8th Cir. 1992) 10

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 15

Miskel v. Karnes,
397 F.3d 446 (6th Cir. 2005) 21

Quan v. Computer Science Corp.,
623 F.3d 870 (9th Cir. 2010) 12

Federal Cases--(continued):

Romberio v. Unumprovident Corp.,
385 Fed. App'x 423 (6th Cir. Jan 12, 2009) (unpublished)
(Clay, J.,dissenting) 20

Roth v. Sawyer-Cleator Lumber Co.,
61 F.3d 599 (8th Cir. 1995) 21 n.4

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) (en banc) 1

Secretary of U.S. Dep't of Labor v. Gilley,
290 F.3d 827 (6th Cir. 2002) 20

Sengpiel v. B.F. Goodrich Co.,
156 F.3d 660 (6th Cir. 1998) 28

Sims v. First Horizon Nat'l Corp., No. 08-2293,
2009 WL 3241689 (W.D. Tenn. 2009) 12

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 16

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 22

Taylor v. KeyCorp.,
678 F. Supp. 2d 633 (N.D. Ohio 2009) 13, 25

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 14

Texas Dep't of Community Affairs v. Burdine,
450 U.S. 248 (1981) 21

Trollinger v. Tyson Foods, Inc.,
370 F.3d 602 (6th Cir. 2004) 22

Varity Corp. v. Howe,
516 U.S. 489 (1996) 6, 26, 27, 28

Federal Cases--(continued):

Whitfield v. Lindemann,
853 F.2d 1298 (5th Cir. 1988)................................19, 19 n.3, 20, 21 n.4

Winnett v. Caterpillar, Inc.,
553 F.3d 1000 (6th Cir. 2009)..24

State Cases:

In re Estate of Lieberman,
909 N.E.2d 915 (Ill. Ct. App. 2009)...17

Federal Statutes

Employee Retirement Income Security Act of 1974 (Title I),
as amended, 29 U.S.C. 1001 et seq:

Section 2, 29 U.S.C. § 1001 1

Section 2(a), 29 U.S.C. § 1001(a) 7

Section 2(b), 29 U.S.C. § 1001(b)...7

Section 404, 29 U.S.C. § 1104 7

Section 404(a)(1), 29 U.S.C. § 1104(a)(1)..7

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 11, 13

Section 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C) 7

Section 404(a)(2), 29 U.S.C. § 1104(a)(2)...7

Section 407(d)(3), 29 U.S.C. § 1107(d)(3) 7

Section 407(d)(6), 29 U.S.C. § 1107(d)(6) 7

Miscellaneous:

Fed. R. Evid. 301 ....18, 19

Miscellaneous—(continued):

Fed. R. Civ. P. 8 22
12(b)(6) 24

Fed. R. App. P. 29(a) 1

H.R. Rep. No. 93-553 (1973),
as reprinted in, 1974 U.S.C.C.A.N. 4639 24

S. Rep. No. 93-127 (1973),
as reprinted in, 1974 U.S.C.C.A.N. 4838, 4863, 4866 14

5B C. Wright & A. Miller, Federal Practice and Procedure § 1357
(3d ed. 2006) 23

Restatement (Second) of Trusts § 212 cmt. e (1959) 19 n.3

Restatement (Third) of Trusts § 90 cmt. e (2007) 17

Restatement (Third) of Trusts § 205 cmt. e (2007) 10

U. S. Dep't of Labor Field Assistance Bulletin 2004-03 (Dec. 17, 2004) 10

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing on the pleadings a claim of fiduciary breach that plausibly alleged that the fiduciaries knowingly and imprudently caused participants to buy and retain employer stock at a price that was artificially inflated by misleading financial statements on the ground that the plaintiffs did not rebut a "presumption of prudence" by sufficiently alleging the employer's "dire financial predicament."

2. Whether the district court erred in dismissing a claim that defendants were liable for fiduciary breach when plaintiffs plausibly alleged that defendants, acting as ERISA fiduciaries, incorporated inaccurate SEC filings by reference into plan communications disseminated to participants and knowingly permitted participants to be misled by misstatements that defendants failed to correct.

STATEMENT OF INTEREST

The Secretary of Labor has primary enforcement responsibility under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc). This case concerns the scope of the "presumption of prudence" that the Court applies to plans that authorize or mandate investment in the employer's own stock. Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995). Pursuant to Fed. R. App. P. 29(a), the Secretary submits this amicus brief in

support of the plaintiffs-appellants because she has a strong interest in correcting the district court's erroneous grafting of a "dire financial predicament" rebuttal standard onto the Kuper presumption and its dismissal on the pleadings of plaintiffs' claim of fiduciary breach stemming from the defendant-fiduciaries' allegedly imprudent investment in employer stock. Likewise, the Secretary has a strong interest in correcting the district court's erroneous dismissal of the plaintiffs' claim that the defendant-fiduciaries can be held liable for imprudence based on misstatements in securities filings incorporated into plan documents.

STATEMENT OF THE CASE

The Fifth Third Master Profit Sharing Plan (the "Plan") includes Fifth Third Bancorp ("Fifth Third") stock among its investment options. Consolidated Class Action Complaint ("Compl.") ¶ 2. Plaintiffs John Dudenhoeffer and other named individuals bring this case as a class action, representing themselves and other former employees of Fifth Third who are participants in the Plan. Compl. ¶ 1. Defendants include Fifth Third and its Pension, Profit-Sharing and Medical Plan Committee, in their capacity as fiduciaries who administer the Plan and select its investment options. Compl. ¶¶ 28-36.

Plaintiffs allege that the defendant-fiduciaries imprudently allowed investment in Fifth Third stock that was artificially inflated because of inaccurate financial statements that failed to properly disclose the company's risky lending

practices. Dudenhoeffer v. Fifth Third Bancorp, 757 F.Supp.2d 753, 754, 762 (S.D. Ohio 2010); Compl. ¶¶ 4-5, 50, 71, 97-99, 103-112; see id. ¶¶ 225-248 (Count I (prudence) cause of action). According to the complaint, given the company's increased marketing of subprime mortgages and the heightened exposure to the risk of mortgage defaults, the defendant-fiduciaries "knew or should have known . . . the Company stock price would suffer and devastate participants' retirement savings once the truth became known," yet "failed to take any steps to protect the Plan and its participants from foreseeable losses." Compl. ¶ 190. Plaintiffs further allege that defendants violated their duties of prudence and loyalty by failing to provide complete and accurate information or to correct inaccurate statements and misleading omissions about Fifth Third's financial condition and the prudence of investing in Fifth Third stock. Dudenhoeffer, 757 F.Supp.2d at 763; Compl. ¶¶ 5, 97, 100, 111, 135-40, 152-56, 191, 245. These alleged inaccuracies and omissions primarily appeared in SEC filings, which were incorporated by reference into the Plan's summary plan description ("SPD") that was distributed to participants. Dudenhoeffer, 757 F.Supp.2d at 763; Compl. ¶¶ 49, 59, 123-134, 141-50; see Compl. Exh. A (2007 SPD), p. 44 ("[w]e incorporate by reference the documents listed below, which we have already filed with the SEC, and any documents we file with the SEC in the future . . ."). Plaintiffs attribute the sharp decline in stock price during the class period (74 percent

between July 19, 2007, and September 18, 2009) to the subsequent public disclosure of the company's actual financial condition. Compl. ¶¶ 50, 245; see also Dudenhoeffer, 757 F.Supp.2d at 759 ("the price of Fifth Third stock declined during the class period from $25.61 in December 2007, Compl. ¶ 50, to a low of $2.85 per share on January 22, 2009[,] Compl. ¶ 177," representing a drop of 89 percent, although it rebounded to $10.24 per share as of September 18, 2009. Compl. ¶ 50).

Although accepting as true allegations that "Fifth Third embarked on an improvident and even perhaps disastrous foray into subprime lending, which in turn caused a substantial decline in the price of its common stock," the district court dismissed the imprudent investment claim because the plaintiffs failed in the complaint "to establish that Fifth Third was in the type of dire financial predicament sufficient to establish a breach of fiduciary duty under" the Kuper presumption. Dudenhoeffer, 757 F.Supp.2d at 762. Also dismissing the misrepresentation claim, the court further held that defendants were not acting as fiduciaries either when they spoke through press releases and other public statements or when they incorporated misinformation contained in SEC filings into the SPD. 757 F.Supp.2d at 64.

SUMMARY OF ARGUMENT

I. The district court wrongly held that plaintiffs inadequately pled that defendants breached their fiduciary duties in holding on to employer stock throughout the class period. This Court presumes the reasonableness of investing in employer stock, but permits a plaintiff to rebut the presumption of prudence by showing that a prudent fiduciary would not invest in the stock under the prevailing circumstances. Kuper, 66 F.3d at 1459. It is never prudent knowingly to pay an inflated price for stock (employer or otherwise), and the presumption either does not apply or is conclusively rebutted in that circumstance. In any event, the district court incorrectly concluded that plaintiffs, at the risk of dismissal, were required under Kuper to additionally plead that the sponsoring employer was in a "dire financial predicament." Kuper says no such thing and ERISA's carefully delimited prudence exception for plans that invest in employer stock leaves no room for the court's additional pleading requirement.

Additionally, the court erred in finding that the presumption applied at the pleading stage. Like all judicial presumptions, the Kuper presumption is an evidentiary presumption; its sole function is to place the burden of production on the plaintiff to come forward with evidence that the fiduciary's continued investment in employer stock under the circumstances was not reasonable and therefore not prudent. That burden necessarily applies at the merits stage only

after the plaintiff has had the opportunity to discover the complete facts concerning what the defendant fiduciaries knew or did with respect to the plan's investment in employer stock.

II. The district court also wrongly dismissed the plaintiffs' misrepresentation claim. In doing so, the court misapplied the Supreme Court's holding in Varity Corp. v. Howe, 516 U.S. 489, 504 (1996), that a corporate defendant "does not act as a fiduciary when he makes statements about the company's financial condition." While the preparation and filing of such statements to comply with SEC requirements or other non-ERISA purposes is a corporate act, their incorporation by plan fiduciaries into the plan SPD, with the foreseeable effect of encouraging investment of the participants' plan assets in employer stock, is a fiduciary act subject to ERISA fiduciary standards. The allegations that defendants breached their fiduciary duties when they incorporated by reference misstatements about Fifth Third's financial condition into plan communications, or when they failed to correct material misstatements having the same effect, are thus sufficient to survive a motion to dismiss.

ARGUMENT

I. THE PRESUMPTION OF PRUDENCE ADOPTED IN KUPER DOES NOT WARRANT DISMISSAL IN THIS CASE

A. The Applicable Legal Framework

ERISA safeguards the "financial soundness" of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b). ERISA accordingly imposes on fiduciaries the bedrock trust law duties of prudence and loyalty. 29 U.S.C. § 1104. Thus, ERISA requires fiduciaries for all plans to act with the same level of care that "a prudent man acting in like capacity and familiar with such matters would use" in similar circumstances. 29 U.S.C. § 1104(a)(1).

Ordinarily, the fiduciary duty to act prudently encompasses a duty to diversify a plan's investments "to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C). To encourage such investment by employee stock ownership plans ("ESOPs"), see 29 U.S.C. § 1107(d)(6), and other "eligible individual account plans" ("EIAPs"), see 29 U.S.C. § 1107(d)(3), however, Congress eliminated the duty to diversify and the duty of prudence to the extent that it requires diversification with respect to investments in employer stock. 29 U.S.C. § 1104(a)(2). But, because ESOPs "cannot override ERISA's goal of ensuring the proper management and soundness of employee benefit plans," Kuper, 66 F.3d at 1457, even this Court has held that this exception is not absolute. Id. (concluding that "the Plan may not be interpreted to include a per se prohibition against diversifying an ESOP").

Under the Kuper presumption of prudence, this Court will "review an ESOP fiduciary's decision to invest in employer securities for an abuse of discretion" and "presume that a fiduciary's decision to remain invested in employer securities was reasonable"; plaintiffs, however can "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 (citations omitted). The presumption, however, does not alter ESOP and EIAP fiduciaries' "unwavering duty to act both as a prudent person would act in a similar situation and with single-minded devotion to those same plan participants and beneficiaries." Id. at 1458 (citations omitted). Accordingly, they may offer and retain a plan's investment in employer stock only if a prudent fiduciary in similar circumstances would do the same. Id.

B. The Presumption Neither Applies To A Fiduciary Who Knowingly Pays An Inflated Price For Employer Stock Nor Requires Allegations of "Dire Financial Predicament" To Rebut It

1. Under Kuper, this Court presumes that "a fiduciary's decision to remain invested in employer securities was reasonable" unless plaintiffs show that a prudent person "acting under similar circumstances would have made a different investment decision." 66 F.3d at 1459. In Kuper, the presumption applied where plaintiffs "merely assert[ed] that defendants' decision to continue to hold [employer] stock was unreasonable because defendants were aware of events that

would continue to cause [employer's] stock to decline in value." Id. at 1460. There were no allegations, as here, that the stock price was artificially inflated as a result of material misstatements in public financial documents, causing the stock to be overvalued. Instead, plaintiffs alleged a failure to investigate the need to diversify or liquidate the ESOP, and the Court found that plaintiffs were unable to rebut the presumption afforded to ESOPs because, while defendants' evidence was that the stock price "fluctuated significantly during this period" and several investment advisors had recommended holding on to the stock, id., plaintiff offered no proof of "a causal link between the failure to investigate and the harm suffered by the plan." Id. at 1459.

There is no basis, however, for extending the Kuper presumption to a claim that the fiduciaries imprudently bought and retained stock that the fiduciaries should have known was overpriced. A prudent fiduciary would not knowingly overpay for plan assets, including employer stock. See In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 233, 237-38 (3d Cir. 2005) (questioning applicability of presumption to employer stock alleged to be "unlawfully and artificially inflated" in value); see also In re Syncor ERISA Litig., 516 F.3d 1095, 1102 (9th Cir. 2008).

Knowingly overpaying for stock is neither prudent nor in the interest of plan participants and beneficiaries. See Hall Holding Co., 285 F.3d at 442-43 ("At the

time the ESOP acquires the stock, it is in the ESOP participant's best interest to do so at the lowest price possible. The lower the price of the stock, the more shares that can be purchased by the ESOP, assuming the investor will invest the same amount without regard to the price per share. Further, a higher return on investment can be generated with a lower purchase price"); id. at 443-44 ("because the [plan] overpaid for the shares of [employer] stock, it suffered a loss"); accord Henry v. Champlain Enterprises, Inc., 445 F.3d 610, 618-19 (2d Cir. 2006); Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992); Restatement (Third) of Trusts § 205 cmt. e (2007) (noting that if a "trustee is authorized to purchase property for the trust, but in breach of trust he pays more than he should pay, he is chargeable with the amount he paid in excess of its value"); cf. U.S. Dep't of Labor Field Assistance Bulletin 2004-03 (Dec. 17, 2004) (directed trustee cannot, with knowledge of material misrepresentations that significantly inflate the company's earnings, "simply follow a direction to purchase that company's stock at an artificially inflated price"). In this context, therefore, presuming that the fiduciaries acted prudently is unwarranted.

This is a different question from the one presented in Kuper, where no one questioned the initial prudence of investing ESOP assets primarily in employer stock, and the issue was whether at some point changed circumstances rendered the decision to hold on to that stock imprudent. In that context, courts reasonably

require plaintiffs to show that prudence dictated a different investment decision "under the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B). And in Circuits like this one that have adopted a presumption of prudence, that showing requires plaintiffs to rebut the presumption. But nothing in Kuper, much less the text of ERISA, excuses fiduciaries who knowingly buy or maintain stock that is artificially inflated by the type of fraud on the market alleged here.

This Court should thus reject the district court's conclusion that how a fiduciary responds to "artificial inflation" is of no consequence to whether the presumption of prudence applies. Dudenhoeffer, 757 F.Supp.2d at 762. Since knowingly allowing participants to overpay for stock based on a fraud on the market (e.g., misrepresentations about the riskiness of investing in the stock) is always a fiduciary breach, plausible allegations consistent with artificial inflation should either render the presumption of prudence void or always conclusively rebut it.[1]

---

[1] Cf. In re Ford Motor Co., 590 F.Supp.2d at 890 (agreeing that "fiduciaries cannot be expected to outguess the market," but declining to dismiss where plaintiffs' claim is not that stock's risk was improperly priced but that "the risk was so *great* that, efficiently priced or not, it was imprudent under the circumstances to subject the plan's assets to it"); id. at 892-93 (finding that Kuper "requires fiduciaries to divest their plans of company stock when holding it becomes so risky – that is, so imprudent – that the problem could not be fixed by diversifying into other assets.") It is noteworthy that the defendant in the Ford case, while advocating for an imminent collapse standard, also contended that "the existence of fraudulently inflated stock prices" would equally provide an appropriate bright line "on which to premise liability." In re Ford Motor Co. ERISA Litigation, 590 F.Supp.2d at

2. Even if the allegations here did not involve inflated stock prices attributable to insider knowledge, the district court's "dire financial predicament" standard would be an inappropriate add-on to the Kuper rebuttal standard, which adheres closely to the statutory prudence standard. See Dudenhoeffer, 757 F.Supp.2d at 762. Cf. DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 423-24 (4th Cir. 2007) ("ERISA itself sets forth the only test of a fiduciary's duties"); compare Quan v. Computer Science Corp., 623 F.3d 870, 882 (9th Cir. 2010) (under an "imminent collapse" standard, "[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment").

As other district courts in this Circuit have recognized, "Kuper did not require that a plaintiff plead the impending collapse of the employer or other dire circumstances to rebut the presumption that the ESOP fiduciary acted reasonably in investing in employer stock. On the contrary, the rebuttal standard requires only that "'a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" Sims v. First Horizon Nat'l Corp., No. 08-2293, 2009 WL 3241689, at *24 & n.38 (W.D. Tenn. 2009) (citing In re The Goodyear

---

891. When plan fiduciaries cause the plan to pay too much for stock, the amount of the overpayment is a dead loss to the plan. As a result of the overpayment, the plan has fewer assets than it otherwise would have had, regardless of whether the plan buys one share of stock or many shares. The loss was neither caused by a diversification violation, nor would it be corrected by diversifying the diminished pool of assets into other investments.

Tire & Rubber Co. ERISA Litig., 438 F.Supp.2d 783, 794 (N.D. Ohio 2006)); accord Taylor v. KeyCorp., 678 F. Supp. 2d 633, 639-40 (N.D. Ohio 2009); In re Ford Motor Co. ERISA Litigation, 590 F.Supp.2d 883, 891-92 (E.D. Mich. 2008). This Court has never suggested that the test for prudence hinges on whether fiduciary misconduct jeopardized all or nearly all of plan participants' retirement savings, or that anything short of a catastrophic collapse in the company or its stock escapes ERISA's exacting standards. See Gregg v. Transp. Workers of Am. Int'l, 343 F.3d 833, 840 n.3 (6th Cir. 2003); Chao v. Hall Holding Co., Inc., 285 F.3d 415, 426 (6th Cir. 2002). Insisting on such an existential threat is thus inconsistent with the statutory prudence standard, including Kuper's application of it.

Instead, the statute expressly defines the relevant standard of care -- "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" -- without any reference to "dire financial circumstances," "imminent collapse," or the like. 29 U.S.C. § 1104(a)(1)(B); see, e.g., In re Unisys Sav. Plan Litigation, 74 F.3d 420, 434-35 (3d Cir. 1996); Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983). Nothing in ERISA, therefore, gives fiduciaries license to wait until the company or its industry is on the verge of financial collapse before taking the steps a prudent person would ordinarily take when a plan's portfolio, as amply alleged

here, see supra, pp. 3-4, is threatened by the discovery that its holdings are overvalued for previously undisclosed reasons. See Hall Holding, 285 F.3d at 425 ("[e]ven though ESOPs can be much riskier than a typical ERISA plan, the fiduciaries of these plans are still held to their fiduciary responsibilities") (citing Kuper, 66 F.3d at 1458).[2]

Courts do not have license to graft on this statutory prudence standard additional extra-statutory limitations on liability, such as adoption of a safe harbor for otherwise imprudent conduct so long as the losses to the plan were not accompanied by the plan sponsor's financial ruin. Only Congress has the ability to establish pleading and proof requirements for particular claims, which courts are not free to alter. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 (2007). In ERISA, Congress plainly exercised that authority by imposing identical fiduciary standards of prudence on all ERISA fiduciaries, including fiduciaries in ESOPs or EIAPs investing heavily or exclusively in employer stock. S. Rep. No. 93-127(1973), as reprinted in, 1974 U.S.C.C.A.N. 4838, 4863, 4866. Because the statute defines the prudence obligation for all fiduciaries in terms of "a prudent fiduciary acting under similar circumstances," Kuper, 66 F.3d at 1459, there is no

[2] In any event, plaintiffs' complaint is replete with allegations, which the court overlooked, that Fifth Third's financial circumstances were dire by the end of the class period, and that this was reflected in a steep decline in the price of its stock. See Compl., ¶¶ 4, 50, 100, 103, 245.

statutory gap to fill and no basis to require a "dire financial predicament" pleading requirement found nowhere in the statute.

Indeed, the district court's adoption of a "dire financial predicament" standard is contrary to Supreme Court precedents that cabin the federal courts' discretion to adopt federal common law. "Federal courts . . . are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 312 (1981). They should only resort to federal common law when "compelled to consider federal questions which cannot be answered from federal statutes alone." Id. at 314 (citations omitted). In the ERISA context in particular, "the authority of courts to develop a 'federal common law' . . . is not the authority to revise the text of the statute." Mertens v. Hewitt Assocs., 508 U.S. 248, 259 (1993) (citations omitted); see also Flacche v. Sun Life Assur. Co. of Canada (U.S.), 958 F.2d 730, 735 (6th Cir. 1992) (courts' federal common law-making powers under ERISA is "limit[ed] [to] the development of federal common law [in] areas where the statutes are silent or ambiguous"). Because the statute clearly and unambiguously articulates the prudence standard of fiduciary behavior, carving out only a limited exception to the diversification requirement for plans that hold investments in employer stock, there is simply no justification to formulate and substitute a more forgiving non-statutory standard that would allow imprudent investments in

employer stock so long as the company was not facing a "dire financial predicament." Cf. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514-15 (1993) ("nothing in law would permit us to substitute for the required [statutory] finding . . . [a] much different (and much lesser) finding"). If a prudent person "acting in a like capacity and familiar with such matters" would not have engaged in the transaction, an ERISA fiduciary may not engage in the transaction regardless of whether the plan was threatened with "dire" financial circumstances or the company's imminent collapse.

A court-created rule of the sort adopted by the district court fundamentally converts Kuper's flexible presumption into a "safe harbor," or "prudence per se" rule in all but the most extreme cases. Such rule is contrary to Hall Holding, 285 F.3d at 425 (citations omitted), which recognizes that ESOP fiduciaries are "still subject to their fiduciary responsibilities" even though ESOPs "place employee retirement assets at much greater risk than the typical diversified ERISA plan;" and to Kuper itself, 66 F.3d at 1458 (citation omitted), which recognizes the need to balance "Congress' expressed policy to foster the formation of ESOPs [with] the policy expressed in equally forceful terms in ERISA: that of safeguarding the interests of participants in employee benefit plans by vigorously enforcing standards of fiduciary responsibility." This latter policy derives from the law of trusts, which Congress purposely incorporated into ERISA and which the Supreme

Court instructs courts to consider first when construing the statute. See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000); Hall Holding Co., 285 F.3d at 426 (describing an ERISA fiduciary's duties as "the highest known to the law") (citation omitted). Trust law rejects any legal determination that "classif[ies] specific investments or courses of action as prudent or imprudent in the abstract." Restatement Third, Trusts § 90, cmt. e (2007); accord In re Estate of Lieberman, 909 N.E.2d 915, 924 (Ill. Ct. App. 2009) (rejecting the argument that investments permitted by statute are per se prudent).

Furthermore, the court erred in suggesting that plaintiffs' fiduciary breach allegations are insufficient to overcome the presumption because plaintiffs are challenging defendants' business judgment and not their fiduciary behavior. Dudenhoeffer, 757 F.Supp.2d at 762-63. Plaintiffs do not make any claims against the defendants in their corporate capacities, and the court was wrong to conclude that Kuper supports its position that plaintiffs are challenging Fifth Third's business practices rather than defendants' fiduciary behavior. Id. Kuper involved two claims, one of which involved a trust-to-trust transfer of plan assets that the Court concluded was a corporate decision outside the scope of ERISA's fiduciary standards. But a second claim was that the ESOP fiduciaries breached their duties by failing to divest some or all of their employer stock after one of the employer's divisions had been sold. That claim, while subject to the Kuper presumption, fell

within the scope of ERISA's fiduciary standards. Accordingly, the district court analogized to the wrong Kuper claim in holding defendants' alleged imprudent investment in artificially inflated stock to be a non-fiduciary, corporate decision.

C. The *Kuper* Presumption Does Not Apply At The Pleadings Stage

Under Fed. R. Evid. 301, "[i]n all civil actions and proceedings . . . a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally set." The presumption of prudence adopted in Kuper is no exception to this rule.

The Kuper presumption does not substantively change ERISA's prudence standard or its treatment of employer stock investments. Instead, consistent with the above-stated Rule, the Kuper presumption involved shifting evidentiary burdens of proof applied at summary judgment. Kuper, 66 F.3d at 1451-452. Kuper consistently described the presumption as evidentiary in nature. E.g., id. at 1460 ("[o]n the other hand, defendants presented evidence . . .") (emphasis added). Under its burden-shifting evidentiary framework, the plaintiff's rebuttal may be based on evidence uncovered through discovery as well as anticipated in the pleadings. Id. Nothing in Kuper, therefore, allows a court to dismiss at the

pleadings stage rather than let the plaintiff go forward with evidence amassed during discovery or at trial "to rebut or meet the presumption." Fed. R. Evid. 301.

The Kuper presumption explicitly deals with a fiduciary's prudence obligations for employer stock funds. 66 F.3d at 1458. Kuper recognized that these prudence claims have three components: "plaintiff must show [1] a causal link between [2] the failure to investigate and [3] the harm suffered by the plan." Id. at 1459 (brackets added). Kuper did not discuss or modify the evidentiary burdens imposed on elements [2] and [3]; however, it clearly did apply a special presumption to element [1] for ESOP cases, concerning whether the alleged loss can be causally linked to the alleged violation. Id. at 1459-60 ("[i]nstead, to show that an investment decision breached a fiduciary's duty to act reasonably in an effort to hold the fiduciary liable for a loss attributable to this investment decision, a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan"); see Whitfield v. Lindemann, 853 F.2d 1298, 1304-305 (5th Cir. 1988).[3] In fact, the district court's decision affirmed in Kuper dealt

---

[3] The Fifth Circuit in Whitfield, 853 F.2d at 1304-305, referencing trust law, stated generally in an ERISA case that:

> Section 212, cmt. e, of the Restatement (Second) of Trusts provides that a 'trustee is not liable for a loss resulting from the breach of trust if the same loss would have been incurred if he had committed no breach of trust.' . . . [The majority rule,] once the existence of a loss has been established, [is that] the burden is on the trustee to show that

exclusively with the burden-shifting framework applicable to loss-causation issues in these cases. See Kuper v. Quantum Chemicals Corp., 852 F. Supp. 1389, 1397 (S.D. Ohio 1994) ("Various authorities have conflicted in the manner in which they have allocated the burden of proof on the issue of causal connection. . . Even assuming that the burden falls upon the defendant. . .") (citing Whitfield, 853 at 1304-305); see also Romberio v. Unumprovident Corp., 385 Fed. App'x 423, 429 (6th Cir. Jan 12, 2009) (unpublished) (interpreting Kuper as dictating evidentiary burdens for showing loss causation); accord id. at 444 (Clay, J., dissenting); In re Unisys Savings Plan Litig., 173 F.3d 145, 160 n.23 (3d Cir. 1999) (reading Kuper as a case about evidentiary burdens on showing loss causation). The Kuper presumption thus incorporates a special rule specific to employer stock cases that has the singular effect of shifting the burden of production to the plaintiffs on the issue of loss causation.

For cases not involving the presumption, "to the extent that there is any ambiguity in determining the amount of loss in an ERISA action, the uncertainty should be resolved against the breaching fiduciary." Secretary of Dep't of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002) (agreeing with "several circuits [that] have held that, in measuring a loss, the burden of persuasion should be placed on

---

there was no causal relation between his breach and the loss, i.e., that the loss would have occurred regardless of the breach.

the breaching fiduciary"); id. ("the district court did not err in resolving that uncertainty [about the loss caused by the defendants' fiduciary breach] against the defendants").[4] The Kuper presumption puts the initial burden of production on the plaintiffs and thus permits courts in an employer stock case to resolve, after discovery, any uncertainty about loss causation against the plaintiffs rather than the breaching fiduciary. Kuper, 66 F.3d at 1460 ("[i]n light of defendants' evidence, plaintiffs' allegations are insufficient to rebut the presumption").

Accordingly, Kuper's evidentiary burden-shifting framework is consistent with the well-established definition of "presumption." "The word 'presumption' properly used refers only to a device for allocating the production burden . . . [u]sually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (emphasis added). See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 245-46 (1988) ("presumptions are . . . useful devices for allocating the burdens of proof between parties"); Miskel v. Karnes, 397 F.3d 446, 455 (6th Cir. 2005) ("[p]resumptions are evidentiary devices that enable a fact finder to presume the existence of an 'ultimate' or 'elemental' fact upon proof of 'evidentiary' or 'basic' facts"); Galbraith v. County of Santa Clara,

[4] See also Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599, 602 (8th Cir. 1995); Kim v. Fujikawa, 871 F.2d 1427, 1430-31 (9th Cir. 1989); Whitfield, 853 F.2d at 1304-305; Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985).

307 F.3d 1119, 1126 (9th Cir. 2002) (putting the onus on the plaintiff to produce evidence and prove causation to rebut presumption that prosecutors acted within the law).

This evidentiary presumption does not, however, eliminate the general rules of notice pleading under Fed. R. Civ. P. 8. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); Back v. Hall, 537 F.3d 552, 558 (6th Cir. 2008) (refusing to apply standards applicable at summary judgment in a First Amendment case to defeat the plaintiff's claim on its pleadings); Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 615 (6th Cir. 2004) (reviewing the pleading of proximate causation solely under Rule 8); Galbraith, 307 F.3d at 1126; see also Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (holding that plaintiffs need only plead facts that give defendants a "fair notice" of "facts indirectly showing unlawful behavior" but need not "rebut" "lawful reasons" for such behavior); Lindsay v. Yates, 498 F.3d 434, 439-440 & n.6 (6th Cir. 2007) (recognizing continued validity of Swierkiewicz).

At the pleading stage, courts must take the factual allegations as true and resolve inferences in the plaintiff's favor. E.g., Bloemker v. Laborers' Local 265 Pension Fund, 605 F.3d 436, 443 (6th Cir. 2010). Similarly, courts may not impose on the plaintiff the added burden of countering in the complaint an evidentiary presumption that is imposed on the plaintiff during later stages of the

litigation. See, e.g., Boltz-McCarthy v. Boltz, No. 10–CV–00215, 2011 WL 1361913, at *2 (D. Vt. Apr. 11, 2011) ("courts have refused to consider presumptions in favor of the defendant on a motion to dismiss since presumptions are evidentiary standards that are inappropriate for evaluation at the pleadings stage") (quoting 5B C. Wright & A. Miller, Federal Practice and Procedure § 1357 (3d ed. 2006)); accord Galbraith, 307 F.3d at 1126. Imposing such an additional burden on plaintiffs would not only be inconsistent with the Federal Rules, but would be inconsistent with Congress's intent to eliminate, through ERISA, the "jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary duties." H.R. Rep. No. 93-553 (1973), as reprinted in, 1974 U.S.C.C.A.N. 4639, 4655.

For these reasons, the district court was incorrect when it stated that "[I]n light of [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)] and [Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)] . . . if the plan at issue is an ESOP, as in this case, there really is no choice but to apply the Kuper presumption at the pleading stage." Dudenhoeffer, 757 F.Supp.2d at 759. A number of district courts in this Circuit have rejected the court's reasoning and properly refused to insert the Kuper presumption into the pleadings stage. E.g., In re Regions Morgan Keegan ERISA Litig., 741 F. Supp. 2d 844, 849-51 (W.D. Tenn. 2010) (listing cases).

As previously stated, plaintiffs here have sufficiently pled facts supporting a claim of imprudence by alleging that the stock was artificially inflated as a result of misleading statements; the fiduciaries knew or should have known that the stock presented an undue risk to plan participants because of the company's excessive exposure to the subprime market and likely mortgage defaults. To hold otherwise would effectively require this Court to presume prudence as a matter of law for the purposes of dismissal of employer-stock claims under Fed. R. Civ. P.12(b)(6) under a standard of care that is far less exacting than the standard set forth in the statute. See Winnett v. Caterpillar, Inc., 553 F.3d 1000, 1005 (6th Cir. 2009) ("[g]enerally speaking, Rule 12(b)(6) permits a defendant to seek relief on the ground that a cause of action fails as a matter of law, regardless of whether the plaintiff's factual allegations are true or not").

As set forth above, Congress did not limit ERISA's fiduciary duties to a "dire financial predicament" standard, and the court should not compromise ERISA's important fiduciary protections by creating a new lower standard for employer stock than the actual prudence standard set out in the text of the statute. Aside from the impropriety of such judicial law-making, governing precedent makes clear that plaintiffs need not rebut in their pleadings even more well-established shields from liability such as qualified immunity. See Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[w]e refused to change the Federal Rules

governing pleading by requiring the plaintiff to anticipate the immunity defense"); Goad v. Mitchell, 297 F.3d 497, 501-02 (6th Cir. 2002). Likewise, Kuper should be read as establishing only an evidentiary framework for allocating burdens of production at the evidentiary stage. Under this proper interpretation, the district court should have declined to apply the presumption to the pleadings stage. Compare Taylor v. KeyCorp, supra.

To be sure, Twombly and Iqbal require the prudence claim to be pled with sufficient facts to raise a plausible inference of a fiduciary breach. Twombly, 550 U.S. at 557; Iqbal, 129 S.Ct. at 1944. But they do not fundamentally change the notice pleading rule, Twombly, 550 U.S. at 557-58; Iqbal, 129 S.Ct. at 195; Bloemker, 605 F.3d at 442, and they certainly do not augment the elements of an ERISA violation or elevate a judicially created evidentiary burden to a substantive rule of law. See, e.g., Braden, 588 F.3d at 598 ("Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct").[5] Plaintiffs, therefore, did not, beyond pleading facts sufficient to support their claim that defendants acted imprudently, have to plead additional

---

[5] Braden also noted that defendants cannot expect plaintiffs in ERISA cases to plead facts that "tend systemically to be in the sole possession of defendants." Id. at 598. Here, facts solely in the possession of defendants would include when and what the fiduciaries knew about the risk to plan participants posed by Fifth Third's risky business practices.

facts plausibly rebutting the prudence presumption defendants could be expected to raise in response to the claim.

Regardless, plaintiffs clearly alleged facts supporting their assertion that defendants knew or should have known of Fifth Third's high-risk conduct, including the risks from exposure to subprime mortgages. Compl. ¶¶ 96-103, 187-198. Despite the court's conclusion that participation in the government's bank bailout shows that Fifth Third was a viable financial institution, Fifth Third would likely have failed without the bailout. Dudenhoeffer, 757 F.Supp.2d at 761-62. In any case, the fiduciaries were unaware of the future bailout at the time they were making investment decisions for the Plan. Moreover, according to the complaint, the defendants' misrepresentations artificially inflated the stock price. Compl. ¶¶ 97-98, 113-63. Coupled with the precipitous decline in stock price, these extensive allegations, at the very least, present a plausible fiduciary breach claim and, if demonstrated, would rebut the Kuper presumption.

II. PLAINTIFF PROPERLY PLED BREACHES OF ERISA DISCLOSURE DUTIES

A fiduciary's duty includes an obligation to convey complete and accurate information to plan participants, as well as a "negative duty not to misinform." James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 452 (6th Cir. 2002); accord Krohn v. Huron Memorial Hosp., 173 F.3d 542, 548 (6th Cir.1999); see generally Varity Corp., 516 U.S. at 506. Here, plaintiffs have alleged breaches of both kinds

of disclosure duties. The district court thus erred when it held, based in part on a mistaken reading of Varity, that plaintiff did not state a valid misrepresentation claim under ERISA when they alleged that defendants breached their fiduciary duty by failing to provide complete and accurate information, or to correct inaccurate statements or misleading omissions, about Fifth Third's financial condition and prospects primarily appearing in SEC filings, which were incorporated by reference into the Plan SPD (under the heading "Where You Can Find More Information About Fifth Third Bancorp"), and various press releases. Compl. ¶¶ 5, 49, 59, 97, 100, 111, 123-56, 191, 245; see Compl. Exh. A (2007 SPD), p. 44; Compl. Exh. F (2008 Prospectus).

In Varity, the Court held that the company, which was also plan administrator, engaged in a fiduciary act covered by ERISA when its representatives made misleading statements to employees about changes to their benefit plan and the financial future of the company. 516 U.S. at 504. As the court observed, "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA." Id. at 506 (citing authorities). Moreover, there is a direct connection between misstatements about the financial health of a company, the value of its stock, and the plan's inducement of participant investment in that stock. Id. at 502-04.

A company and its officers do not become ERISA fiduciaries merely by filing SEC forms. See Varity, 516 U.S. at 505 (an employer does not become a fiduciary "simply because it made statements about its expected financial condition"). But, here, while the original statements in the SEC filings may have been prepared by company employees acting in a corporate capacity, their inclusion in terms or by reference in an ERISA SPD, a plan communication directed at participants, is decidedly a fiduciary act. The fiduciaries could not stand idly by in tacit disregard of the dangers posed by public filings that they knew or should have known "would mislead a reasonable employee in making an adequately informed decision in pursuing . . . benefits to which she may be entitled." Krohn, 173 F.3d at 547; see Sengpiel v. B.F. Goodrich Co., 156 F.3d 660, 666 (6th Cir. 1998) (distinguishing between business and fiduciary decisions, and stating that "[a]n employer is said to act in a fiduciary capacity when it communicates with employees about their benefits because, in essence, the employer puts on its plan administrator hat and undertakes action designed to carry out an important purpose of the plan"). Where, as here, the SEC filings are incorporated by reference into the plan documents, and participants base their investment decisions on plan documents, ERISA requires that the fiduciaries take action to protect plan participants. See, e.g., In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861, 888 (S.D. Tex. 2004) (finding that when fiduciaries issued an

SPD and then encouraged participants to review the company's SEC filings, these actions "also triggered an affirmative duty to disclose material adverse information that [they] knew or should have known regarding the risks and appropriateness of investing in company stock"). The district court thus erred in finding that the alleged misrepresentations contained in SEC filings that were incorporated by reference into the SPD were not made in a fiduciary capacity.

Here, the complaint plausibly alleges that defendants, while serving in an ERISA fiduciary capacity, incorporated or made inaccurate or misleading statements, or failed to correct such statements or material omissions that they knew or should have known participants would rely on. Therefore, the plaintiff alleged more than enough to withstand a motion to dismiss. The determination of whether defendants' actions or inactions in this regard constituted fiduciary breaches should be made after the discovery stage, once the facts have been fully developed.

CONCLUSION

For these reasons, this Court should reverse the district court's decision to grant the defendants' motion to dismiss.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

NATHANIEL I. SPILLER
Counsel for Appellate and Special
Litigation

____
MELISSA MOORE
Attorney
U.S. Department of Labor
Room N-4611
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5281

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 6,951 words of Times New Roman (14 point) regular type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

/s/Melissa Moore
Melissa Moore
Attorney

Dated: July 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2011, pursuant to 6th Cir. R. 25, I caused the foregoing brief to be served electronically on the following through the ECF System:

Edward W. Ciolko
Mark K. Gyandoh
Julie Siebert-Johnson
KESSLER TOPAZ
MELTZER & CHECK LLP
280 King of Prussia Road
Radnor, PA 19087

Ronald R. Parry
PARRY DEERING FUTSCHER
& SPARKS PSC
411 Garrard Street
P. O. Box 2618
Covington, KY 41012-2618

Thomas J. McKenna
GAINEY & McKENNA
440 Park Avenue South,
5th Floor
New York, NY 10016

/s/ Melissa Moore
Melissa Moore
Trial Attorney

Dated: July 14, 2011