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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18-20379

JEFFERY SCHWEITZER; JONATHAN SAPP; RAUL RAMOS; DONALD FOWLER,

Plaintiffs - Appellants

v.

THE INVESTMENT COMMITTEE OF THE PHILLIPS 66 SAVINGS PLAN; SAM FARACE; JOHN DOES 1-10, INCLUSIVE,

Defendants – Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, SMITH, and HIGGINSON, Circuit Judges. PATRICK E. HIGGINBOTHAM, Circuit Judge:

Four participants in Phillips 66's retirement plan bring this putative class action against the plan's Investment Committee for breach of fiduciary duties under the

Employee Retirement Income Security Act. They allege that the Defendants failed to monitor properly and divest ConocoPhillips stock from the retirement plan. The district court granted Defendants' motion to dismiss for failure to state a claim, and Plaintiffs timely appealed. We affirm.

I.

In 2012, ConocoPhillips Corporation, a large oil and gas company, spun off Phillips 66 as a separate, independent company. ConocoPhillips retained its upstream business, namely exploration and production, while Phillips 66 took on the downstream business, including refining, marketing, and transportation operations.

With the separation, 12,000 ConocoPhillips employees became employees of Phillips 66. Many of them had held assets in individual retirement accounts in the ConocoPhillips Savings Plan at the time of the separation. These accounts included large investments in two single-stock funds comprised of ConocoPhillips stock. As a result of the separation, each employee received one share of Phillips 66 stock for every two shares of ConocoPhillips stock held in their account. Afterward, Phillips 66 employees had $2.9 billion in ConocoPhillips Plan assets, including $1.1 billion invested in the ConocoPhillips Funds. The ConocoPhillips Plan transferred these assets to the Phillips 66 Savings Plan, the newly established retirement plan for Phillips 66 employees. After the transfer, Phillips 66 Plan participants could retain or sell their investments in the ConocoPhillips Funds, but could not make new investments in the Funds.

As the Phillips 66 Plan is a defined contribution plan, each participant has an individual account and benefits are

based on the amounts contributed to that participant's account.[1] Plan participants decide how much to contribute to their accounts and how to allocate their assets among an array of investment options selected by the Plan's Investment Committee. The Phillips 66 Plan allows participants to invest in two single-stock funds comprised of Phillips 66 stock.[2] Just a few months after the spin-off, the Plan had $1.1 billion invested in the ConocoPhillips Funds and $0.9 billion in the Phillips 66 Funds. Together, these funds accounted for 58% of the Plan's assets.

When ConocoPhillips spun off Phillips 66 on April 30, 2012, ConocoPhillips's share price was about $55. Over the next two years, its share price increased by more than 50%, reaching $86 by June 2014. Plaintiffs allege, however, that by the second half of 2014, there were red flags indicating ConocoPhillips was a risky investment. Plaintiffs point to publicly available information, including declining share prices, uncertainty in the price of oil, and Berkshire Hathaway's sale of its stake in ConocoPhillips. ConocoPhillips's share price fell to $69 by the end of 2014, $46 by the end of 2015, and $40 by February 2016. When Plaintiffs filed this lawsuit in October 2017, the share price was $50.[3]

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[1] A defined benefit plan, by contrast, promises employees fixed payments and retains full responsibility for investing the plan's assets.

[2] The Phillips 66 Plan is an Eligible Individual Account Plan, which like an employer stock option plan "offer[s] ownership in employer stock as an option to employees." *Amgen Inc. v. Harris*, 136 S. Ct. 758, 758 (2016) (per curiam).

[3] "We can, of course, take judicial notice of stock prices." *Catogas v. Cyberonics, Inc.,* 292 F. App'x 311, 316 (5th Cir. 2008) (unpublished) (per curiam).

Plaintiffs allege that the Investment Committee and its members (the "Fiduciaries") breached their fiduciary duties of diversification and prudence under ERISA by failing to independently review the merits of divesting the ConocoPhillips Funds. According to Plaintiffs, the Fiduciaries incorrectly believed that ConocoPhillips was a "qualifying employer securit[y]," an ESOP, and thus exempt from certain diversification requirements.[4]

The district court held that Plaintiffs failed to state a claim based on the duty to diversify because the Phillips 66 participants were not allowed to make new investments in the ConocoPhillips Funds and could elect to exchange their assets out of the Funds at any time. It also held that Plaintiffs' duty-of-prudence claim was foreclosed by the Supreme Court's holding in *Fifth Third Bancorp v. Dudenhoeffer.*[5] This appeal followed.

II.

"This court reviews de novo a district court's grant or denial of a Rule 12(b)(6) motion to dismiss, 'accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[.]'"[6] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[7] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

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[4] *See* 29 U.S.C. § 1104(a)(2).

[5] 573 U.S. 409 (2014).

[6] *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009) (quoting *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007)).

[7] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

defendant is liable for the misconduct alleged."[8] However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[9]

III.

ERISA governs employee benefit plans and their invested funds. Congress enacted the statute to "promote the interests of employees and their beneficiaries" in these funds.[10] To that end, ERISA fiduciaries are assigned "a number of detailed duties and responsibilities, which include 'the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.'"[11] Their duties to plan participants are "derived from the common law of trusts"[12] and are "the highest known to the law."[13]

Section 1104(a)(1) sets out "several overlapping duties."[14] The duty of prudence requires a fiduciary to "discharge his duties . . . . with the care, skill, prudence,

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[8] *Id.* (citing *Twombly*, 550 U.S. at 556).

[9] *Id.* (citing *Twombly*, 550 U.S. at 555).

[10] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983).

[11] *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251–52 (1993) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142–43 (1985)).

[12] Tibble v. Edison Int'l, 575 U.S. 523, 135 S. Ct. 1823, 1828 (2015) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)).

[13] *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014) (quoting *Donovan v. Bierwirth,* 680 F.2d 263, 272 n.8 (2d Cir. 1982)).

[14] *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000).

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."[15] The duty to diversify requires a fiduciary to "diversify[] 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."[16] ERISA also requires fiduciaries to adhere to a duty of loyalty and to act in accordance with the plan insofar as it does not conflict with the Act.[17] To state a claim under this section, a plaintiff must plausibly allege that a fiduciary breached one of these duties, causing a loss to the employee benefit plan.[18]

Plaintiffs contend that the Fiduciaries breached their duty to diversify under § 1104(a)(1)(C) and their duty of prudence under § 1104(a)(1)(B) by failing to consider reducing their holdings in the ConocoPhillips Funds.

A.

The Fiduciaries first argue that Plaintiffs' claims never get off the ground because the ConocoPhillips Funds are "qualifying employer securities," which are statutorily exempt from "the diversification requirement of [§ 1104(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [§ 1104(a)(1)(B)]."[19] The Fiduciaries contend that the ConocoPhillips Funds were employer securities when

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[15] 29 U.S.C. § 1104(a)(1)(B).

[16] *Id.* § 1104(a)(1)(C).

[17] *Id.* § 1104(a)(1)(A), (D).

[18] *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).

[19] 29 U.S.C. § 1104(a)(2).

they were issued by ConocoPhillips and therefore retained that status after separating from Phillips 66.

But ERISA's plain text does not support this conclusion. A qualifying employer security is a "security issued by an employer of employees covered by the plan, or by an affiliate of such employer."[20] An employer is a party "*acting* directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan."[21] So an employer security is one that is issued by a party "acting . . . as an employer" "of employees covered by the plan."[22]

Although ConocoPhillips had employed the Phillips 66 Plan's participants, Phillips 66 is the only entity now "acting" as the employer of employees covered by the Phillips 66 Plan. The ConocoPhillips Funds are qualifying employer stock only if they were issued by Phillips 66.[23] They were not. The ConocoPhillips Funds were not "employer securities" after the spin- off and were no longer exempt from the duties under § 1104(a)(1)(B) and (C).

B.

Under § 1104(a)(1)(C), fiduciaries have a duty to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it

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[20] 29 U.S.C. § 1107(d)(1); *see id.* § 1107(d)(5).

[21] *Id.* § 1002(5) (emphasis added).

[22] *Id.* §§ 1002(5), 1107(d)(1).

[23] Our reading of the statute is informed by a private letter ruling by the Internal Revenue Service. I.R.S. Priv. Ltr. Rul. 201427024 (July 3, 2014). As the district court noted, although the IRS's interpretation is not binding, it has persuasive force "because it addresses the precise issue in question—whether an employer security retains that character after a spinoff."

is clearly prudent not to do so."[24] This duty looks to a pension plan as a whole, not to each investment option.[25]Plaintiffs argue that the Fiduciaries breached this duty by holding an excessive percentage of Plan assets in ConocoPhillips Funds, exposing participants to a high risk of large losses. They rely primarily on a case in which fiduciaries for a defined benefit plan breached their duty to diversify by placing 23% of plan assets in a single investment.[26]

But the duty to diversify under § 1104(a)(1)(C) imposes obligations on fiduciaries for defined benefit plans that are different from those for defined contribution plans, like the Phillips 66 Plan. As fiduciaries for defined benefit plans choose the investments and allocate the plan's assets, they must ensure the plan's assets as a whole are well diversified. The fiduciaries for a defined contribution plan, however, only select investment options; the participants then choose how to allocate their assets to the available options. These fiduciaries therefore need only provide investment options that enable participants to create diversified portfolios; they need not ensure that participants actually diversify their portfolios.[27] Plaintiffs

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[24] *Id.* § 1104(a)(1)(C).

[25] *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (unpublished) (emphasis added) ("The language of [§ 1104(a)(1)(C)] contemplates a failure to diversify claim when a plan is undiversified *as a whole*.").

[26] Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan, 507 F. Supp. 378, 384 (D. Haw. 1980).

[27] *See, e.g.*, *Yates v. Nichols*, 286 F. Supp. 3d 854, 864 (N.D. Ohio 2017) ("[T]he plan participants themselves—rather than the [fiduciaries]—decide how to allocate their contributions among the plan's investment options. The [fiduciaries], in other words, have no ability to enforce the diversification requirement on the participants. All they can do, it would seem, is offer a diversified menu of

have not alleged that the Fiduciaries did not offer sufficient investment options or failed to warn Plan participants of the risk of a concentrated portfolio, as we will explain. As a result, their § 1104(a)(1)(C) claim fails.

C.

The duty of prudence requires that fiduciaries act "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."[28]Fiduciaries must determine that each investment "is reasonably designed, as part of the portfolio[,] . . . to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain."[29] They also must "give[] appropriate consideration to those facts and circumstances that . . . [they] know[] or should know are relevant to the particular investment."[30]In short, prudence requires fiduciaries to consider the totality of the circumstances.[31] In so doing,

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investment options. What seems most critical, then, at "least in terms of the [fiduciaries'] diversification duty, is the range of investment options available to the participants.")."

[28] U.S.C. § 1104(a)(1)(B).

[29] 29 C.F.R. § 2550.404a-1(b)(2)(i).

[30] *Id.* § 2550.404a-1(b)(1)(i); *see Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 307 n.13 (5th Cir. 2007) (citing § 2550.404a-1(b)(1)(i)–(ii)).

[31] *Bussian*, 223 F.3d at 299 ("What the appropriate methods [of investigation] are in a given situation depends on the 'character' and 'aim' of the particular plan and decision at issue and the 'circumstances prevailing' at the time a particular course of action must be investigated and undertaken."); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) ("The prudent man rule as codified in ERISA is a flexible standard[.]"); *DiFelice v. U.S. Airways, Inc.*,

fiduciaries must engage in a reasoned decision- making process for investigating the merits of each investment option[32] and ensure that each one "remain[s] in the best interest of plan participants."[33]

The parties engage over the prudence of retaining the ConocoPhillips Funds without undertaking a proper investigation. Plaintiffs allege that single-stock funds are inherently imprudent because they expose investors to extreme volatility and risk, and they argue that the duty of prudence requires each individual fund in a plan to be diversified. The Fiduciaries respond that the Plaintiffs' duty-of-prudence claim fails under the Supreme Court's decision in *Dudenhoeffer*, and that requiring each fund to be diversified would conflict with modern portfolio theory, which evaluates the prudence of an investment in the context of a portfolio as a whole.

1.

There are two wings of Plaintiffs' duty-of-prudence claim. The first alleges the Fiduciaries should have known from publicly available information that the stock market underestimated the risk of holding ConocoPhillips stock. *Dudenhoeffer* addressed this line of argument, holding that "where a stock is publicly traded, allegations that a fiduciary should have recognized *from publicly available information alone* that the market was over- or

497 F.3d 410, 420 (4th Cir. 2007) (explaining that evaluating the prudence of an investment decision requires a totality-of-the-circumstances inquiry that takes into account "the character and aim of the particular plan and decision at issue and the circumstances prevailing at the time") (internal quotation marks omitted).

[32] *Langbecker*, 476 F.3d at 308 n.18; *see also DiFelice,* 497 F.3d at 423.

[33] *Tatum*, 761 F.3d at 358.

undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances."[34] In so doing, *Dudenhoeffer* effectively foreclosed claims, like Plaintiffs', that a fiduciary should have known from public information that the market underestimated the risk of holding a publicly traded security.[35]

That said, *Dudenhoeffer* and its progeny do not apply to the second wing of Plaintiffs' argument: that the ConocoPhillips Funds were imprudent because of the risk inherent in failing to diversify. Unlike the claim in *Dudenhoeffer*, this claim does not turn on publicly available information or whether Fiduciaries can beat the market.[36] Moreover, *Dudenhoeffer* and our subsequent decisions all involved employer securities, which are exempt from the duty of prudence "to the extent that it requires diversification."[37] They do not address the prudence of holding a single-stock fund in the first place. As a result, this second wing of Plaintiffs' duty-of-prudence claim does not implicate *Dudenhoeffer* and is not foreclosed by it.

2.

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[34] *Dudenhoeffer*, 573 U.S. at 426 (emphasis added).

[35] *See Kopp v. Klein*, 894 F.3d 214, 219–20 (5th Cir. 2018) (per curiam); *Singh v. RadioShack Corp.*, 882 F.3d 137, 146–47 (5th Cir. 2018) (per curiam).

[36] By the Efficient Market Hypothesis and modern portfolio theory, stock prices in efficient markets do not reflect risks that an investor could eliminate through diversification. JEFFREY J. HAAS, CORPORATE FINANCE 113 (2014) ("Under portfolio theory, the market return received by an investor on a particular stock in a competitive market does not include any compensation for the investor shouldering [business-specific] risk. Indeed, the market does not reward investors who fail to diversify this risk down to zero.").

[37] 29 U.S.C. § 1104(a)(2).

Plaintiffs claim that holding a single-stock fund is imprudent per se because of the risk inherent in holding an undiversified asset. But ERISA contains no prohibition on individual account plans' offering single-stock funds. Rather, it requires fiduciaries to provide in each benefit statement to participants "an explanation . . . of the importance . . . of a well-balanced and diversified investment portfolio, including a statement of the risk that holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately diversified[.]"[38] A per se rule against single-stock funds would also conflict with the fact-specific focus of the duty of prudence,[39] as well as with ERISA's legislative history and implementing regulations, which clarify that single-stock investments can be a prudent investment option.[40]

Yet, courts have expressed concern about the prudence of single-stock funds, recognizing that a single-stock investment option may be imprudent in some circumstances, as it may encourage investors to put too many eggs in one basket.[41] The Supreme Court has observed that, as single-stock funds, qualifying employer

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[38] *Id.* § 1025(a)(2)(B).

[39] *Tatum*, 761 F.3d at 360 (rejecting argument that "non-employer, single stock funds are imprudent *per se* due to their inherent risk") (alteration and internal quotation omitted).

[40] *Id.*; H.R. REP. NO. 93–1280 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5085–86; 29 C.F.R. § 2550.404c–1(f)(5).

[41] *DeFelice,* 497 F.3d at 424 ("[A]lthough placing retirement funds in *any* single-stock fund carries significant risk

, and so would seem generally *imprudent* for ERISA purposes, Congress has explicitly provided that qualifying concentrated investment in *employer* stock does not violate the 'prudent man' standard per se.").

securities are "not prudently diversified."[42]Likewise, the Seventh Circuit recognized that because employer securities are undiversified, "[t]here is a sense in which" they are "imprudent per se, though legally authorized."[43] Because of the "built-in 'imprudence,'" the court warned that fiduciaries for plans investing in employer securities must be "especially careful to do nothing to increase the risk faced by the participants still further."[44] The Fourth Circuit also recognized in *DiFelice* that while there is no per se bar on single-stock funds, such funds "carr[y] significant risk, and so would seem generally imprudent for ERISA purposes."[45] Indeed, Plaintiffs have plausibly alleged that the ConocoPhillips Funds, by its resulting concentration of investment, became an imprudent investment with the spinoff.

But it does not follow that the Fiduciaries were obligated to force Plan participants to divest from the Funds. "ERISA does not require fiduciaries of [a defined contribution plan] to act as personal investment advisers to plan participants . . . Such a plan gives participants the control by design, and it gives employees the responsibility and freedom to choose how to invest their funds."[46]

No "rule . . . forbids plan sponsors to allow participants to make their own choices."[47] ERISA imposed other

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[42] *Dudenhoeffer*, 573 U.S. at 416 (internal citation omitted).

[43] *Armstrong v. LaSalle Bank Nat. Ass'n*, 446 F.3d 728, 732 (7th Cir. 2006) (Posner, J.).

[44] *Id.*

[45] *DiFelice*, 497 F.3d at 424.

[46] White v. Marshall & Ilsley Corp., 714 F.3d 980, 994 (7th Cir. 2013), abrogated by Dudenhoeffer, 573 U.S. 409.

[47] *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011). Nor

obligations, which the Fiduciaries met. They repeatedly provided Plan participants with the statutorily mandated warning against holding "more than 20 percent of a portfolio in the security of one entity."[48] For example, Phillips 66's January 2016 Summary Plan Description highlighted the risk of holding a single-stock fund:

> Funds that hold the common stock of a single company, such as the Phillips 66 Stock Fund, are generally considered a higher risk investment than a fund that holds many different stocks, such as actively managed funds described above. The advantage of an actively managed fund is that not all of the stocks within a fund will have price movements in the same direction at the same time, and this reduces investment risk when compared to a single stock.

The Summary Plan Description also explained the importance of diversification to its participants:

> WHY DIVERSIFICATION MATTERS
>
> As the saying goes, "don't put all your eggs in one basket." This is especially true when investing for retirement. Maintaining a mix of stocks, bonds and short-term investments in your plan account can help manage your investment risk.

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does any rule bar fiduciaries from forcing divestment. *See Tatum*, 761 F.3d 346.

[48] 29 U.S.C. § 1025(a)(2)(B).

> This "diversification" is a key principle of sound investing. The idea is that when one type of asset is doing poorly, another may be doing well. For example, if your stock funds are losing value, your bond steady. Of course, the opposite may also occur, where your bond funds lose value while your stock are going up. And there may be times when it seems that every type of investment is losing value.
>
> How much of your account you should allocate to the different asset classes depends on you — your financial goals, your tolerance for risk, your other assets and needs, and how much time you have until retirement.

By closing the ConocoPhillips Funds to new investments immediately after the spin-off, the Fiduciaries also ensured that they were not offering participants an imprudent investment option.[49] At that point, while blocked from adding more "eggs to the basket," Plaintiffs were free to sell off their investments at any time and reinvest in other funds. With a rising market, they chose to retain the ConocoPhillips Funds for over two years, balancing the risk of a want of portfolio diversity against the rising values of ConocoPhillips stock—a risk against which the Fiduciaries urged caution.

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[49] *See Langbecker*, 476 F.3d at 308 n.18 ("Under ERISA, the prudence of investments or classes of investments offered by a plan must be judged individually."); *see also DiFelice*, 497 F.3d at 423–24 (rejecting the view that "any single-stock fund, in which that stock existed in a state short of certain cancellation without compensation, would be prudent if offered alongside other diversified Funds").

They cannot enjoy their autonomy and now blame the Fiduciaries for declining to second guess that judgment.

Finally, Plaintiffs argue that the district court erred in dismissing their claim that the Fiduciaries failed to comply with their duty "to follow a regular, appropriate, systematic procedure to evaluate the ConocoPhillips Funds as investments in the Plan." We considered and rejected a similar argument in *Kopp v. Klein*.[50] There, beneficiaries argued that—separate and "apart from any substantive imprudence—the [d]efendants breached their 'procedural' duty of prudence by failing to meet and discuss a possible course of action regarding the Plan's investment in [the challenged] stock."[51] Their claim failed, however, as it rested solely on the fiduciaries' procedural lapses.[52]Plaintiffs' claim here fails for the same reason.

IV.

We affirm the district court's dismissal of Plaintiffs' suit.

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[50] 894 F.3d at 221.

[51] *Id.* at 220–21.

[52] *Id.* at 221; *accord Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010) (holding that a claim alleging a breach of the duty to monitor and inform the plan committee "cannot survive without a sufficiently pled theory of the underlying breach" of the duty-of-prudence claim).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

JEFFERY SCHWEITZER, JONATHAN SAPP, RAUL RAMOS, and DONALD FOWLER, on behalf of the Phillips 66 Savings Plan and a class of all others similarly situated, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-17-3013
THE INVESTMENT COMMITTEE OF THE PHILLIPS 66 SAVINGS PLAN, SAM FARACE, and JOHN DOES 1-10, Defendants.	§	

MEMORANDUM OPINION AND ORDER

Plaintiffs, Jeffery Schweitzer, Jonathan Sapp, Raul Ramos, and Donald Fowler, bring this action pursuant to Sections 404, 405, 409, and 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§

1104, 1105, 1109, and 1132, on behalf of the Phillips 66 Savings Plan (the "Plan" or the "Phillips 66 Plan") and a class of similarly situated participants in the Plan whose retirement assets were invested in the "ConocoPhillips Stock Fund" and the "ConocoPhillips Leveraged Stock Fund" (together, the "ConocoPhillips Funds") through the Plan during the period from May 2, 2012, to the date of judgment in this action (the "Class Period")[1] against defendants, the Investment Committee of the Phillips 66 Savings Plan (the "Committee"), individual members of the Investment Committee, John Does 1 through 10, and Sam Farace, the Plan's Financial Administrator (collectively "Defendants") . Pending before the court is Defendants the Investment Committee of the Phillips 66 Savings Plan and Sam Farace's Motion to Dismiss Plaintiffs' Class Action Complaint with Brief in Support ("Defendants' Motion to Dismiss") (Docket Entry No. 15). For the reasons explained below, Defendants' Motion to Dismiss will be granted.

I. Factual and Procedural Background[2]

Phillips 66 Company, Inc. ("Phillips 66") was incorporated in Delaware in 2011 as a wholly owned subsidiary of ConocoPhillips Corporation ("ConocoPhillips") On April 30, 2012, Phillips 66 was spun-off from ConocoPhillips and became a separate, independent company. As a result of the spinoff approximately 12,000 former ConocoPhillips employees

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[1] Class-Action Complaint ("Complaint") , Docket Entry No. 1, p. 1 ¶ 1. All page number citations are to the pagination imprinted by the federal court's electronic filing system at the top and right of the document.

[2] See id. ¶¶ 13-89.

became Phillips 66 employees. Phillips 66 established the Plan on May 1, 2012, for Phillips 66 employees in connection with the spinoff. The Plan is an employee benefit plan within the meaning of ERISA Sections 3(3) and 3(2) (A), 29 U.S.C. §§ 1002 (3) and 1002 (2) (A). The Plan is a "defined contribution" or "individual account" plan that maintains individual accounts for each participant within the meaning of ERISA Section 3 (34), 29 U.S.C. § 1002 (34).[3] Participants designate the manner in which amounts allocated to their accounts will be invested in an array of investment funds. ConocoPhillips employees are not eligible to participate in the Plan.

Assets of Phillips 66 employees who were former ConocoPhillips employees that were held in participant accounts under the ConocoPhillips Savings Plan ("ConocoPhillips Plan") were transferred to the Phillips 66 Plan. Included among the assets transferred from the ConocoPhillips Plan to the Phillips 66 Plan were shares of ConocoPhillips stock. The shares were originally

[3] A defined contribution plan does not pay any fixed or determinable benefits. Instead, benefits will vary depending on the amount of plan contributions, the investment success of the plan, and allocations made of benefits forfeited by non-vested participants who terminate their employment. Thus, the amount of benefits is based, in part, on the earnings generated by the plan. Both defined benefit and defined contribution plans can provide for employee contributions. The individual accounts for all participating employees reflect each participant's share in the underlying trust assets and are adjusted annually to take into account plan contributions, earnings, and forfeitures. Defined benefit plans ordinarily do not maintain individual accounts, except to the extent necessary under the Internal Revenue Code to record benefits attributable to voluntary contributions by employees. SEC Release No. 33-6188, 1980 WL 29482, at *6-7 (Feb. 1, 1980).

contributed by ConocoPhillips to an employee stock ownership plan ("ESOP") and held in the ConocoPhillips Funds of the ConocoPhillips Plan. After the spinoff the shares became part of the ConocoPhillips Funds in the Phillips 66 Plan. The ConocoPhillips Funds invested exclusively in ConocoPhillips stock. The ConocoPhillips Funds were closed to new investments after the spinoff, but participants of the Phillips 66 Plan could "exchange out of the funds at any time."[4]

The Board of Directors of Phillips 66 appointed the Phillips 66 Savings Plan Committee. The Committee is a named fiduciary with respect to the general administration of the Plan having "all powers necessary or desirable to discharge the duties relating to the administration of the Plan as are delegated to it by the Plan and Trust Agreements. . . . "[5] Defendant Sam Farace is the Plan Financial Administrator who "shall be a fiduciary and shall have responsibility to manage and control the assets of the Plan in accordance with the terms of the Plan. . . ."[6]

Plaintiffs allege that Defendants breached their fiduciary duties of diversification and prudence by retaining the ConocoPhillips Funds in the Plan after the spinoff because the ConocoPhillips stock no longer qualified as an "employer security" under ERISA.

[4] ConocoPhillips U.S. Employee Transition Guide, Exhibit 8 to Defendants' Motion to Dismiss, Docket Entry No. 15-8, p. 6.

[5] Phillips 66 Savings Plan, Exhibit 9 to Defendants' Motion to Dismiss, Docket Entry No. 15-9, p. 65.

[6] Id.

Defendants move to dismiss Plaintiffs' claims for failure to state a claim under Rule 12 (b) (6) .[7]

II. Standard of Review

Under Rule 8 of the Federal Rules of Civil Procedure a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a) (2). A Rule 12(b) (6) motion tests the formal sufficiency of the pleadings and is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001), cert. denied sub nom. Cloud v. United States, 122 S. Ct. 2665 (2002). The court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. Id.

To defeat a motion to dismiss pursuant to Rule 12 (b) (6) a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 127 S. Ct. at 1965). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 127 S. Ct. at 1965). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between

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[7] Defendants' Motion to Dismiss, Docket Entry No. 15.

possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 127 S. Ct. at 1966).

When considering a motion to dismiss, district courts are "limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." Lone Star Fund v (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010). "Federal courts are required to dismiss, pursuant to Federal Rule of Civil Procedure 12 (b) (6), claims based on invalid legal theories, even though they may be otherwise well-pleaded." Flynn v. State Farm Fire and Casualty Insurance Co. (Texas), 605 F. Supp. 2d 811, 820 (W.D. Tex. 2009) (citing Neitzke v. Williams, 109 S. Ct. 1827, 1832 (1989)) . "[W] hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007) (quoting Twombly, 127 S. Ct. at 1964-65) (quotations omitted); see also Exxon Mobil Corp. v. FX Networks, LLC, 39 F. Supp. 3d 868, 870-71 (S.D. Tex. 2014) .

Claims asserted under ERISA are subject to the notice pleading standard of Federal Rule of Civil Procedure 8, which "substitute[d] the requirement of 'a short and plain statement of the claim showing that the pleader is entitled to relief' for the technical formula, such as 'facts constituting a cause of action,' which typified the preexisting codes." Heimann v. National Elevator Industry Pension Fund, 187 F.3d 493, 509 (5th Cir. 1999), overruled on other grounds, Arana v. Ochsner Health Plan, 338 F.3d 433 (5th Cir. 2003) (quoting Charles A.

Wright and Arthur R. Miller, Federal Practice and Procedure, § 1202 at 68 (2d ed. 1990)). See also Swierkiewicz, 122 S. Ct. at 998 (Rule 8 is a simplified notice pleading standard that applies to all civil actions, with limited exceptions, i.e., those enumerated in Rule 9 (b) , and requires merely a statement that gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.).

III. Applicable Law

A. ERISA

ERISA is a statutory scheme enacted by Congress to protect employees' rights to benefits while also encouraging employers to develop employee benefits programs. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 411 (5th Cir. 2003) (citing Edward E. Bintz, Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?, 54 U. Pitt. L. Rev. 979, 979 (1993)). "ERISA assigns to plan fiduciaries 'a number of detailed duties and responsibilities, which include the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specific information, and the avoidance of conflicts of interest.'" Laborers National Pension Fund v. Northern Trust Quantitative Advisors, Inc., 173 F.3d 313, 317 (5th Cir.), cert. denied, 120 S. Ct. 406 (1999) (quoting Mertens v. Hewitt Associates, 113 S. Ct. 2063, 2066 (1993)).

ERISA requires employee benefit plans to be established and maintained pursuant to a written instrument that provides for one or more "named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102 (a) (1).

> [T] he term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

29 U.S.C. § 1102(a) (2). Persons or entities who are not named as fiduciaries in plan documents but who exercise discretionary authority and control that amounts to actual decision-making power are also plan fiduciaries. 29 U.S.C. § 1002(21) (A). "A fiduciary within the meaning of ERISA must be someone acting in the capacity of manager, administrator, or financial adviser to a 'plan.'" Pegram v. Herdrick, 120 S. Ct. 2143, 2151 (2000) (citing 29 U.S.C. § 1002 (21) (A) {i)- (iii)). "'[A] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control.'" Bannistor v. Ullman, 287 F.3d 394, 401 (5th Cir. 2002) (quoting Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1459-60 (5th Cir. 1986) 1 cert. denied, 107 s. Ct. 884 (1987)). "[F]iduciary status is to be determined by looking at the actual authority or power demonstrated, as well as the formal title and duties of the party at issue." Landry v. Air Line Pilots Ass'n Intern. AFL-CIO, 901 F.2d 404, 418 (5th Cir.), cert. denied, 111 S. Ct. 244 (1990). The issue of fiduciary status is a mixed question of law and fact. Reich v. Lancaster, 55 F.3d 1034, 1044 (5th Cir. 1995).

B. Fiduciary Duties under ERISA

(1) [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.

29 U.S.C. § 1104(a)(1).

C. Remedies for Breach

ERISA makes fiduciaries liable for breach of their duties and specifies the remedies available against them. Mertens, 113 S. Ct. at 2066 (citing 29 U.S.C. § 1109(a)). ERISA allows any plan participant, beneficiary, or fiduciary to bring a civil action "for -9- Case 4:17-cv-03013 Document 48 Filed on 05/09/18 in TXSD Page 9 of 30 appropriate relief under section 1109." Id. at 2066-67 (quoting 29 U.S. C. § 1132 (a) (2)).

IV. Defendants' Motion to Dismiss

Defendants do not dispute the Committee's status as a fiduciary of the Plan or Sam Farace's status as the Plan Administrator and named fiduciary within the meaning of ERISA, 29 U.S.C. §§ 1002 (16) (A), (21) (A) and§ 1102 (a) (2). Defendants argue that they are exempt from ERISA' s diversification requirement because the ConocoPhillips shares retain their character as employer securities after the spinoff under ERISA Section 407 (d) (1)[8] and that Plaintiffs have failed to plead facts to state a claim for breach of the duty of prudence and the duty to diversify.[9]

A. Employer Security

Under ERISA an eligible individual account plan ("EIAP") as defined in 29 U.S.C. § 1107(d) (3) that invests in "qualifying employer securities" exempts fiduciaries from the duty to diversify. ERISA§ 404 (a) (2), 29 U.S.C. § 1104 (a) (2); Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2467 (2014). Plaintiffs do not dispute that the Plan is an EIAP. An "employer security" is "a security issued by an employer of employees covered by the plan, or by an affiliate of such employer." ERISA§ 407 (d) (1), 29 U.S.C. § 1107(d) (1). Plaintiffs allege that the shares of ConocoPhillips stock no longer qualify as "employer security" after Phillips 66 separated from ConocoPhillips because ConocoPhillips no longer was the employer of employees covered by the plan or an affiliate of such employer.[10] See id. No court has addressed whether, after a spinoff resulting in two independent companies, shares

[8] Defendants' Motion to Dismiss, Docket Entry No. 15, pp. 13-18.

[9] Id. at 19-24 .

[10] Complaint, Docket Entry No. 1, pp. 12-13 ~~ 50-55.

of stock that were "employer securities" before the spinoff retain that character after the spinoff.

Defendants argue that because ConocoPhillips was the "employer" that "issued" the ConocoPhillips shares before the spinoff, the shares retain their status of "employer securities" after the spinoff.[11] Defendants cite Manor Care of America, Inc. v. Property & Casualty Insurance Guaranty Corp., 185 F. App'x 308, 309, 311 (4th Cir. 2006) (per curium) in support of their argument that under the plain language of the statute, "whether a stock qualifies as an employer security is evaluated at the time of issuance."[12] In Manor Care the Fourth Circuit held that to be eligible for insurance coverage, "a policyholder must have been a Maryland resident when the policy was issued, not when the claim is submitted." 185 F. App'x at 311. It reasoned that the phrase "issued to a resident unmistakably tethers the residency requirement to a particular event, the issuance of the policy." Id. Defendants argue that "[w]hether a security qualifies as an employer security under ERISA is likewise 'tethered' to the time of issuance of the security."[13] Plaintiffs respond that Defendants "ignor[e] that neither ERISA'S language nor its history supports [Defendants'] desired outcome."[14]

The statute at issue in Manor Care did not involve ERISA. The meaning of the word "issue" "cannot be determined in isolation, but must be drawn from the context in which it is used." Henrikson v. Guzik, 249 F.3d

[11] Defendants' Motion to Dismiss, Docket Entry No. 15, p. 13.

[12] Id. at 13-14.

[13] Id. at 14.

[14] Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss ("Plaintiffs' Response"), Docket Entry No. 38, p. 14.

395, 398 (5th Cir. 2001) (citations omitted). "It is important to look to the structure and language of the statute as a whole." Id. The decision in Manor Care as to the meaning of "issued" in the context of Maryland insurance law has little relevance in deciding the issue before the court.

Defendants also Tatum v. RJR Pension Investment Committee, 761 F.3d 346 (4th Cir. 2014), in support of their interpretation of 29 U.S.C. § 1107 (d) (1) because it "illustrates what undoubtedly would have happened had Defendants forced divestment of participant holdings of the ConocoPhillips stock around the time of the spinoff."[15] In Tatum, RJR Nabisco spun off its tobacco business, RJR, from its food business, Nabisco. Tatum, 761 F.3d at 351. After the spinoff RJR forced the divestment of the Nabisco shares held by employees in their 401(k) accounts. Id. at 354. The plaintiff alleged that the plan fiduciaries breached their duties by eliminating Nabisco stock from the plan without conducting a thorough investigation. Id. at 355. The district court determined that "nothing in the law or regulations required that the Nabisco Funds be removed from the Plan." Tatum v. R.J. Reynolds Tobacco Co., 926 F. Supp. 2d 648, 680 (M.D. North Carolina 2013) . The district court held that RJR breached its fiduciary duty of procedural prudence when it "decided to remove and sell Nabisco stock from the Plan without undertaking a proper investigation into the prudence of doing so" but that RJR met its burden of proving that its decision was objectively prudent. Id. at 651. The Fourth Circuit upheld the district court's ruling that RJR breached its duty of procedural prudence but

[15] Defendants' Motion to Dismiss, Docket Entry No. 15, pp. 14-15.

remanded the action to determine whether RJR met its burden of proving that a prudent fiduciary would have made the same decision under the circuit's articulated standard. Tatum, 761 F.3d at 361, 368.

Defendants argue that "[l]ikewise, at the time ConocoPhillips shares were issued to the participants, they were indisputably employer securities under ERISA, and nothing in the law or regulations should be read to require divestment of those shares simply due to a change in the nominal employer of the participants."[16] Defendants argue that under Plaintiffs' interpretation of "employer security," "ERISA plans would, at a minimum, feel increased pressure to force participants to divest stock like the Nabisco stock, due to the fact that fiduciaries would no longer be exempt from ERISA'S diversification requirements with respect to such holdings."[17] Plaintiffs respond that on remand the district court in Tatum reviewed extensive evidence and held that RJR fiduciaries acted prudently when they divested the plan's holdings in Nabisco stock.[18] Tatum v. R.J. Reynolds Tobacco Company, Civil Action No. 1:02-00373, 2016 WL 660902 at *23 (M.D. North Carolina, Feb. 18, 2016). Plaintiffs argue that "[t]his analysis would have been completely irrelevant if, following the spin-off, Nabisco stock was still an 'employer security' for the plan at issue."[19]

The issue in Tatum was RJR' s lack of investigation before forcing divestiture of the plan's shares in Nabisco. The Fourth Circuit did not determine whether the Nabisco shares retained

[16] Id. at 15-16.

[17] Id. at 16.

[18] Plaintiffs' Response, Docket Entry No. 38, p. 15

[19] Id. at 15.

their status as employer securities after the spinoff. Although Defendants argue that fiduciaries would "feel increased pressure to force participants to divest stock like the Nabisco stock," the teaching of Tatum is that the fiduciaries would merely feel pressure to evaluate the prudence of keeping the legacy stock as an investment option -- just as they would evaluate the prudence of including other investments in a plan.

Plaintiffs argue that Defendants' interpretation of "employer security" to include a prior employer's shares is incorrect because under ERISA an "employer" means "acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan. "[20] 29 U.S.C. § 1002 (5) (emphasis added). Plaintiffs argue that ConocoPhillips stock is not an "employer security" because "the only 'employer of employees covered by the Plan' is Phillips 66. ConocoPhillips stock was not issued by Phillips 66 or an affiliate of Phillips 66. "[21] The Plan names Phillips 66 as the "employer."[22] The Plan is an ESOP that "shall consist primarily of Company Stock purchased by the Trustees holding the assets."[23] The Plan defines "Company Stock" as shares "issued by Phillips 66, which shall constitute 'employer securities.' "[24] Although Article XXIII of the Plan is titled "Special Provisions for Former Participants in the Retirement Savings Plan of ConocoPhillips Company,"[25] it does not state that ConocoPhillips remained an employer, or that its shares

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[20] Id. at 10.

[21] Plaintiffs 'Response, Docket Entry No. 38, p. 10.

[22] Phillips 66 Savings Plan, Exhibit 9 to Defendants' Motion to Dismiss, Docket Entry No. 15-9, p. 10, Article I definition 30.

[23] Id. at 32, Article VI section 7.

[24] Id. at 9, Article I definition 18.

[25] Id. at 82, Article XXIII.

were employer securities under the Phillips 66 Plan. The court concludes that the language of the Phillips 66 Plan supports Plaintiffs' argument that shares of ConocoPhillips stock were not employer securities of the Plan after the spinoff. See In re Ford Motor Co. ERISA Litigation, 590 F.Supp.2d 883, 903–04 (E.D. Mich. 2008) (determining whether a Plan is an ESOP by reviewing the terms of the Plan).

Plaintiffs also cite the Internal Revenue Code Private Letter Ruling 201427024 ("PLR").[26] Because ConocoPhillips ceased to be the employer of the participants of the Plan after the spinoff, Plaintiffs argue that under the PLR "[ConocoPhillips] shares are not employer securities with respect to [the] Plan." I.R.S. PLR 201427024 (July 3, 2014). Defendants respond that the IRS "does not have regulatory or enforcement authority with respect to the relevant provisions of ERISA" and that the PLR evaluated securities under the

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[26] Plaintiffs'Response, Docket Entry No. 38, p. 12.

PLR 201427024 states:

[F] ollowing the Spin-Off, Company B ceased to be the employer of the participants covered under Plan X, and Company A ceased to be the employer of the participants covered under Plan Y. In addition, Company A and Company Bare no longer affiliated employers within the meaning of section 407(d)(7) of ERISA since Company A and Company B will not be members of the same controlled group of corporations as determined under section 1563(a) of the Code (except substituting 50 percent for 80 percent). Since section 407(d)(1) of ERISA defines "employer security" as a security issued by an employer of employees covered by the plan or by an affiliate of such an employer, following the Spin-Off, Company B shares are not employer securities with respect to Plan X, and Company A shares are not employer securities with respect to Plan Y.

Internal Revenue Code, not ERISA.[27] Although the IRS's Private Letter Ruling is not binding precedent, it is persuasive because it addresses the precise issue in question—whether an employer security retains that character after a spinoff.

Finally, Plaintiffs argue that ownership of ConocoPhillips stock does not promote the purpose of ERISA's "employer securities" exemption to "bring about stock ownership by all corporate employees."[28] Defendants respond that their interpretation is supported by ERISA's policies because it encourages employee ownership "without the possibility that employees could be forced to divest of securities merely because of a corporate transaction that later changed the identity of their employer."[29] ESOPs are designed to promote employee ownership of employer stock, and Congress supports ESOPs' use for that purpose. Fifth Third Bancorp, 134 S.Ct. at 2468–70. Companies use ESOPs to encourage employee participants to focus on company performance and share price appreciation since the participants themselves are shareholders. Because Phillips 66 became an independent company following the spinoff, participant ownership of ConocoPhillips stock would not promote the purposes of ESOPs.

Having carefully considered the parties' arguments and authorities the court concludes that shares of

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[27] Defendants' Motion to Dismiss, Docket Entry No. 15, pp. 17-18.

[28] Plaintiffs' Response, Docket Entry No. 38, p. 13 (citing Fifth Third Bancorp, 134 S. Ct. at 2469)

[29] Defendants the Investment Committee of the Phillips 66 Savings Plan and Sam Farace's Reply in Support of Their Motion to Dismiss Plaintiffs' Class Action Complaint ("Defendants' Reply"), Docket Entry No. 43, pp. 9-10.

ConocoPhillips stock are not employer securities and that Defendants are therefore not exempt from ERISA's diversification requirement with respect to the ConocoPhillips Funds.

B. Duty to Diversify

Fiduciaries must "diversify[ ] 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." 29 U.S.C. § 1104(a)(1)(C). "As a general proposition, ERISA's duty to diversify prohibits a fiduciary from investing disproportionately in a particular investment or enterprise." In re Unisys Savings Plan Litigation, 74 F.3d 420, 438 (3d Cir. 1996). As the Fifth Circuit has explained:

> The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case. The factors to be considered include (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds or shares of stock or otherwise; (5) distribution as to geographical location; (6) distribution as to industries; (7) the dates of maturity.

Metzler v. Graham, 112 F.3d 207, 209 (5th Cir. 1997) (quoting H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5084–85 (Conf. Rpt. at 304)). The court also noted that "[w]e think it is entirely appropriate for a fiduciary to consider the time horizon over which the plan will be required to pay out benefits in evaluating the risk of large loss from an investment

strategy." Id. at 210 n.6. "To establish a violation, a plaintiff must demonstrate that the portfolio is not diversified 'on its face.' " Id. at 209. Once Plaintiff establishes that a plan is not diversified on its face, "the burden shift[s] to the defendant to show why under the circumstances it was prudent not to diversify the investments of the plan." In re Dell, Inc. ERISA Litigation, 563 F.Supp.2d 681, 690 (W.D. Tex. 2008) (citing Metzler, 112 F.3d at 209).

Plaintiffs allege that Defendants breached their duty to diversify "by failing to diversify Plan investments"[30] because ***619** the Plan had more than 25% of its assets invested in the ConocoPhillips Funds at the beginning of the Class Period and "continued to hold an excessive amount of assets in the ConocoPhillips Funds."[31] Plaintiffs allege that "Defendants took no actions to diversify the Plan's assets and end the Plan's investments in the ConocoPhillips Funds"[32] and that "Defendants' failure to properly diversify the Plan's assets caused the Plan to suffer tens of millions of dollars in losses during the Class Period."[33]

In support of their Motion to Dismiss Defendants argue that (1) the Plan offered a diverse menu of investment options in which participants could invest their assets; (2) the extent of the Plan's holdings in ConocoPhillips was attributable to the participants' elections to retain the ConocoPhillips stock; and (3) section 404(c) of ERISA relieves plan fiduciaries of

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[30] Complaint, Docket Entry No. 1, p. 24, 105.

[31] Id. at 19, 80-81.

[32] Id. at 25, 107.

[33] Id.

liability for losses that result from a participant's exercise of control.[34]

Defendants rely heavily on Yates v. Nichols, 286 F.Supp.3d 854 (N.D. Ohio 2017).[35] The facts of Yates are similar to those of this case: After a spinoff of one company from another, a retirement plan participant sued the plan administrator, the investment committee, and members of that committee for breach of the fiduciary duty to diversify because they placed 6.5% of the plan's total assets into a fund holding only the legacy company's stock. Yates, 286 F.Supp.3d at 857. Like the Phillips 66 Plan, the plan at issue in Yates was a defined contribution plan. Id. The district court explained that "because ERISA requires that fiduciaries diversify 'the investments of the plan,' the statute 'contemplates a failure to diversify claim when a plan is undiversified as a whole.' " Id. at 863 (quoting Young v. General Motors Investment Management Corp., 325 Fed.Appx. 31, 33 (2d Cir. 2009) (unpublished opinion)). The court held:

> [E]valuating the plan as a whole makes good sense when the plan at issue is ... a defined-contribution plan where each participant has his or her own account.
>
> In these cases, the plan participants themselves–

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[34] Defendants' Motion to Dismiss, Docket Entry No. 15, pp. 19-22. Section 404(c) is an affirmative defense that is generally not suitable for resolution by a 12(b)(6) motion. The court therefore has not addressed Defendants section 404(c) argument

[35] See Defendants the Investment Committee of the Phillips 66 Savings Plan and Sam Farace's Notice of Supplemental Authority, Docket Entry No. 24; Defendants' Reply, Docket Entry No. 43, pp. 12-18.

> rather than the plan's trustees or its investment committee–decide how to allocate their contributions among the plan's investment options. The trustees and the investment committee, in other words, have no ability to enforce the diversification requirement on the participants. All they can do, it would seem, is offer a diversified menu of investment options. What seems most critical, then, at least in terms of the trustees' diversification duty, is the range of investment options available to the participants.
>
> Here, there is no question that [the plan], taken as a whole, offered diverse options.

Id. at 864.

The participants in the Phillips 66 Plan decide how to allocate their contributions among the Plan's investment options,[36] and ***620** Plaintiffs do not challenge the diversity of the investment options. "Defendants had little, if any, authority under the Plan to 'override' the employee investors' decisions to [retain] [ConocoPhillips] stock in order to diversify the actual holdings of the Plan." In re Dell, 563 F.Supp.2d at 690. "All they can do ... is offer a diversified menu of investment options." Yates, 286 F.Supp.3d at 864; see also In re Dynegy, Inc. ERISA Litigation, 309 F.Supp.2d 861, 896 (S.D. Tex. 2004)

[36] See Phillips 66 Savings Plan [Summary Plan Description] , Exhibit 2 to Defendants' Motion to Dismiss, Docket Entry No. 15-2, pp. 19, 21 ("Do I get to decide how my money is invested? Yes. In fact, it's your responsibility. . You can choose to invest in one or more of the plan's investment funds. . you can 'mix and match' your funds from among all of the groups. Whichever funds you choose, you're always responsible for selecting and monitoring your investment choices.").

(holding that because the self-directed portion of the plan "always included an array of investment options" the plaintiff "does not ... allege that the Plan was not diversified on its face.").

Plaintiffs challenge the fiduciaries' decision not to force divestiture of the assets in the ConocoPhillips Funds. But the participants could "exchange out of the funds at any time."[37] Because the participants could elect to exchange their assets out of the ConocoPhillips Funds, any amount of the Plan's assets that remained invested in the ConocoPhillips Funds was there by the participants' choice. If plan participants choose to exchange their holdings in ConocoPhillips Funds they may reinvest in the remaining investment options of the Plan, which Plaintiffs do not allege are not diversified. Dividends on the shares of the ConocoPhillips Funds "will automatically be reinvested according to [participants'] current investment allocation election [in the Phillips 66 Plan]."[38]

Fiduciaries have a duty to diversify "investments of the plan," but the ConocoPhillips funds were "closed to new investments."[39] Because the shares of ConocoPhillips are no longer employer securities, a fiduciary's decision to allocate 25% of the plan's assets to the ConocoPhillips Funds might, hypothetically, violate the duty to diversify the plan's investments. But because the ConocoPhillips Funds were no longer an investment option, and because participants could remove their assets from the ConocoPhillips Funds, the fiduciaries had no power to

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[37] ConocoPhillips U.S. Employee Transition Guide, Exhibit 8 to Defendants' Motion to Dismiss, Docket Entry No. 15-8, p. 6.

[38] Id. at 7.

[39] Id. at 6.

allocate assets to the ConocoPhillips Funds. The real issue is not diversification but the prudence of the fiduciaries' decision not to force divestiture. Because Defendants did not mandate that participants' assets remain in ConocoPhillips Funds and because Plaintiffs do not allege that the Plan's other investment options are not diversified, Plaintiffs fail to allege that the Plan was not diversified on its face. Plaintiffs have therefore failed to state a claim for relief based on a duty to diversify.

C. Prudence

Plaintiffs allege that Defendants breached their duty of prudence by permitting participants to retain their interests in the ConocoPhillips Funds in their accounts after the spinoff.[40] Plaintiffs allege that the ConocoPhillips stock was an excessively risky and volatile investment and thus an imprudent option.[41]

ERISA requires fiduciaries to discharge their duties "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). The Fifth Circuit has stated:

> In determining compliance with ERISA's prudent man standard, courts objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and

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[40] Complaint, Docket Entry No. 1, pp. 8-14, 32-76.

[41] Id.

> exercised independent judgment when making investment decisions. "[ERISA's] test of prudence ... is one of conduct, and not a test of the result of performance of the investment. The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed." Thus, the appropriate inquiry 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."

Laborers National, 173 F.3d at 317 (citations omitted).

"This 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.' " Singh v. RadioShack Corp, 882 F.3d 137, 144 (5th Cir. 2018) (per curium) (citing Dudenhoeffer, 134 S.Ct. at 2468.) The duty of prudence applies fully to employee-owned stock ownership plans, except that ESOPs need not be diversified. Dudenhoeffer, 134 S.Ct. at 2468. Dudenhoeffer establishes different standards for duty-of-prudence claims based on public information versus insider information. Id. at 2471–72. The Court held that "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." Id. at 2471. Unless special circumstances make the market unreliable, "ERISA fiduciaries, who likewise could reasonably see 'little hope of outperforming the market ... based solely on their analysis of publicly available information,' may, as a general matter, likewise prudently

rely on the market price." Id. Such "special circumstances" must "affect [ ] the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information.' " Id. at 2472.

Defendants argue that "Plaintiffs' Complaint cannot survive scrutiny under Dudenhoeffer and thus does not state a claim for breach of the duty of prudence."[42] Plaintiffs respond that Dudenhoeffer does not apply because unlike the shares of ConocoPhillips, Dudenhoeffer involved employer securities that "fall within ERISA's limited exemption from normal diversification considerations."[43] Plaintiffs argue that "[w]here, as here, that exemption does not apply, failure to properly diversify must be considered as part of a prudence analysis."[44] The court is not persuaded by Plaintiffs' argument because in Dudenhoeffer the Court stated that "the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries," with the limited exception that ESOP fiduciaries are "under no duty to diversify the ESOP's holdings." Dudenhoeffer, 134 S.Ct. at 2467.

Plaintiffs allege that "the Plan's highly concentrated holding of ConocoPhillips stock at the time of the spin-off, together with public information and ConocoPhillips' poor performance, were red-flags to Defendants that the ConocoPhillips stock was not a prudent investment for the Plan."[45] Plaintiffs' claim that Defendants breached the duty of prudence by holding the ConocoPhillips Funds is

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[42] Defendants' Motion to Dismiss, Docket Entry No. 15, p. 24.

[43] Plaintiffs' Response, Docket Entry No. 38, p. 27.

[44] Id.

[45] Id. at 28.

based on publicly available information such as the Vanguard Institutional Index Fund,[46] ConocoPhillips' 10–K,[47] the price of ConocoPhillips stock,[48] the price of oil,[49] website articles,[50] and other "publicly available information [that] showed the riskiness of ConocoPhillips stock."[51] In the absence of special circumstances, the claim is implausible. Dudenhoeffer, 134 S.Ct. at 2471; see also Singh, 882 F.3d at 146 (holding that because "the overall decline in the price of [defendant's] stock during the class period shows that the market accounted for [ ] negative [public] information ... Plaintiffs' public-information claims are implausible under Dudenhoeffer's general rule"). Plaintiffs have neither alleged in their Complaint nor argued in their Response that any "special circumstances" are present. Because Plaintiffs have not identified any plausible special circumstances undermining the market price as a measure of ConocoPhillips' value, Plaintiffs fail to state a claim for breach of the duty of prudence based on public information. See Singh, 882 F.3d at 147 (holding that the defendant's heavy debt load and bond-market indicators that the defendant would likely default do not qualify as special circumstances because "the stock market presumably incorporated that information into the price of [defendant's] stock.").

D. Failure to Engage in Adequate Process

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[46] Complaint, Docket Entry No. 1, p. 10, 40.

[47] Id. at 10, 43.

[48] Id. at 13-16, 57, 65,67-68.

[49] Id. at 14, 59-62.

[50] Id. at 15-17 63, 69, 74.

[51] Id. at 16, 69

Plaintiffs allege that "Defendants had a duty to follow a regular, appropriate systematic procedure to evaluate the ConocoPhillips Funds as investments in the Plan. They breached that duty and failed to conduct an appropriate investigation of continued investment in the ConocoPhillips Funds."[52] Plaintiffs also allege that "ConocoPhillips remained an investment option for the Plan's participants because Defendants did not follow an appropriate process in evaluating the prudence of the ConocoPhillips Funds."[53]

"[T]o plead plausibly a breach of the duty of prudence for failure to investigate, plaintiffs must allege facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56, 67 (2d Cir. 2016) (internal quotations and citations omitted).

> But when the alleged facts do not "directly address [ ] the process by which the Plan was managed," a claim alleging a breach of fiduciary duty may still survive a motion to dismiss if the court, based on circumstantial factual allegations, may reasonably "infer from what is alleged that the process was flawed." To survive a motion to dismiss, a plaintiff may "allege facts sufficient to raise a plausible inference that ... a superior alternative investment was readily apparent such that an adequate investigation would have uncovered that alternative."

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[52] Complaint, Docket Entry No. 1, p. 24, 102.

[53] Id. at 11, 45.

Main v. American Airlines Inc., 248 F.Supp.3d 786, 793 (N.D. Tex. 2017) (quoting Pension Benefits Guaranty Corp. ex rel. St. Vincent Catholic Medical Centers Retirement Plan v. Morgan Stanley Investment Management Inc., 712 F.3d 705, 716 (2d Cir. 2013) (quoting Braden v. Wal–Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009))). "For instance, the complaint may allege facts sufficient to raise a plausible inference that the investments at issue were so plainly risky at the relevant times that an adequate investigation would have revealed their imprudence[.]" Pension Benefits, 712 F.3d at 719.

Plaintiffs' Complaint contains only legal conclusions with no specific factual allegations about the process Defendants engaged in. Moreover, Plaintiffs fail to allege that an adequate investigation would have revealed anything other than the publicly available information allegedly establishing that the ConocoPhillips Funds were a risky investment option. Because Plaintiffs' allegations restate their claim for breach of the duty of prudence based on public information, Dudenhoeffer forecloses their claim. Therefore, Plaintiffs fail to state a claim for failure to engage in an adequate process for evaluating the prudence of continuing to hold the ConocoPhillips Funds.

E. Claims for Co–Fiduciary Liability

In addition to any liability that a fiduciary may have under any other provision of ERISA, 29 U.S.C. § 1105(a) provides that

> a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly

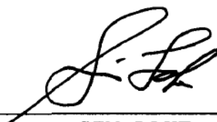
> undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Plaintiffs allege that the Committee and its individual members and Sam Farace are liable as co-fiduciaries for each other's breaches of their fiduciary duties.[54] Because the court has concluded that the allegations against all Defendants fail to state a claim for which relief may be granted, the court concludes that Plaintiffs have also failed to state claims against Defendants for co-fiduciary liability.

V. Conclusions and Order

For the reasons set forth above, Defendants The Investment Committee of The Phillips 66 Savings Plan and Sam Farace's Motion to Dismiss Plaintiffs' Class Action Complaint (Docket Entry No. 15) is **GRANTED.**

SIGNED at Houston, Texas, on this the 9th day of May, 2018.



[54] Complaint, Docket Entry No. 1, pp. 25-26, 109-116.

SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

JEFFERY SCHWEITZER, JONATHAN SAPP, RAUL RAMOS, and DONALD FOWLER, on behalf of the Phillips 66 Savings Plan and a class of all others similarly situated, Plaintiffs, v. THE INVESTMENT COMMITTEE OF THE PHILLIPS 66 SAVINGS PLAN, SAM FARACE, and JOHN DOES 1-10, Defendants.	CIVIL ACTION NO. H-17-3013 (Consolidated)

ZAM A TIRAM, on behalf of the Phillips 66 Savings Plan, himself, and a class consisting of similarly situated participants of the Plan, *Plaintiffs*, v. PHILLIPS 66 COMPANY, GREG C. GARLAND, PAULA A. JOHNSON,BRIAN R. WENZEL, JOHN D. ZUKLIC, PHILLIPS 66 SAVINGS PLAN COMMITTEE, INVESTMENT COMMITTEE, BENEFIT COMMITTEE, PLAN FINANCIAL ADMINISTRATOR, PLAN BENEFITS ADMINISTRATOR, GREGG. MAXWELL, KEVIN MITCHELL, JESSE A. STEPHAN, ALEX J. SHABET, and JOHN DOES 1-20, Defendants.	CIVIL ACTION NO. 4:l 7-cv-03740

AMENDED FINAL JUDGMENT

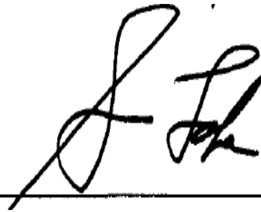
In accordance with the court's Memorandum Opinion and Order granting Defendants' Motion to Dismiss, this action is **DISMISSED WITH PREJUDICE**.

The dismissal applies to all plaintiffs in this consolidated action-including Plaintiffs Jeffery Schweitzer, Jonathan Sapp, Raul Ramos, Zam Atiram, and Donald Fowler.

Costs are taxed against the Plaintiffs.

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this the 15th day of May, 2018.



Sim Lake
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18-20379

JEFFERY SCHWEITZER; JONATHAN SAPP;
RAUL RAMOS; DONALD FOWLER,

Plaintiffs - Appellants

v.

THE INVESTMENT COMMITTEE OF THE
PHILLIPS 66 SAVINGS PLAN; SAM FARACE;
JOHN DOES 1-10, INCLUSIVE,

Defendants – Appellees

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

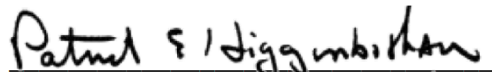
(Opinion May 22, 2020, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, SMITH, and HIGGINSON, Circuit Judges.
PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE