APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1212

CHRISTINA STEGEMANN,
Appellant,

and

JEFFREY QUATRONE,
on Behalf of Gannett Co., Inc. 401(k) Savings Plan
and all others similarly situated,
Plaintiff-Appellant,

v.

GANNETT COMPANY, INC.;
THE GANNETT BENEFIT PLANS COMMITTEE,
Defendants-Appellees,

and

JOHN AND JANE DOES 1-10,
Defendants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Anthony John Trenga, District Judge.
(1:18-cv-00325-AJT-JFA)

Argued: May 26, 2020
Decided: August 11, 2020

Before NIEMEYER, WYNN, and FLOYD,
Circuit Judges.

OPINION

Vacated and remanded by published opinion. Judge Wynn wrote the majority opinion, in which Judge Floyd joined. Judge Niemeyer wrote a dissenting opinion.

WYNN, Circuit Judge:

Plaintiffs-Appellants Christina Stegemann and Jeffrey Quatrone, participants in the Gannett Co., Inc. 401(k) Savings Plan (the "Plan"), brought this suit on behalf of themselves and other participants in the Plan against the Plan's sponsor, Defendant Gannett Company, Inc., and the Plan's management committee, Defendant Gannett Benefit Plans Committee (the "Committee"). Plaintiffs allege that Defendants breached their fiduciary duties of prudence and diversification under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*. *See* 29 U.S.C. § 1104(a)(1). Specifically, Plaintiffs contend that Defendants ignored an imprudent single-stock fund in the Plan for several years, resulting in millions of dollars in losses.

The district court dismissed Plaintiffs' complaint for failure to state a claim. The court concluded that Defendants could not have known that the single-stock fund was imprudent, nor were they obligated to diversify it absent any notice it was imprudent.

But to state a claim, a plaintiff need only "plausibly allege that a fiduciary breached [a duty], causing a loss

to the employee benefit plan." *Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan*, 960 F.3d 190, 195 (5th Cir. 2020). Put simply, Plaintiffs did just that—they set out facts describing how Defendants failed to monitor a fund, which led to a failure to recognize and remedy a defect, which then led to a loss to the Plan. Accordingly, we vacate the judgment of the district court and remand for further proceedings.

I.

A.

"ERISA, a 'comprehensive and reticulated statute,' governs employee benefit plans, including retirement plans." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 417 (4th Cir. 2007) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993)). "It is intended to 'promote the interests of employees and their beneficiaries in employee benefit plans.' " *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)).

Relevant to this appeal, ERISA draws on the common law of trusts and assigns plan fiduciaries "a number of detailed duties and responsibilities, which include the proper management, administration, and investment of plan assets." *Mertens*, 508 U.S. at 251, 113 S.Ct. 2063 (internal quotation marks and alterations omitted). Courts have often called these fiduciary duties the "highest known to the law." *Schweitzer*, 960 F.3d at 194 (quoting *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014)); *see also, e.g.*, *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) (same).

In broad terms, Plaintiffs here allege that Defendants are such fiduciaries[1] and that they breached their duties of prudence and diversification, both of which we describe in more detail later in this opinion. *See* 29 U.S.C. § 1104(a)(1).

B.

In June 2015, the publicly traded media company Gannett Co., Inc.—a different Gannett Co., Inc. than is the Defendant in this case—changed its name to TEGNA, Inc. (hereinafter either "Old Gannett" or "TEGNA"). Simultaneously, it spun off its publishing business into a newly created, independently traded company, which inherited the name Gannett Co., Inc.[2] This new, spun-off Gannett Co., Inc. *is* the selfsame Defendant in this case (hereinafter "New Gannett").

Before the spin-off, Old Gannett sponsored a 401(k) retirement plan for its employees. Under ERISA, this

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[1] An ERISA fiduciary is only "a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or] has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Plaintiffs allege that both the Gannett Benefit Plans Committee and the Gannett Company, Inc. are such fiduciaries for the purposes of this lawsuit. Although Defendants do not contest that the Committee is a plan fiduciary, Defendants argue that Plaintiffs have not properly alleged Gannett Company, Inc.'s fiduciary status. Because the district court did not rule on this question in the first instance, we assume without deciding that both Defendants are fiduciaries and direct the district court to address this issue on remand. *See* J.A. 51 n.2.

[2] A "spin-off" is "[a] corporate divestiture in which a division of a corporation becomes an independent company and stock of the new company is distributed to the corporation's shareholders." *Spin-Off*, *Black's Law Dictionary* (11th ed. 2019).

plan was a "defined contribution plan" or an "individual account plan"—these terms are synonymous. *See* 29 U.SC. § 1002(34). Such a plan is structured so that each employee-participant "has an individual account and benefits are based on the amounts contributed to that participant's account." *Schweitzer*, 960 F.3d at 193. "Plan participants decide how much to contribute to their accounts and how to allocate their assets among an array of investment options selected by [plan fiduciaries]." *Id.* This array of investment options is often called a plan's "menu." In addition to contributions from an employee-participant, individual accounts can also be funded via contributions from an employer, and exact arrangements vary. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 455-57 (2004).[3]

During the Old Gannett period, although participants were generally able to direct which items on the

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[3] For further context, in addition to defined contribution plans, ERISA provides for defined benefit plans. In a defined benefit plan, a fiduciary makes all investment and allocation decisions for plan assets (whereas a participant in a defined contribution plan may control allocations within the limited universe of the plan menu selected by the fiduciaries). *See Schweitzer*, 960 F.3d at 193 & n.1. Although the defined contribution scheme allocates some power to participants, a fiduciary's menu construction is still important because poor menu construction "leads to predictably worse outcomes for investors." Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 Yale L. J. 1476, 1507 (2015). A defined contribution plan's distribution of decision-making power can impact a fiduciary's liability for investments. *See* 29 U.S.C. § 1104(c)(1). Accordingly, it is important to note what kind of plan is at issue in any given case. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255-56, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008) (distinguishing defined contribution plans from defined benefit plans).

menu they would invest in, Old Gannett's contributions to employees' accounts were in the form of employer stock. Oral Argument at 2:30-3:00. Thus, immediately prior to the spin-off, there were employees set to transfer over to the spun-off company who had individual accounts that included investments in Old Gannett stock.

When Old Gannett effectuated the spin-off and became TEGNA, Old Gannett's then-existing plan became the operative plan for the employees of the spun-off New Gannett, including those employees who transferred from Old Gannett to New Gannett. Employees staying with TEGNA, and their liabilities and account balances, transferred to a new TEGNA 401(k) plan.

It goes without saying that, post-spin-off, New Gannett employees were not employees of TEGNA. Furthermore, there was no reason going forward for New Gannett to make contributions to its employees' accounts in the form of TEGNA stock. Although historically connected, TEGNA and New Gannett were now two different publicly traded companies. However, because Old Gannett had made Old Gannett stock contributions for employees who now worked for New Gannett, the New Gannett Plan had a significant investment in Old Gannett's successor, TEGNA.

ERISA plans are governed in accordance with certain documents and instruments. *See* 29 U.S.C. § 1104(a)(1)(D). In this case, during the spin-off process, the governing document for the Old Gannett plan that New Gannett inherited was restated and amended to provide for the new TEGNA stock. *See* Dist. Ct. ECF 22-1, Exhibit A (hereinafter "New Gannett Plan Document").

The amendments created a "TEGNA Stock Fund" on the Plan's investment menu to hold, exclusively, TEGNA stock—such a fund is commonly called a "single-stock fund." *See* New Gannett Plan Document §§ 1.29, 6.7. However, the fund was "frozen," meaning that it started with the TEGNA stock in the Plan at the time of the spin-off, but participants would not be able to increase investment in the fund thereafter, and would only be able to shift investments out of the fund and into other options on the Plan's menu. *Id.* §§ 6.7, Appendix C(r). In fewer words, money could only travel one way: out of the fund. The New Gannett Plan Document explained this arrangement as being due to "the historical relationship between [New Gannett] and TEGNA." *Id.* § 6.7.

Roughly contemporaneous with the amendments that created and froze the TEGNA Stock Fund, New Gannett and TEGNA entered into an "Employee Matters Agreement." J.A. 77.[4] While the New Gannett Plan Document set out that the TEGNA Stock Fund would be frozen, the Employee Matters Agreement allegedly stated that "all outstanding investments in [the TEGNA Stock Fund] shall be liquidated and reinvested in other investment funds offered [in the Plan] on such dates and in accordance with such procedures as are determined by the administrator of the [Plan]." J.A. 80.

Although the Employee Matters Agreement was not itself a governing plan document, the New Gannett Plan Document explicitly provided for the Employee Matters Agreement: "In connection with the Spin-off, [New Gannett] will enter into that certain Employee Matters Agreement with [TEGNA]." New Gannett

[4] Citations to "J.A. __" refer to the Joint Appendix filed by the parties in this appeal.

Plan Document at 1. The New Gannett Plan Document further stated that that "[t]he Employee Matters Agreement may be used as an aid in interpreting the terms of the [spin-off] transitions described above." *Id.*

At the time of the spin-off in June 2015, the New Gannett Plan allegedly "held $269 million invested in TEGNA common stock, representing more than 21.7% of the Plan's total assets." J.A. 82. At the end of 2015, the Plan still held $178 million in TEGNA common stock (the price of which had fallen 19.3%, accounting for some of the decline). Then at the end of 2016, the Plan held over $115 million in TEGNA common stock. During that year, the share price had decreased a further 16%. Meanwhile, for two years after the spin-off, Defendants maintained the frozen holding pattern for the TEGNA Stock Fund before deciding in June 2017 to liquidate it over a twelve-month period beginning in July 2017. Nevertheless, as of August 2018 (the date of Plaintiff's proposed Amended Complaint), the TEGNA Stock Fund had still not been fully liquidated.

Plaintiffs allege that between the time of the spin-off and the decision to liquidate the TEGNA Stock Fund, Defendant Gannett Benefit Plans Committee repeatedly received risk warnings related to holding large quantities of TEGNA stock. As early as August 2015, one member of the Committee received a letter from an investment firm alerting him that "the Plan had a 'significant holding' in TEGNA stock that was 'problematic.'" J.A. 82. And in 2015 and 2016 financial statements, auditors for the Plan reported that the TEGNA and New Gannett holdings "expose[d] the Plan to concentration risk." J.A. 85, 93. In mid-2016, a Committee member prepared a draft presentation and sent it to another Committee member, as well as New

Gannett's CFO and General Counsel; this presentation recommended "evaluat[ing] a sunsetting process for eliminating the TEGNA Company Stock Fund." J.A. 85. For the rest of 2016, however, although the Committee reviewed other investment decisions with respect to the Plan's mutual funds, "the Committee did not consider liquidating the TEGNA Stock Fund." J.A. 85.

According to Plaintiffs, the problem with the TEGNA Stock Fund was that, as a single-stock fund, it was inherently unduly risky because it put all the eggs in one basket, thus violating the diversification principle of sound investment. This Court has previously noted the dangers of single-stock funds. *See, e.g.*, *DiFelice*, 497 F.3d at 424 ("[P]lacing retirement funds in *any* single-stock fund carries significant risk . . . ."). Plaintiffs further contend that maintaining the TEGNA Stock Fund was doubly problematic because the Plan also had another single-stock fund devoted to New Gannett stock, and the performances of the TEGNA stock and the New Gannett stock were correlated, thus exacerbating the concentration issues. Despite the known issues with single-stock funds, however, the Committee allegedly accepted qualitatively less thorough reports from its investment consultant on the TEGNA Stock Fund, as compared to the reports provided by the same consultant on the other funds on the Plan's menu. Ultimately, the Committee took no steps to address liquidating the TEGNA Stock Fund until April 2017, when the Committee delegated investigating a sunset process to a newly formed subcommittee. On July 31, 2017, the Committee notified the Plan's participants that the TEGNA Stock Fund would be liquidated within a 12-month sunset period.

During the Committee's period of inaction, TEGNA stock prices fell. Plaintiffs calculate that the failure to promptly liquidate TEGNA stocks during the first half of 2016 cost the Plan between $43 million and $57 million, depending on how the funds might have been otherwise invested.

In March 2018, named plaintiff Jeffrey Quatrone filed a putative class action suit on behalf of the Plan against Defendants Gannett Co., Inc. and the Gannett Benefit Plans Committee.[5] Quatrone faulted Defendants for failing to respond to the warnings about the TEGNA Stock Fund. In Quatrone's view, Defendants ought to have been on notice the TEGNA Stock Fund should be divested due to the Employee Matters Agreement and should have discussed divestment as early as the spin-off. At minimum, though, Quatrone alleged that Defendants ought to have assessed whether the fund remained a prudent investment prior to April 2017, and that if Defendants had taken up the matter of the TEGNA Stock Fund, they would have recognized it was an imprudent, undiversified fund and would have been obligated to take immediate steps to sunset it. More precisely, the operative Complaint alleges that the Plan's fiduciaries should have made the liquidation decision and informed participants of liquidation by January 1, 2016, and the liquidation should have been completed six months later. This series of failures allegedly constituted

[5] Plaintiff Quatrone's Complaint included John/Jane Doe Defendants representing individual members of the Gannett Benefit Plans Committee and any other possible individual fiduciaries of the plan, but Plaintiffs have since dropped their claims against the John/Jane Doe Defendants.

breaches of Defendants' fiduciary duties of prudence and diversification.[6]

The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6). The district court's two key holdings were that (1) Plaintiffs' duty-of-prudence claims were barred under *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 134 S. Ct. 2459, 2471, 189 L.Ed.2d 457 (2014), which raised the bar for pleading a breach of the duty of prudence related to the retention of publicly traded stock by requiring a plaintiff to allege "special circumstances" related to mistakes in market valuation not alleged here, and (2) the duty to diversify requires diversity among the full set of funds offered in the menu of plan offerings but does not compel every individual fund in a plan to be diversified.

Plaintiffs sought leave to amend the complaint. The proposed amendments added allegations based on some discovery and sought to substitute named Plaintiffs but did not alter the fundamental claims. The district court denied amendment as futile because the amended complaint "fail[ed] to address the deficiencies of the original complaint." J.A. 71. Specifically, the district court determined that the amended complaint still did not allege "special circumstances" and its diversification theory was still that the fiduciaries should have compelled participants to have diverse portfolios by forcing them out of an undiversified fund (i.e., divesting the TEGNA stock). J.A. 70-71.

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[6] The complaint also alleged that Defendants breached the duty of loyalty, 29 U.S.C. § 1104(a)(1)(A), but the district court did not address whether the complaint plausibly pleaded such a breach, and Plaintiffs have not raised the duty of loyalty on appeal.

Accordingly, on appeal we consider whether and how a participant in a defined contribution plan can allege a breach of the ERISA fiduciary duties of either prudence or diversification on the basis of a plan fiduciary's non-divestment of an allegedly imprudent frozen single-stock fund.

II.

Where a district court denies a motion for leave to amend a complaint on grounds of futility, this Court employs the same standard that would apply in a review of a motion to dismiss. *United States ex rel. Ahumada v. NISH*, 756 F.3d 268, 274 (4th Cir. 2014). Therefore, this Court reviews de novo the district court's legal conclusion that the complaint failed to state a claim on which relief could be granted. *Id.* A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

III.

To state a claim for a breach of an ERISA fiduciary duty, "a plaintiff must plausibly allege that a fiduciary breached [a duty], causing a loss to the employee benefit plan." *Schweitzer*, 960 F.3d at 195; *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) ("[A] plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan." (citing *Pegram v. Herdrich*, 530 U.S. 211, 225-26, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000))).

Here, Plaintiffs' claims turn on alleged breaches of the duty of prudence, 29 U.S.C. § 1104(a)(1)(B), and the duty to diversify, *id.* § 1104(a)(1)(C). The duty of

prudence requires a fiduciary to discharge their duties with respect to the plan "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." *Id.* § 1104(a)(1)(B). This means that a fiduciary must "give[ ] appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved." 29 C.F.R. § 2550.404a-1(b)(1)(i). 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." 29 U.S.C. § 1104(a)(1)(C).

Of those two duties, Plaintiffs focus on the duty of prudence because, although ERISA has a statutory duty to diversify in § 1104(a)(1)(C), the § 1104(a)(1)(B) duty of prudence has an included duty to diversify as well.[7] *See Armstrong v. LaSalle Bank Nat'l Ass'n*, 446

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[7] Between § 1104(a)(1)(B) and § 1104(a)(1)(C), ERISA has a somewhat circular structure. Prudence includes diversification, and diversification references prudence. Accordingly, while classifying a claim that an investment decision was imprudent for want of diversification as either a prudence claim or a diversification claim is analytically useful, each duty implicates the other. Although the dissent argues our analysis inappropriately merges these duties, *post* at 484-85, other courts have acknowledged that the duties overlap. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1278 (11th Cir. 2012) ("[T]he duty of prudence the statute imposes requires diversification of investments to lower risk.") *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409, 134 S. Ct. 2459, 189 L.Ed.2d 457); *Peabody v. Davis*, 636 F.3d 368, 374 (7th Cir. 2011) (discussing judicial efforts to "reconcile[ ]" the two duties when prudence applies but diversification, by statute, does not); *Steinman v. Hicks*, 352 F.3d 1101, 1106 (7th Cir. 2003)

F.3d 728, 732 (7th Cir. 2006) ("The duty to diversify is an essential element of the ordinary trustee's duty of prudence . . . ."). Relevant to this case, the duty of prudence also includes a duty to monitor investments and remove imprudent investments. *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. 1823, 1828, 191 L.Ed.2d 795 (2015).

Plaintiffs' claims are simple: the TEGNA Stock Fund was an imprudent investment, Defendants failed to monitor the TEGNA Stock Fund, and their failure to monitor the imprudent investment led to a failure to remove it, thereby causing a loss to the Plan. However, this case is not simple. Defendants argue that *Dudenhoeffer* requires a plaintiff to additionally plead "special circumstances" in order to state a claim that an investment was imprudent for want of diversification. *See* 134 S. Ct. at 2471. Defendants also contend that, because the Plan was of the defined contribution type, individual participants could choose how to allocate their own funds, thereby absolving fiduciaries of any responsibility for not divesting imprudent funds that are frozen to new investments. Addressing a case with near-identical facts and claims earlier this year, the Fifth Circuit rejected the first argument (*Dudenhoeffer*), but accepted the second argument (participant-choice). *Schweitzer*, 960 F.3d at 197-99. We agree with the Fifth Circuit as to *Dudenhoeffer* but disagree as to the effect of participant choice on a fiduciary's duties with respect to a defined contribution plan.

Accordingly, we conclude that Plaintiffs have stated a claim, and we reject Defendants' arguments that

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(Posner, J.) (noting that the duty of prudence can become a duty to diversify and bring diversification "in . . . by the back door," and collecting cases).

various considerations apply to bar Plaintiffs' claim at the motion to dismiss stage of litigation.

A.

Our analysis begins with the duty of prudence. ERISA's duty of prudence draws from the common law of trusts and has several sub-duties. Relevant to this case are the included duties of investigation, monitoring, and diversification.

We start with the duty to investigate. "Although not set out verbatim in the statute, a generally recognized duty of a [p]lan fiduciary under [§ 1104(a)(1)(B)] includes that of investigating and reviewing investment options for an ERISA plan's assets." *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 216 (4th Cir. 2011). To enforce this duty, "the court focuses not only on the merits of [a] transaction, but also on the thoroughness of the investigation into the merits of [that] transaction." *DiFelice*, 497 F.3d at 418 (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)). Put another way, where a plaintiff alleges an imprudent investment decision, "courts measure [the] 'prudence' requirement . . . [by] focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996); *see also id.* (collecting cases).

We next turn to the duty to monitor, which is an extension of the duty to investigate. Once fiduciaries have made the initial investigation and added an investment to a plan, there is a "continuing duty to monitor" that investment. *Tibble*, 135 S. Ct. at 1828; *see also DiFelice*, 497 F.3d at 423. If monitoring reveals that the investment is imprudent, a fiduciary must

remove the investment. *Tibble*, 135 S. Ct. at 1828. What counts as an imprudent investment that must be removed depends on the circumstances. In *Tibble*, the fiduciaries offered high-fee, retail-class mutual funds on a defined contribution plan menu when identical lower-fee, institutional-class mutual funds were available. *Id.* at 1826. Because the retail-class funds were more expensive to participants, the participants alleged that they were imprudent. *Id.* In this case, Plaintiffs allege that the TEGNA Stock Fund was imprudent because it was a single-stock fund with high concentration risk. This brings us to the duty to diversify.

Much ink has been spilled on the prudence of investing in single-stock funds such as the TEGNA Stock Fund. Prudence entails appropriate caution, but *all* investments involve some degree of risk. Restatement (Third) of Trusts § 90 cmt. e(1). In a "diversified" portfolio, that is, one which contains a variety of investments, "the risks of the various components of such a portfolio tend to cancel out; that is the meaning and objective of diversification." *Summers v. State St. Bank & Tr. Co.*, 453 F.3d 404, 409 (7th Cir. 2006). Accordingly, ERISA fiduciaries "have a duty of diversification as part of their overall duty of prudence." *Id.* Because single-stock funds are, by definition, not diversified, this Court has observed that they "would seem generally imprudent for ERISA purposes." *DiFelice*, 497 F.3d at 424 (emphasis omitted). Indeed, diversification is so important that, in addition to the duty of diversification imposed by the duty of prudence, ERISA also codifies a freestanding duty of diversification, 29 U.S.C. § 1104(a)(1)(C), addressed below in Section III.B.

Because single-stock funds are often disfavored, we pause to address the origin of the TEGNA Stock Fund,

which relates back to pre-spin-off Old Gannett stock. Despite the risks, Congress has sanctioned one particular kind of single-stock investment, the Employee Stock Ownership Plan ("ESOP"). *Dudenhoeffer*, 134 S. Ct. at 2465-66. ESOPs exist to primarily invest in employer stock and are permissible because ERISA provides that acquiring or holding employer stock does not violate a fiduciary's duties of diversification or prudence (to the extent prudence requires diversification). 29 U.S.C. § 1104(a)(2). As employer stock, Old Gannett stock in the Old Gannett plan pre-spin-off would have been subject to less scrutiny than the stock of another company.

But post-spin-off is a different situation. We are aware of only one court of appeals that has addressed whether, post-spin-off, the TEGNA stock in the New Gannett Plan might also be employer stock and exempt from prudence and diversification requirements—and that court held such stock is not employer stock post-spin-off. *Schweitzer*, 960 F.3d at 195. Because of that persuasive authority, because the New Gannett Plan Document stated that "stock of TEGNA Inc. will not constitute Employer Stock" after the spin-off, and because Defendants have not argued the TEGNA stock qualified for employer stock treatment, we assume that it did not. New Gannett Plan Document § 1.22. Accordingly, Plaintiffs contend that Defendants' duty to monitor and remove the TEGNA Stock Fund was triggered at the time of the spin-off. *Cf.* Restatement (Third) of Trusts § 92 ("The trustee has a duty, within a reasonable time after the creation of the trust, to review the contents of the trust estate and to make and implement decisions concerning

the retention and disposition of original investments . . . .").[8]

Following the foregoing principles, Plaintiffs allege that Defendants breached their duty of prudence because they did not monitor and remove the allegedly imprudent TEGNA Stock Fund. Plaintiffs' claims of failure to monitor stem from the allegations that two years elapsed where Defendants did not address the TEGNA Stock Fund, even though: (1) Defendants could have been on notice that the TEGNA Stock Fund was problematic because of the Employee Matters Agreement that called for liquidation; (2) Defendants received risk warnings from auditors; and (3) the TEGNA stock came into the plan under unique circumstances. Plaintiffs' allegations that the fund was imprudent are based on its non-diversification (a problem which the Plan's other single-stock fund, which held New Gannett stock, exacerbated). Plaintiffs claim that had the Defendants monitored and removed the imprudent investment, the Plan and its participants would be better off now to the tune of tens of millions of dollars. We find these allegations sufficient to state a claim for a breach of the duty of prudence.

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[8] As to what a "reasonable time" would be in this case, the Restatement explains that "[n]o positive rule can be stated with respect to what constitutes a reasonable time." Restatement (Third) of Trusts § 92 cmt. b. Prudent timing of the disposition of improper inception assets depends on many factors. *Id.* Here, Plaintiffs have alleged nearly two years elapsed after the spin-off before the Committee created a subcommittee to investigate sunsetting the TEGNA Stock Fund. A two-year delay is plausibly unreasonable, especially given that the single-stock TEGNA Stock Fund did not become any more or less diversified in that time.

Our analysis, however, cannot end there. Defendants raise several unsuccessful arguments as to why the facts of this case call for the application of different rules than the ones discussed above. We address each argument in turn.

B.

Attacking the legal foundation of Plaintiffs' claim, Defendants contend that in a defined contribution plan a fiduciary is not obligated to ensure individual funds are diversified so long as the plan's menu allows participants to choose between a mix of options; diversification must be judged at the plan level rather than the fund level. In other words, regardless of the thoroughness of monitoring, it was not inappropriate to have the TEGNA Stock Fund in the Plan. Binding precedent in this Circuit forecloses this argument, which turns on the false premise that the § 1104(1)(C) duty to diversify can eclipse the § 1104(a)(1)(B) duty of prudence.

The leading case is *DiFelice*, in which this Court considered a plan with a menu of funds and held that "*each* available [f]und considered on its own" must be prudent. *DiFelice*, 497 F.3d at 423 (emphasis in original). This holding applies regardless of whether the menu contains "other funds, which individuals may *or may not* elect to combine with a [single-stock] fund . . . [to] create a prudent portfolio." *Id.* If it were otherwise, "[a]ny participant-driven 401(k) plan . . . would be prudent . . . so long as a fiduciary could argue that a participant could, and should, have further diversified his risk," but that result is "perverse." *Id.* at 424.

From *DiFelice*, it follows that each available fund on a menu must be prudently diversified. As discussed above, diversification is a component of prudence. *See*

Armstrong, 446 F.3d at 732; *see also Summers*, 453 F.3d at 406 (calling the duty to diversify an "included" duty in the duty of prudence). Accordingly, if the duty of prudence applies, then so does the duty of prudence's included duty of diversification. After all, the point of the duty to diversify is not diversification for diversification's sake, but risk management.[9]

The text of ERISA compels this conclusion as well. Regarding the abrogation of fiduciary duties with respect to employer stock, ERISA states, "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) is not violated by acquisition or holding of . . . qualifying

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[9] The dissent objects that our opinion creates a per se rule against single-stock, non-employer funds. *See post* at 488. In the context of the case before us, the dissent's objection is premature. We are at the motion to dismiss stage, where we take allegations as true and hold claims to a plausibility standard. The requirement that a fiduciary prudently diversify a fund means that the fiduciary must undertake an appropriate investigation and implement whatever risk management steps, e.g., diversification, that the investigation reveals to be prudent. We note that this Court has previously recognized that "an investment . . . , made *upon appropriate consideration of the surrounding facts and circumstances*, should not be deemed to be imprudent merely because the investment, standing alone, would have . . . a relatively high degree of risk." *Tatum*, 761 F.3d at 367 (quoting Investment of Plan Assets under the "Prudence" Rule, 44 Fed.Reg. 37,221, 37,224 (June 26, 1979)) (emphasis in *Tatum*). Here, we have taken as true—because of the allegations, not because of a per se rule—that there was a single-stock fund with a relatively high degree of risk and a failure to consider the surrounding facts and circumstances. Accordingly, we do not address whether the fiduciaries would ultimately be liable if they later prove either that they did undertake a thorough investigation, or that a hypothetical prudent fiduciary would have retained the TEGNA Stock Fund in its undiversified form had such a hypothetical prudent fiduciary investigated.

employer securities." 29 U.S.C. § 1104(a)(2). This language explicitly indicates that "the prudence requirement" normally "requires diversification." *Id.*

Nevertheless, Defendants argue that *DiFelice* addressed prudence only and cannot be extended to diversification. Defendants argue that "the duty of diversification, in contrast [to the duty of prudence's analysis of each fund individually], involves the mix of funds available [in a plan menu]." Appellees' Br. at 16 (citing *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (unpublished) (holding that allegations that specific funds in a plan were undiversified were insufficient to state a claim absent allegations that the plan was undiversified as a whole)). The district court agreed with Defendants.

This argument relies on separating the duty of prudence codified at § 1104(a)(1)(B) from the duty of diversification codified at § 1104(a)(1)(C), and then substituting the requirements of § 1104(a)(1)(C) for those of § 1104(a)(1)(B). However, given that trust law, ERISA case law, and the text of ERISA all understand diversification as an element of prudence, we cannot accept this argument. *See* Restatement (Third) of Trusts § 90 cmt. e(1); *Armstrong*, 446 F.3d at 732; 29 U.S.C. § 1104(a)(2).

This is not to say that § 1104(a)(1)(B) and § 1104(a)(1)(C) are identical duties. Nor is it to say that Plaintiffs here failed to state a claim that the Defendants breached their § 1104(a)(1)(C) duty of diversification.

First addressing the distinction between § 1104(a)(1)(B) and § 1104(a)(1)(C), we examine the Second Circuit case that Defendants cite, *Young v. General Motors*. This unpublished case addressed the § 1104(a)(1)(C) duty of diversification as applied to a

defined contribution plan, and held that the duty "contemplates a failure to diversify claim when a plan is undiversified as a whole," and that allegations that "individual funds within the plan were undiversified" were insufficient to state a claim. *Young*, 325 F. App'x at 33.

Returning to ERISA's employer stock rule, the text of the statute exempts employer stock from both the § 1104(a)(1)(C) duty of diversification *and* the § 1104(a)(1)(B) duty of prudence to the extent it requires diversification. Accordingly, even assuming the Second Circuit was correct that § 1104(a)(1)(C) does not extend down to the fund level, and that we should instead seek diversity across the menu of funds in the plan, we may distinguish that case as not addressing § 1104(a)(1)(B)'s requirement of prudence. *Cf. Tatum*, 761 F.3d at 380 ("Although ERISA does not in so many words require every fund in an investment plan to be fully diversified, each fund, when considered individually, must be prudent.") (Wilkinson, J., dissenting).

That said, Plaintiffs *do* argue that there was a failure to diversify at a plan level, not just at a fund level. Plaintiffs contend that because the New Gannett Plan had a New Gannett ESOP on its menu as well as the TEGNA Stock Fund, and because New Gannett and TEGNA are in the same sector and tend to rise and fall together, the interplay between the two single-stock funds caused the Plan overall to have a diversification problem. Plaintiffs' claim thus passes muster even under *Young*. It also falls within our precedents. We have previously recognized that the prudence of investing in one single-stock fund can be impacted by the trials and tribulations of another single-stock fund where the funds each hold stock in formerly related companies, and that such a situation

implicates the duty of diversification under § 1104(a)(1)(C). *See Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 566-67 (4th Cir. 2017). Accordingly, Plaintiffs' correlation theory plausibly states a claim for a breach of the duty of diversification under § 1104(a)(1)(C).[10]

C.

Having established that a single fund on a menu, such as the TEGNA Stock Fund, can be scrutinized for imprudence for want of diversification, we next turn to whether a fiduciary is obligated to divest a non-diversified fund. Defendants contend that since the TEGNA Stock Fund was frozen to new investments and participants were able to leave the fund on their own initiative, no further action was required. This line of thinking supposes a per se rule that a fiduciary

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[10] We express no opinion on other situations where, for instance, there are single-stock funds for companies that have never been related. Furthermore, the dissent notes, correctly, that it is difficult to blame alleged overconcentration in a fund or funds in a defined contribution plan menu on a fiduciary because of potential intervening participant choice. *Post* at 489 ("[T]hat the Plan may have been concentrated in . . . one sector does not reflect a breach of any duty . . . . [I]t merely reflects individual Plan participants' decisions as to how to allocate their own investments."). Accordingly, we emphasize that the § 1104(a)(1)(C) diversification claim here turns on fund selection. This is not to say that a fiduciary's fund selection will never need to account for whether participants have overconcentrated themselves in one fund. But it is to agree with the dissent that investment volume alone is not the applicable test for a breach of duty here. That said, the dissent's assertion that "the cause of any overconcentration in TEGNA stock was individual Plan participants' decisions to retain their assets in the TEGNA Stock Fund," *post* at 487, is a double-edged sword: the fiduciaries also had the power to divest but did not exercise it; but unlike the participants, the fiduciaries were under an obligation to act prudently.

will *never* be required to divest a fund in a defined contribution plan, although that may be an available option.

Again, binding precedent in this Circuit forecloses this argument. While merely freezing the fund may be prudent in some cases, in other cases prudence may compel divestment on a reasonable timeline and freezing the fund to new investments will not be enough. *Cf.* Restatement (Third) of Trusts § 92 cmt. d ("[An] authorization to retain [an investment that was part of the trust property at the time of the creation of the trust] . . . ordinarily does not justify the trustee in retaining such assets if, under the circumstances, retention would be imprudent.").

This Court previously addressed the divestment of a frozen fund in a defined contribution plan in *Tatum v. RJR Pension Investment Committee*—in fact, this Court addressed *Tatum* three times. *See Tatum v. R.J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004) ("*Tatum I*"); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014) ("*Tatum II*"); *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553 (4th Cir. 2017) ("*Tatum III*").

The facts of *Tatum* were the inverse of those here. In *Tatum*, there was a frozen single-stock fund created by a spin-off, and the *Tatum* plaintiffs sued because plan fiduciaries *did* divest it. *See Tatum II*, 761 F.3d at 351-55. After a bench trial, the district court found that although the *Tatum* fiduciaries had breached their duty of procedural prudence by not undertaking a thorough investigation prior to divesting the fund six months after the spin-off, they were not liable because a prudent fiduciary *could have* made the same decision to divest after performing a proper investigation. *Id.* at 351. This Court remanded for the district court to instead apply a *would have* standard. *Id.* at 368-69.

The district court subsequently determined that a prudent fiduciary *would have* divested the stock, and we affirmed. *Tatum III*, 855 F.3d at 556.

Tatum demonstrates that fiduciaries of defined contribution plans have the power to force divestment and that, in some circumstances, forcing divestment is the objectively prudent thing to do even if the fund is frozen. *See Tatum II*, 761 F.3d at 363 (discussing "objective prudence"). Accordingly, in this case, where Plaintiffs allege Defendants did not take up the matter of retaining a single-stock fund in the Plan for nearly two years after it lost its employer stock exemption, it is eminently plausible that a hypothetical prudent fiduciary who did investigate the fund in that time would have begun the divestment process earlier. Indeed, the dissenting opinion in *Tatum II* observed that, "[h]ad the plan fiduciaries failed to diversify and the . . . stocks had continued to decline, the fiduciaries would have been sued for *keeping* the stocks." *Id.* at 381 (Wilkinson, J., dissenting); *see also Tibble*, 135 S. Ct. at 1828-29 (discussing duty to "monitor investments and *remove* imprudent ones" in a defined contribution plan (emphasis added)); *DiFelice*, 497 F.3d at 420 (explaining the relevant inquiry "when plaintiffs allege . . . a fiduciary's *failure* to engage in a transaction, such as *removal* . . . of a company fund" (second emphasis added)).

We further note that if we were to hold that there can never be liability for failure to force divestment of a frozen fund in a defined contribution plan, there would be a gross liability asymmetry in this Circuit due to *Tatum*. The finding in *Tatum* that a prudent fiduciary *would have* forced divestment sets the divestment decision on a high pedestal compared to any alternative. Effectively, the *Tatum* defendants were ultimately not liable because they proved they

did the objectively right thing. However, the litigation dragged on for nearly fifteen years. If freezing the fund and walking away means a plaintiff can never state a claim and that fiduciaries always prevail on a motion to dismiss, no reasonable fiduciary would ever do as the fiduciaries in *Tatum* did—that is, no fiduciary in the *Tatum* situation will ever do the right thing. Plan fiduciaries should be guided by prudence, not the calculus of litigation costs. Accordingly, a bright line rule that a fiduciary of a defined contribution plan will never be obligated to divest an imprudent but frozen fund is unwise.

D.

Defendants also argue that where participants in a defined contribution plan hold legacy previous-employer stock in a frozen single-stock fund, those participants should have the freedom to stay invested in the fund and thus accept a higher risk to potentially reap a higher reward.[11] In *Schweitzer*, the Fifth Circuit adopted a variation of this position, positing that "[w]ith a rising market, [participants] chose to retain the [legacy single-stock fund] for over two years, balancing the risk of a want of portfolio diversity against the rising values of [the legacy stock]." 960 F.3d at 199. The Fifth Circuit concluded that where a fund is frozen, participants may divest if they choose to, and the plan distributes statutorily mandated warnings that portfolios are better if diversified, a

[11] Defendants also contend that "everyone agrees [the TEGNA stock investment] was prudent when the investment was initially made." Appellees' Br. at 18. Because the TEGNA stock was the legacy of an employer stock investment, and because the complaint from which we draw the facts on a motion to dismiss does not make an allegation about the initial prudence of the TEGNA investment, we cannot assume that "everyone agrees" the investment was prudent in the first instance.

plaintiff cannot state a claim that alleges a fiduciary should have forced divestment. *Id.*

Empirical evidence and general investment principles undermine these arguments, which, at bottom, are contrary to the statutory structure of ERISA because the claim that intervening participant choice should relieve a fiduciary of liability for a breach is an affirmative defense that courts do not consider at the motion to dismiss stage. *Pfeil v. State St. Bank & Tr. Co.*, 671 F.3d 585, 598 (6th Cir. 2012), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409, 134 S. Ct. 2459, 189 L.Ed.2d 457.

i.

We begin with the contention that participants in a plan will balance the concentration risk of a single-stock fund against the potential for a high return. Perhaps participants in the New Gannett Plan did this, but perhaps they did not—and it is inappropriate to assume they did at the motion to dismiss stage of litigation.

First, that participants affirmatively balance risk and choose to retain funds under such circumstances is a dubious assertion. *See Tatum II*, 761 F.3d at 380 ("[O]nce plan participants allocate their assets among various funds, there is a substantial risk that inertia will keep them from carefully monitoring and reallocating their retirement savings to take into account changing risks.") (Wilkinson, J., dissenting). Empirical evidence shows that employees in defined contribution plans "often follow the path of least resistance" and "[a]lmost always, the easiest thing to do is nothing whatsoever." James J. Choi, David Laibson, Brigitte C. Madrian & Andrew Metrick, *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*,

16 Tax Pol'y & Econ. 67, 70 (2002). Accordingly, while some participants may have decided they wished to stay invested in the TEGNA Stock Fund, it is a stretch to assume that they did.

Furthermore, returning to why diversification is desirable, the essence of diversification is that a diversified portfolio is superior to a non-diversified portfolio because a diversified portfolio can achieve the same expected return as an un-diversified portfolio, but the diversified portfolio will be less risky. *See* Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 Iowa L. Rev. 1151, 1166 (1992). Diversification minimizes so-called "uncompensated risk." The "uncompensated" moniker highlights that such risk is not "compensated" by a better expected return. *See* Restatement (Third) of Trusts, § 90 cmt. e(1) ("Because market pricing cannot be expected to recognize and reward a particular investor's failure to diversify, a trustee's acceptance of this type of risk cannot, without more, be justified on grounds of enhancing expected return."); *see also* Unif. Prudent Inv'r Act, cmt. to § 3 (Unif. Law Comm'n 1994) (explaining that diversification minimizes uncompensated risk). Thus, it is not clear what "potentially . . . higher reward" Defendants contend participants could choose to pursue in exchange for bearing the higher risk of the TEGNA Stock Fund. Appellees' Br. at 18.

Of course, participants in a plan may make idiosyncratic decisions, and the ability of a participant to calibrate their retirement investing based on their individual situation is one of the virtues of the defined contribution plan structure. *See* James Kwak, *Improving Retirement Savings Options for Employees*, 15 U. Pa. J. Bus. L. 483, 522 (2013). Accordingly, while some plan participants in this case may have decided for themselves to stay invested in the TEGNA Stock

Fund, we should not prospectively assume this occurred.

ii.

We next turn to the appropriate way to account for participant choice (if there was such choice) when a fiduciary is sued for a breach of a duty that caused a loss to the plan, but some of the loss may have been caused by participants. In the words of the Fifth Circuit, plan participants "cannot enjoy their autonomy and [then] blame the [f]iduciaries for declining to second guess that judgment." *Schweitzer*, 960 F.3d at 199. The Fifth Circuit is generally correct that fiduciaries should not be liable for participant autonomy, but we disagree with that court on whether a defendant may invoke that autonomy in a motion to dismiss.

In *Tatum II*, we noted that the "legislative history and federal regulations clarify that the diversification and prudence duties do not prohibit a plan trustee from holding single-stock investments as an option in a plan that includes a portfolio of diversified funds." 761 F.3d at 356. In a footnote, we then quoted the legislative history for 29 U.S.C. § 1104(c) and cited the corresponding regulation from the Department of Labor, 29 C.F.R. § 2550.404c-1. Section § 1104(c), more commonly known by its ERISA number, § 404(c), is a safe harbor provision that shields fiduciaries of defined contribution plans from liability where a loss "results from [a] participant's . . . exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii). Accordingly, "if the participant instructs the plan trustee to invest the full balance of his account in, e.g., a single stock, the trustee is not to be liable for any loss because . . . the investment does not meet the prudent man standards." *Tatum II*, 761 F.3d at 356 n.5 (quoting H.R. Rep. No. 93-1280, at 305 (1974) (Conf. Rep.),

reprinted in 1974 U.S.C.C.A.N. 5038, 5085-86). In order to qualify for this safe harbor, however, a plan must be more than simply a generic defined contribution plan. Instead, the plan must satisfy the intricate requirements of 29 C.F.R. § 2550.404c-1.

Counting over twenty-five requirements that a fiduciary must meet before invoking the § 404(c) safe harbor, the Sixth Circuit held this section "is an affirmative defense that is not appropriate for consideration on a motion to dismiss when, as here, the plaintiffs did not raise it in the complaint." *Pfeil*, 671 F.3d at 598. Other courts of appeals have held similarly. *See Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009); *Allison v. Bank One-Denver*, 289 F.3d 1223, 1238 (10th Cir. 2002); *In re Unisys*, 74 F.3d at 446. Because the § 404(c) affirmative defense is custom-tailored to the issue of participant choice in a defined contribution plan, we conclude that the fiduciary of a defined contribution plan should not have the benefit of safe harbor on account of participant choice without proving the § 404(c) defense first. In other words, as-yet-unproven participant choice does not abrogate a fiduciary's duties such that a plaintiff fails to state a claim where the plaintiff attacks the prudence of an option on a plan's menu.[12]

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[12] *DiFelice* supports our conclusion. In that case, we held that even where a plan comports with § 404(c), "a fiduciary cannot free himself from his duty to act as a prudent man simply by arguing that other funds, which individuals may *or may not* elect to combine with a company stock fund, could theoretically, in combination, create a prudent portfolio." 497 F.3d at 423. Accordingly, it is even less appropriate that a fiduciary escape its duty by invoking participant autonomy even before proving that a plan comported with § 404(c). *See also Peabody*, 636 F.3d at 376-77 (holding fiduciaries breached duty of prudence where they allowed a participant in a defined contribution plan to "remain invested exclusively in [closely-held employer] stock during the

E.

Finally, we turn to *Dudenhoeffer*. 573 U.S. 409, 134 S. Ct. 2459, 189 L.Ed.2d 457. In *Dudenhoeffer*, plan participants in an ESOP filed a lawsuit alleging that plan fiduciaries breached their duty of prudence by continuing to buy and hold employer stock when they should have known that the stock was "overvalued and excessively risky." *Id.* at 2464. The participants claimed that the fiduciaries should have known this due to publicly available information. *Id.* For example, they argued that the fiduciaries could have understood from newspaper articles that the value of the employer stock was decreasing and would continue to decrease, and that the fiduciaries should have acted on that prediction by selling the stock, ceasing to purchase more of it, canceling the ESOP, or disclosing insider information "so that the market would adjust its valuation of [the] stock downward." *Id.*; *see id.* at 2471. The Court rejected this argument, explaining that, like other investors, ERISA fiduciaries may prudently "rely on [a] security's market price as an unbiased assessment of the security's value in light of all public information."[13] *Id.* at 2471 (quoting *Halliburton Co. v.*

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company's decline," and the fiduciaries did not prove § 404(c) defense or justify their failure to divest from the stock).

[13] The Court's holding endorsed the efficient market hypothesis. *Dudenhoeffer*, 134 S. Ct. at 2472 ("[F]ail[ure] to outsmart a presumptively efficient market . . . [is] not a sound basis for imposing liability." (citation omitted)). The efficient market hypothesis supposes that "markets for widely-traded stock . . . are efficient and impound all publicly available information." *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 992 (7th Cir. 2013) (quoting *Nelson v. Hodowal*, 512 F.3d 347, 350 (7th Cir. 2008)), *abrogated on other grounds by Dudenhoeffer*, 573 U.S. 409, 134 S. Ct. 2459, 189 L.Ed.2d 457). Under this framework, "stock prices in efficient markets do not reflect risks that an

Erica P. John Fund, Inc., 573 U.S. 258, 134 S. Ct. 2398, 2411, 189 L.Ed.2d 339 (2014)). Therefore, it is "implausible as a general rule" that a "fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock . . . , at least in the absence of special circumstances." *Id.* Accordingly, *Dudenhoeffer* forecloses claims that fiduciaries should have outsmarted an efficient market, although it leaves the door ajar if there were "a special circumstance affecting the reliability of the market price." *Id.* at 2472.

But Plaintiffs do not contend that fiduciaries should have outsmarted an efficient market. A claim that a fund was imprudent due to lack of diversification does not turn on reading tea leaves to predict the *performance* of a stock—what *Dudenhoeffer* forecloses as a basis for liability. Instead, Plaintiffs allege that their fiduciaries should have recognized the imprudence of a fund based on the fund's *composition*.[14] It is true that a fund's composition might be informed by publicly available information about the stocks that it contains and therefore that a plaintiff's allegations might reference such publicly available information. But those references do not shift an imprudent non-

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investor could eliminate through diversification." *Schweitzer*, at 960 F.3d at 197 n.36.

[14] We further observe that *Dudenhoeffer* related to an ESOP option in a defined contribution plan. 134 S. Ct. at 2463-64. As previously noted, "ESOPs expose retirees to great risk," but these "evils . . . are endemic to the ESOP form established by Congress." *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 861 (6th Cir. 2017) (quoting *Pfeil v. State St. Bank & Trust Co.*, 806 F.3d 377, 387 (6th Cir. 2015)). Because employer stock enjoys an exemption from the diversification requirements of both § 1104(a)(1)(B) and § 1104(a)(1)(C), we are wary of looking to ESOP litigation for guidance where, as here, a plaintiff alleges a failure to diversify a fund consisting of non-employer stock.

diversification claim into the ambit of *Dudenhoeffer*. *See Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 389 (6th Cir. 2015) ("One can concede that the market is generally efficient in pricing stocks without concluding that all decisions to buy, sell or hold are therefore prudent.") (White, J., dissenting); *cf. Summers*, 453 F.3d at 410-11 (Posner, J.) (suggesting that a change in the debt-equity ratio of an employer's stock on account of a plummeting stock price or a merger might require diversification of an ESOP under the duty of prudence). We therefore conclude that *Dudenhoeffer* does not apply to Plaintiffs' allegations.

IV.

We pause now to recapitulate Plaintiffs' claims. Again, to state a claim for a breach of an ERISA fiduciary duty, "a plaintiff must plausibly allege that a fiduciary breached [a duty], causing a loss to the employee benefit plan." *Schweitzer*, 960 F.3d at 195.

Here, Plaintiffs allege that Defendants breached their duty of prudence. Defendants allegedly breached this duty by failing to monitor the continuing prudence of holding a single-stock fund. Because Defendants did not monitor the merits of the fund, they did not uncover that it was an imprudent fund. As the fund was a single-stock fund with inherent concentration risk, it is plausible that the fund was, in fact, imprudent. Simultaneously, the allegedly imprudent single-stock fund was correlated with another single-stock fund on the Plan's menu, intensifying diversification concerns. Defendants' failure to discover the imprudence led to another failure, a failure to divest the fund. Since the fiduciaries did not divest the fund, when the price of the stock in the fund went down, the Plan suffered a loss.

As we have explained, *DiFelice* authorizes examining the prudence of a fund standing alone from the other offerings on a plan's menu. That case also requires a fiduciary to identify and remedy imprudent funds on a menu. *Tatum* then shows that maintaining an allegedly imprudent fund in a frozen state is not necessarily adequate—indeed, the outcome of *Tatum* suggests that a prudent fiduciary would have near-immediately moved to sunset the single-stock fund. Accordingly, Plaintiffs have plausibly alleged Defendants breached their duty of prudence and caused a loss to the Plan.

Finally, neither *Dudenhoeffer* nor participant choice structure bar the above claim. *Dudenhoeffer* is simply inapposite. And as for participant choice, ERISA accounts for that choice with the situational safe harbor of § 404(c)—but that does not affect whether Plaintiffs here have stated a claim.

For the foregoing reasons, we vacate the judgment of the district court and remand for further proceedings.

VACATED AND REMANDED

NIEMEYER, Circuit Judge, dissenting:

The Gannett Co., Inc. 401(k) Savings Plan (the "Gannett Plan"), a defined contribution plan, offered its participants a menu of investments ranging in type and level of diversification, thus giving the participants choices from which they could build their individual investment portfolios. Among those options was a fund consisting of only one publicly traded stock—TEGNA Inc. In the time frame relevant to this appeal, the TEGNA Stock Fund accounted for as much as 20% of the value of all investments held by the Plan.

Jeffrey Quatrone, a participant in the Gannett Plan who had invested in the TEGNA Stock Fund,

commenced this putative class action under the Employee Retirement Income Security Act of 1974 ("ERISA") against the Plan's alleged fiduciaries, claiming damages resulting from a drop in the market price of TEGNA stock. He alleged that the Plan's fiduciaries violated the ERISA duty of "diversification" by allowing the value of the TEGNA Stock Fund to constitute over 20% of all the Plan's investments and that they violated the duty of "prudence" by retaining, in light of known risks, the TEGNA Stock Fund as an option for investment in the Plan.

The district court, in a well-reasoned opinion, concluded that Quatrone failed to state plausible claims. It dismissed the diversification-duty claim by reasoning that, notwithstanding the undiversified nature of the TEGNA Stock Fund component, "*the Plan as a whole* was comprised of various options for the participants to select." (Emphasis added). The court explained that Quatrone's diversification claim was in effect a claim that the Plan's fiduciaries should have "force[d] the participants to diversify their investments." And it dismissed the prudence-duty claim in light of the Supreme Court's decision in *Fifth Third Bancorp. v. Dudenhoeffer*, 573 U.S. 409, 426, 134 S.Ct. 2459, 189 L.Ed.2d 457 (2014), which held that, as a general rule, "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."

I agree with the district court's irresistible reasoning, which the majority opinion simply sidesteps with a myopic analysis. Specifically, the majority merges the duties of diversification and prudence and then erroneously focuses on *a single investment option* on the Plan's diversified menu in

concluding that the complaint adequately alleged breach of these duties. It also fails to account for the fact that the participants were given free rein to diversify their individual accounts. The result of the majority's approach is a mechanically derived holding that is divorced from common sense and that will unnecessarily restrict the options offered in defined contribution plans.

I

Before splitting into two companies, Gannett Co., Inc. was engaged in the businesses of publishing and broadcasting. In June 2015, however, it spun off its publishing operation, transferring the relevant assets to a newly formed company, which it named Gannett Co., Inc. ("New Gannett"). The original Gannett company then renamed itself TEGNA Inc. New Gannett and TEGNA are both publicly traded companies.

The original Gannett company sponsored the Gannett Plan, a 401(k) defined contribution plan, for its employees. In a defined contribution plan, the plan maintains an individual account for each participant, and the benefits to the participant are limited to the value of that account, over which the participant exercises control. *See* 29 U.S.C. § 1002(34) (defining "defined contribution plan"). The Gannett Plan's terms make this explicit, providing that, "all amounts allocated to a Participant's accounts shall be *subject to the investment direction of the Participant* as provided in this Section. For this purpose, the Trustee shall establish investment funds as designated by the [Gannett Plan] Committee." (Emphasis added). Accordingly, the Gannett Plan offered a menu of options from which participants could select to allocate their contributions. As the Plan provides,

> Each Participant upon commencement of participation in the Plan shall elect how the Participant's contributions are to be invested among the available investment choices. Once made, a Participant's elections shall remain in effect until a new election is made. A Participant may change investment elections as to current and future Employee contributions as of any dates that may be specified by the [Gannett Plan] Committee.

One option offered by the Gannett Plan was investment in a fund that held only the stock of the original Gannett company. After the original Gannett company spun off the new company, New Gannett assumed sponsorship of the Plan. Under its sponsorship, the Gannett Plan continued to hold as an option for investment the stock of the original company—with the name change, the TEGNA Stock Fund. As a result, the employees of New Gannett who had participated in the Gannett Plan prior to the spinoff continued to have the option to maintain their investments in the TEGNA Stock Fund, even though, after the split, they were no longer employees of the original Gannett company. At the time of the spinoff, over 20% of the Gannett Plan's assets were invested in the TEGNA Stock Fund.

After the spinoff—presumably because New Gannett employees were no longer connected to TEGNA—the Gannett Plan froze investments in the TEGNA Stock Fund, thus effectively reducing its holdings of TEGNA stock; participants could no longer allocate contributions to the TEGNA Stock Fund, but they could reduce or cash-out their investments in that Fund. The Gannett Plan, however, never *required* participants to divest themselves of their holdings in the TEGNA Stock Fund.

In late 2015 and 2016, investment banks began publicly to "downgrade" or become "bearish" about TEGNA common stock. Nonetheless, the Gannett Plan fiduciaries took no specific action to remove the TEGNA Stock Fund option or somehow divest the Plan of TEGNA stock. During the period between the spinoff in 2015 and early 2018, the value of TEGNA's publicly traded common stock declined approximately 31%, while the S&P Index increased approximately 32%. Thus, according to the complaint, the failure to divest the Plan of all TEGNA stock resulted in an alleged $135 million loss in value to the Plan.

Plan participant Quatrone commenced this action in March 2018 on behalf of himself and a putative class of other Gannett Plan participants, naming as defendants those who he alleged were fiduciaries of the Plan. He alleged that those fiduciaries breached their duties of "diversification" and "prudence," as imposed by ERISA, by failing "to timely liquidate the Plan's significant holdings in TEGNA common stock." The defendants filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state plausible claims under ERISA, and the district court granted the motion. It held that the Gannett Plan's fiduciaries did not breach the duty of diversification because, notwithstanding the undiversified nature of the TEGNA Stock Fund, "the Plan as a whole was comprised of various options for the participants to select." It further held that the fiduciaries were not liable for breach of the prudence duty based on the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, as the risks of holding TEGNA stock were public and the plaintiffs had offered no other basis for a lack-of-prudence claim. The district court also denied Quatrone's motion for leave

to amend the complaint, concluding that such amendment would be futile.

From the district court's judgment dated February 13, 2019, Quatrone filed this appeal.

II

In essence, the complaint is grounded on the simple allegation that the Gannett Plan's fiduciaries maintained too long the participants' option to retain their investments in the TEGNA Stock Fund, which had represented at one time over 20% of the Plan's assets. It alleged that the fiduciaries' conduct violated ERISA's duties of diversification, as imposed by 29 U.S.C. § 1104(a)(1)(C), and of prudence, as imposed by § 1104(a)(1)(B). While Quatrone acknowledges that the Gannett Plan included, among its multiple offerings, diverse options, he contends that the duty to diversify operates both at the Plan level and "at the level of individual funds within [the] [P]lan." Based on that contention, he argues that "[i]ncluding a non-diverse, single-stock fund [the TEGNA Stock Fund] in a [P]lan lineup invites exactly the sort of overconcentration that a prudent fiduciary should avoid." In effect, therefore, Quatrone maintains that a defined contribution plan with diverse options cannot include as one option a non-employer, single-stock fund because such inclusion somehow "invites" participants to overconcentrate in that option, thus rendering the entire Plan inadequately diversified.

As the district court explained, the argument makes little sense in the context of a defined contribution plan in which the participants, such as Quatrone, determine the allocation of their contributions. In particular, Quatrone was free to divest himself *entirely* of the TEGNA Stock Fund, but he continued to hold the investment, despite warnings available from

public sources, while market forces reduced its value. Then, he filed this action seeking to hold the fiduciaries liable for not promptly forcing him to divest his holdings of the TEGNA Stock Fund. This is not an ERISA problem, nor is it a problem caused by the fiduciaries' failure to diversify. It was the outcome of a free, individualized decision made by each participant who remained invested in the TEGNA Stock Fund. And the district court was correct to recognize this.

The standard of care that ERISA imposes on fiduciaries requires them 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." 29 U.S.C. § 1104(a)(1)(C) (emphasis added). This duty is imposed with respect to "*the plan*," not with respect to *each investment* offered by the plan. *Id.*; *see also Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014) ("[L]egislative history and federal regulations clarify that the diversification and prudence duties do not prohibit a plan trustee from holding single-stock investments as an option in a plan that includes a portfolio of diversified funds"); *Schweitzer v. Inv. Comm. of Phillips 66 Sav. Plan*, 960 F.3d 190, 195 (5th Cir. 2020) (explaining that ERISA's diversification duty "looks to a pension plan as a whole, not to each investment option"). Thus, the ERISA duty of diversification requires that a plan's investments be diversified but not that each investment be diversified.

Moreover, the diversification duty under § 1104(a)(1)(C) "imposes obligations on fiduciaries for *defined benefit plans* that are different from those for *defined contribution plans*." *Schweitzer*, 960 F.3d at 196 (emphasis added). Because fiduciaries of a defined benefit plan both choose investments and allocate the plan's assets among them, the duty of diversification

requires that their investment choices and the relative allocation of funds among those choices result in proper diversification. But for defined contribution plans, like the Gannett Plan, the fiduciaries' role is limited to selecting the menu of investment options offered to plan participants for their choosing. The individual participants then select how to allocate their investments among those options. Accordingly, fiduciaries of defined contribution plans "need only provide investment options that enable participants to create diversified portfolios." *Id.*

Apparently recognizing these principles, at least to some degree, Quatrone argues that the complaint contains allegations sufficient to establish that "the Plan's heavy investment in the TEGNA Stock Fund caused *the Plan as a whole* to be undiversified for purposes of [§ 1104(a)(1)(C)]." (Emphasis added). Yet, it does not follow from the Plan's concentration in TEGNA stock that the fiduciaries violated their duty to diversify. Rather, the cause of any overconcentration in TEGNA stock was individual Plan participants' decisions to retain their assets in the TEGNA Stock Fund. In short, the complaint provides no basis on which to conclude that the fiduciaries' inclusion of the TEGNA Stock Fund as an option caused the Plan's overall menu of options to be undiversified. Therefore, the complaint failed to state a claim that the fiduciaries neglected to "diversify[ ] the investments of the plan," as required by § 1104(a)(1)(C).

Of course, if the retention of the TEGNA Stock Fund *as an investment option* was itself imprudent, the defendants would be liable for breach of the prudence duty imposed by § 1104(a)(1)(B). But the complaint does not plausibly allege that, in these circumstances, offering a single-stock fund involving a publicly traded

company was imprudent, especially in light of the Supreme Court's decision in *Dudenhoeffer*.

ERISA applies a prudent man's standard of care, requiring 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." 29 U.S.C. § 1104(a)(1)(B). And particularly as relevant in the context of a defined contribution plan, like the Gannett Plan, "[a] fiduciary . . . must exercise prudence *in selecting and retaining available investment options*." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) (emphasis added). This is a contextual exercise that requires fiduciaries to evaluate each investment option in light of the other options available to participants and the goals of the plan itself. *See Dudenhoeffer*, 573 U.S. at 425, 134 S.Ct. 2459 (noting that the proper inquiry is "context specific"); *see also* 29 C.F.R. § 2550.404a-1(b) (2019) (requiring that fiduciaries give appropriate consideration to relevant facts and circumstances that they know or should know in evaluating each investment to determine whether it is appropriate to further the goals of the plan). But in this case, the complaint provides no contextual facts about the Plan's menu from which to conclude that including the TEGNA Stock Fund on that menu demonstrated a lack of prudence.

Nonetheless, Quatrone attempts to use a slice of language from *DiFelice* to maintain that compliance with ERISA's duty of prudence must be evaluated *exclusively* at the level of each individual fund offered by a plan, without regard to the characteristics of the plan as a whole. And unfortunately, the majority seems to agree. *See ante* at 476–77. Indeed, the

majority takes the additional step of extending *DiFelice*'s language to conclude that, for a participant-driven, defined contribution 401(k) plan, "each available fund on a menu must be prudently diversified." *Id*. at 476.

This conclusion not only collapses any meaningful distinction between the separately enumerated duties of diversification and prudence, but it also creates tension with our precedent. Specifically, *DiFelice* explains that to satisfy ERISA's duty of prudence, "a fiduciary must initially determine, and continue to monitor, the prudence of *each* investment option available to plan participants." 497 F.3d at 423. But this language cannot be read to mean that, to satisfy the duty of prudence, each individual fund must be diversified—as maintained by Quatrone and the majority. Such a position necessarily leads to the conclusion that no non-employer, single-stock investment option offered under an ERISA plan could ever satisfy the duty of prudence. Indeed, Quatrone's counsel acknowledged that his position would essentially create such a *per se* rule, stating at oral argument that "you cannot" prudently offer a single-company fund in the context of a participant-driven, defined contribution plan. And, by not explaining how plan fiduciaries could ever prudently offer a single-stock, non-employer fund if the duty of prudence indeed requires "each available fund on a menu [to] be prudently diversified," the majority has now adopted that position. *Ante* at 476-77.

Yet, we have already unequivocally rejected the notion that offering single-stock funds is imprudent *per se* because such a "*per se* approach is directly at odds with our case law and federal regulations interpreting ERISA's duty of prudence." *Tatum*, 761 F.3d at 360; *see also id.* at 367 (rejecting the

"contention that it would *necessarily* be imprudent for a fiduciary to maintain an existing single-stock investment in a plan that . . . offers participants a diversified portfolio of investment options"). Thus, allegations regarding the TEGNA Stock Fund's single-stock nature are insufficient to establish that the fiduciaries acted imprudently when they allowed participants to retain their investments in the Fund.

Moreover, TEGNA is a publicly traded stock, meaning that both fiduciaries and plan participants could "rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Dudenhoeffer*, 573 U.S. at 426, 134 S.Ct. 2459 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 273, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014)). This means that, "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone" that a stock was excessively risky "are implausible as a general rule, at least in the absence of special circumstances." *Id.* And because Quatrone has pleaded no special circumstances, his allegation that the TEGNA stock's volatility made the inclusion of the TEGNA Stock Fund an imprudent investment simply fails to state a claim in light of *Dudenhoeffer*.

Finally, Quatrone argues that the TEGNA Stock Fund was imprudent because "[t]he sheer size of the Plan's holdings in TEGNA common stock was unreasonable by any measure" and caused the overall Plan to be overconcentrated in one company. Relatedly, he asserts that, when considered alongside the Plan's holdings in the stock of New Gannett, retention of the TEGNA Stock Fund caused the Plan to be overconcentrated in one sector. But that the Plan may have been concentrated in one company or one sector does not reflect a breach of any duty owed by the

fiduciaries. Instead, it merely reflects individual Plan participants' decisions as to how to allocate their own investments. And while it might be generally imprudent *for a fiduciary* to invest a large percentage of plan assets in a single security or a single sector, a defined contribution plan is structured such that the plan participants—not the fiduciaries—make the actual investment decisions. In effect, Quatrone's argument ignores the structure of a defined contribution plan and suggests that an investment can become imprudent simply because many plan participants independently decide to allocate their contributions to it. But an investment option's prudence cannot rise or fall based on the number of participants who ultimately decide to invest in (or remain invested in) it.

In sum, other than identifying the single-stock nature of the TEGNA Stock Fund and its asset share relative to other investments offered by the Gannett Plan, Quatrone has pleaded no other facts from which to conclude that the TEGNA Stock Fund was an imprudent investment option. Accordingly, I conclude that Quatrone has failed plausibly to allege that the inclusion of the TEGNA Stock Fund on the menu of diversified options was imprudent.

For these reasons, I would affirm the judgment of the district court dismissing this case for failure to state an ERISA claim.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

Civil Action No. 1:18-cv-325 (AJT/JFA)

JEFFREY QUATRONE
On Behalf of Gannett Co., Inc. 401(k) Savings Plan
and all other similar situated,
Plaintiff,

v.

GANNETT CO., INC. et al.,
Defendants.

Signed 02/13/2019

ORDER

Anthony J. Trenga, United States District Judge

Pending before the Court is Plaintiffs' Motion for Leave to Amend Complaint [Doc. No. 54] (the "Motion to Amend"). On September 26, 2018, the Court issued an order granting Defendants' Motion to Dismiss [Doc. No. 60] (the "Order"), and judgment was entered in favor of Defendants in accordance with Fed. R. Civ. P. 58 [Doc. No. 62] (the "Rule 58 Judgment"). Defendants' Motion to Dismiss was directed at the original Complaint [Doc. No. 1], and the Motion to Amend was still pending at the time of the Order and Rule 58

Judgment. Thus, on October 1, 2018, the Court issued an order vacating the Rule 58 Judgment pending the Court's consideration of the Motion to Amend. [Doc. No. 64]. Upon consideration of the Motion to Amend and the memoranda of law in support thereof and in opposition thereto, and for the following reasons, the Motion to Amend is DENIED. Also pending at the time the Order and Rule 58 Judgment were entered was Plaintiffs' Motion for Class Certification [Doc. No. 39]; because the Court denies the Motion to Amend, the Motion for Class Certification is DENIED as moot.

Pursuant to Fed. R. Civ. P. 15(a)(2), a court must "freely give leave [to amend] when justice so requires." "[L]eave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc) (internal quotations omitted). Amendment would be futile "if the proposed amended complaint fails to satisfy the requirements of the federal rules." *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (internal quotations omitted). Thus, where the proposed amended complaint fails to state a claim under Fed. R. Civ. P. 12(b)(6), leave to amend is properly denied. *See id.*

Here, both the original and amended complaints allege violations of §§ 404, 405, and 409 of the Employee Retirement Income Security Act of 1974 ("ERISA") (codified, respectively, at 29 U.S.C. §§ 1104, 1105, and 1109) on the part of Defendants Gannett Co., Inc. ("Gannett") and the Gannett Benefit Plans Committee (the "Committee") with respect to the Gannett Co., Inc. 401(k) Savings Plan (the "Plan"). Briefly summarized, Plaintiff asserts that after

Gannett Co., Inc. and TEGNA, Inc. split into two separate companies in mid-2015, Defendants, as fiduciaries of the Plan, should have at some point forced the employees who transferred to Gannett to sell the TEGNA stock they had accumulated in the Plan as TEGNA employees. This Court held that the original complaint failed to state a claim for breach of fiduciary duty arising from Defendants' alleged breach of their duties of prudence, to diversify, and to investigate in failing to force the sale of the TEGNA stock. Because the complaint failed to state a claim as to any underlying breach of fiduciary duty, the Court also found that it failed to allege co-fiduciary liability, and thus dismissed both counts of the original complaint.

Plaintiff seeks to amend the complaint in order to "(1) remove Defendants John/Jane Does 1-10, (2) conform the allegations to the facts learned through discovery, and (3) replace Mr. Quatrone with proposed Class Representative Christina Stegemann as the named plaintiff." [Doc. No. 54] at 1. The question before the Court is whether these proposed amendments rectify the deficiencies of the original complaint, which the Court previously dismissed for failing to state a claim; if not, amendment would be futile and leave to amend should be denied. The proposed removal of the John/Jane Doe Defendants and the replacement of Mr. Quatrone as the class representative clearly would not address the deficiencies of the original complaint. Thus, the question is whether the amendments made to conform the allegations in the complaint to the facts learned through discovery are sufficient to correct those deficiencies. Plaintiff characterizes the proposed amendments as encompassing two new sets of allegations: (1) that Defendants "were required to

liquidate the TEGNA Stock Fund pursuant to the Employee Matters Agreement ('EMA')"[1] and (2) that Defendants "were repeatedly told and knew that the TEGNA Stock Fund was an imprudent investment but failed to act on the information in breach of their fiduciary duties." [Doc. No. 66] at 2.

In finding that the original complaint failed to state a claim for breach of fiduciary duty, the Court relied on the pronouncements of the Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), as well as the guidance provided by the Fourth Circuit in *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007) and *Tatum v. RJR Pension Investment Committee*, 855 F.3d 553 (4th Cir. 2017). In *Dudenhoeffer*, the Supreme 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." 134 S. Ct. at 2471. This Court found that "the holding in *Dudenhoeffer* applies to Plaintiff's breach of fiduciary duty claims," as a result of which those claims are "implausible absent 'special circumstances.' " [Doc. No. 60] at 8. The Court determined that the original complaint failed to allege the kind of special circumstances contemplated by *Dudenhoeffer*, which include "factors that affect the 'reliability of the market price as an unbiased assessment of the security's value in light of all public information.' " *Id.* at 10-11 (quoting *Dudenhoeffer*, 134 S Ct. at 2471). Plaintiff's amended complaint also fails

[1] While the proposed amended complaint does include additional allegations with respect to the EMA, *see* [Doc. No. 54-2] ¶¶ 6(e), 23-24, the original complaint also referenced and quoted from the agreement [Doc No 1] ¶ 47 and the Court referenced it in its Order, [Doc. No. 60] at 4.

to allege the special circumstances required to make a breach of fiduciary duty claim plausible under *Dudenhoeffer*; in fact, Plaintiff admits as much in his Reply in support of the Motion to Amend. [Doc. No. 66] at 8.

Instead, Plaintiff argues that the proposed amended complaint states a breach of fiduciary duty claim because "the undiversified TEGNA Stock Fund was an imprudent investment for the Plan because TEGNA stock was properly priced and the Plan received no compensation for the extraordinary uncompensated risk it assumed from massive concentration in the stock." *Id.* at 9. "The bottom line," Plaintiff argues, "is that it is imprudent to offer a single-stock fund unless it is an employer securities fund expressly exempted from the duty to diversify." *Id.* at 10. These allegations, while arguably adding to the fabric of plaintiff's diversification theory, are nevertheless bound up with that theory. In holding that the original complaint failed to state a claim, this Court rejected the theory that Defendants were required to force Plan participants to diversify their investments, especially where, as here, participants had the choice to allocate their contributions among different plan investments. [Doc. No. 60] at 12. None of these additional allegations in the proposed amended complaint undercuts the Court's reasoning in rejecting Plaintiff's diversification theory.

Like the original complaint, Plaintiff's proposed amended complaint also alleges that Defendants breached their duty of prudence under the Plan by failing to "conduct an appropriate investigation of continued investment in TEGNA common stock." [Doc. No. 54-2] ¶ 122; [Doc. No. 1] ¶ 107. In dismissing the original complaint, the Court, operating within the *Dudenhoeffer* framework, held that Plaintiff failed to

allege what "special circumstances" an investigation would have uncovered, and had therefore "failed to allege facts that make plausible that any failure to conduct an adequate investigation caused any harm to the Plan." [Doc. No. 60] at 13. The proposed amended complaint does contain new allegations as to the process that ultimately led to the liquidation of the TEGNA stock fund in the Plan—specifically, that the Committee regularly monitored the TEGNA stock fund and discussed the possibility of closing it on several occasions before ultimately deciding to do so. [Doc. No. 54-2] ¶¶ 33-35, 38-44, 48-57. However, the amended complaint still lacks any allegations that further investigation by Defendants would have uncovered the "special circumstances" required to state a claim under *Dudenhoeffer*. Because the proposed amended complaint fails to address the deficiencies of the original complaint with respect to Defendants' alleged breach of their duties of prudence, to diversify, and to investigate, amendment would be futile.

For the reasons stated above, it is hereby

ORDERED that Plaintiffs' Motion for Leave to Amend Complaint [Doc. No. 54] be, and the same hereby is, DENIED; and it is further

ORDERED that Plaintiffs' Motion for Class Certification [Doc. No. 39] be, and the same hereby is, DENIED as moot.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

Civil Action No. 1:18-cv-325 (AJT/JFA)

JEFFREY QUATRONE
On Behalf of Gannett Co., Inc. 401(k) Savings Plan
and all other similar situated,

Plaintiff,

v.

GANNETT CO., INC. et al.,

Defendants.

Signed 09/26/2018

ORDER

Anthony J. Trenga, United States District Judge

In June 2015, Gannett Co, Inc., a publicly traded media company, changed its name to TEGNA, Inc. ("TEGNA" or "Old Gannett") and spun off its publishing business into a newly created, independently traded company, which was also called Gannett Co., Inc. ("New Gannett" or "Gannett"). As part of that transaction, a new 401(k) plan was established for employees who remained Old Gannett/TEGNA employees. The then existing 401(k) Plan (which was the operative plan for Old Gannett/ TEGNA employees),

known as the Gannett Co., Inc. 401(k) Savings Plan, became the operative 401(k) plan for New Gannett employees, including those Old Gannett employees who transferred to New Gannett ("the Plan" or "the Gannett Plan").

Before the spinoff, Old Gannett/TEGNA employees could invest their 401(k) plan contributions in "company stock," i.e., Old Gannett/TEGNA company stock. After the spinoff, participants in the Plan, i.e., New Gannett employees, had the option of either continuing to hold that TEGNA stock in the Plan or selling it whenever they chose and re-investing those sales proceeds into other investments options offered by the Plan. However, they did not have the option of purchasing additional TEGNA stock.

Plaintiff alleges various breaches of fiduciary duties on the part of the Defendants in connection with Old Gannett/TEGNA's spinoff of its publishing business. Briefly summarized, Plaintiff claims in support of these allegations that "Defendants caused the Plan to be undiversified by their failure to decrease the Plan's substantial holdings of TEGNA common stock following the separation, thereby subjecting the Plan and its participants to the risks associated with being too heavily invested in one company ('company risk') and industry ('industry risk')." Compl. ¶ 6(a). In that regard, Plaintiff claims that "Defendants took no meaningful steps to monitor or review the single-stock TEGNA Stock Fund from the Plan even though the investment risk was exacerbated by TEGNA's volatility, high correlation to Gannett Co., Inc. stock, in which the Plan also held a large position, and the huge percentage of Plan assets invested in TEGNA." [Doc. No. 28] ("Pl.'s Opp. Mem." at 1). Moreover, Plaintiff claims, "Defendants included TEGNA stock in the Plan because of Gannett's 'historical relationship' with

TEGNA. And, although Defendants agreed to liquidate the Plans' holdings in TEGNA in June 2015, they did nothing as the price of TEGNA plummeted over the next three years, costing the plan and its beneficiaries over $100 million." *Id.* at 1–2 (citing Compl. ¶¶ 58–60). In effect, Plaintiff contends that the Defendants should have at some point forced the employees who transferred to New Gannett to sell the TEGNA stock they had accumulated in the Plan as Old Gannett/TEGNA employees.

Defendants have filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) [Doc. No. 3] (the "Motion"). The Court held a hearing on May 18, 2018, following which it took the Motion under advisement. For the reasons stated below, the Complaint fails to state a claim for relief under the pronouncements in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) and will be dismissed pursuant to Fed. R. Civ. 12(b)(6).

I. FACTUAL ALLEGATIONS

Plaintiff Jeffrey Quatrone, on behalf of the Gannett Co., Inc. 401(k) Savings Plan (the "Plan" or "Gannett Plan"), and a class of similarly situated participants in the Plan, alleges violations of §§ 404, 405, and 409 of the Employee Retirement Income Security Act of 1974 ("ERISA") (codified, respectively, at 29 U.S.C. §§ 1104, 1105, and 1109). Named as defendants are (1) New Gannett (2) the Gannett Benefit Plans Committee ("the Committee"), which serves as the administrator of the Plan; and (3) the individual members of the Committee.

The Complaint alleges the following in support of his claims:

TEGNA caused a spinoff of its publishing business into a new entity, Gannett, on June 29, 2015 (the "date of separation"). Compl. ¶ 1. As a result of the spin-off,

two publicly traded companies were formed: (1) TEGNA, which was named "Gannett Co., Inc." before the spinoff, a broadcasting and digital company; and (2) a newly created entity, a publishing company, taking the name Gannett Co., Inc. previously used by TEGNA. *Id.* ¶ 22. The spinoff resulted in a new 401(k) plan for TEGNA employees, while the Gannett Plan became the operative 401(k) plan for New Gannett, the spun-off company.[1] *Id.* TEGNA distributed one common share of New Gannett common stock for every two shares of TEGNA stock held by TEGNA stockholders. *Id.* ¶ 22. During the putative class period, the value of the TEGNA common stock held in Plaintiff's accounts diminished considerably, resulting in losses. *Id.*

Plaintiff is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7) and held shares of TEGNA common stock during the putative class period. *Id.* ¶ 14. Defendant "Gannett is a fiduciary because it exercised discretionary authority or control over management of the Plan, exercised authority or control over the management or disposition of the Plan assets and/or had discretionary authority, and because it had discretionary authority to appoint and monitor Plan fiduciaries who had authority or control over management or disposition of Plan assets." *Id.* ¶ 16. The Committee administered the Plan and was also a fiduciary of the Plan within

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[1] The Plan is an employee benefit plan within the meaning of ERISA §§ 3(3) and 3(2)(A), 29 U.S.C. §§ 1002(3) and 1002(2)(A). *Id.* ¶ 25. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34) because it provides individual accounts for each participant and benefits based upon the amount contributed to the participants account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which could be allocated to such participants' accounts. *Id.* ¶ 26.

the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *Id.* ¶¶ 17, 18. Defendants John/Jane Does 1 through 10 are the individual members of the Committee, and other committee(s) responsible for carrying out the provisions of the Plan or serving as Plan Financial fiduciary during the class period. *Id.* ¶ 20.

Plaintiff claims that Defendants breached their duties of loyalty, prudence, and diversification under ERISA § 404, 29 U.S.C. § 1104 by allowing the Plan to invest in TEGNA common stock for an unreasonable period of time following the date of separation. *Id.* ¶¶ 4, 6, 30. More specifically, Plaintiff alleges that allowing such an investment into a single stock option was a breach of fiduciary duties because it caused the Plan to be undiversified and subjected the Plan and its participants to an "imprudent and unnecessary undiversified risk;" subjected participants to additional risks because both TEGNA and Gannett stocks' performance are heavily dependent on the business cycle and economic conditions; TEGNA is volatile stock; and Defendants' liquidation of stock was unreasonable. *Id.* ¶ 6(a)–(d). Defendants were allegedly aware of the risks associated with the lack of diversification of the Plan's TEGNA holdings, *id.* ¶¶ 45–46, and due to the concentration risks associated with the Plan's excessive holdings of TEGNA common stock, management for TEGNA and Gannett mandated in June 2015 that Defendants liquidate the Plan's TEGNA holdings, *id.* ¶ 47. As a result of these alleged breaches, Plaintiff claims Defendants are liable to the Plan for all losses resulting from each of their breaches of fiduciary duty. *Id.* ¶ 10.

II. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "the material allegations of the complaint are taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Moreover, "the complaint is to be liberally construed in favor of the plaintiff." *Id.; see also Bd. of Trustees v. Sullivant Ave. Properties, LLC*, 508 F. Supp. 2d 473, 475 (E.D. Va. 2007). The alleged facts are presumed true, and the complaint should be dismissed only when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (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." *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to meet this standard, *id.*, and a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555.

III. ANALYSIS

A. Plaintiff fails to allege a breach of fiduciary duty pursuant to ERISA.[2]

1. Breach of Prudence Claim

The Complaint alleges, *inter alia*, that Defendants breached a duty of prudence by allowing Plan participants to invest in TEGNA common stock for an unreasonable time following the date of separation. Compl. ¶¶ 6, 48–57, 61–62, 79–82, 110. Plaintiff alleges that such continued investment was a breach of duty of prudence because publicly available information (e.g. TEGNA's poor stock performance) should have informed the fiduciaries that investment into a single stock was an unnecessary risk. *See id.* ¶ 110. Defendants move for dismissal of Plaintiff's breach of duty of prudence claim on the ground that the Supreme Court's *Dudenhoeffer* decision precludes similar claims based on publicly available information absent special circumstances. Defs.'s Mem. in Supp. at 5–7. Plaintiff argues that the Fourth Circuit's *Tatum v. R.J. Reynolds Inv. Comm.*, 855 F.3d 553, 562 (4th Cir. 2017) ("*Tatum 7*"),[3] and *DiFelice*, 497 F.3d at 410,

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[2] The Committee does not contest that it is a fiduciary under ERISA. Defendant Gannett disputes, however, that it is an ERISA fiduciary for the purpose of Plaintiff's claim. Although there is a substantial question whether Gannett is a fiduciary under ERISA, given its decision that Plaintiff has failed to adequately allege a breach of fiduciary duty against any of the Defendants, the Court will assume, without deciding, that Gannett was a fiduciary for the purposes of the Motion.

[3] *Tatum* involved several cases surrounding the litigation of a putative ERISA class action against R.J. Reynolds ("RJR") and various RJR committees arising from RJR's "spin-off" of the company's food business, Nabisco, from its tobacco business. *See Tatum v. R.J. Reynolds Tobacco Co.*, 294 F.Supp.2d 776 (M.D.N.C. 2003) (dismissing complaint) ("*Tatum I*"); *Tatum v.*

decisions hold contrary positions and therefore do not preclude Plaintiff's claims.

ERISA is "intended to 'promote the interests of employees and their beneficiaries in employee benefit plans.' " *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 417 (4th Cir. 2007) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). "Under ERISA, [benefit] plan 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, [and] the disclosure of specific information . . . ." *Id.* (internal quotation marks and citation omitted). "ERISA requires that a fiduciary shall 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.' " *Id.* (quoting 29 U.S.C. § 1104(a)(1)(B)).

It is the "prudent person" standard by which a fiduciary's investment decisions and disposition of assets are measured. *Dudenhoeffer*, 134 S. Ct. at 2467 (citing *Massachusetts Mut. Life Ins. Co. v. Russull*, 473

R.J. Reynolds Tobacco Co., 392 F.3d 636 (4th Cir. 2004) (reversing *Tatum 1*) ("*Tatum* 2"); *Tatum v. R.J. Reynolds Tobacco Co.*, 02-00373, 2007 WL 1612589 (M.D.N.C. May 31, 2007) (denying motion to dismiss in part) ("*Tatum 3*"); *Tatum v. R.J. Reynolds Tobacco Co.*, 926 F.Supp.2d 648 (M.D.N.C. 2013) (entering judgment for defendants after bench trial) ("*Tatum 4*"); *Tatum v. R.J. Reynolds Tobacco Co.*, 761 F.3d 346 (4th Cir. 2014) (reversing and vacating *Tatum 4* in part and remanding) ("*Tatum 5*"); *Tatum v. R.J. Reynolds Tobacco Co., No.* 1:02CV00373, 2016 WL 660902, at *2 (M.D.N.C. Feb. 18, 2016) (on remand, determining defendants had shown that a fiduciary acting with prudence would have divested the Nabisco Funds) ("*Tatum 6*"); and *Tatum v. R.J. Reynolds Inv. Comm.*, 855 F.3d 553 (4th Cir. 2017) (affirming *Tatum 6*) ("*Tatum* 7").

U.S. 134, 143, n.10 (1985)). Under this standard, "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Tibbie v. Edison Int'l*, 135 S. Ct. 1823, 1828–29 (2015). Thus, "[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 1829.

In *Dudenhoeffer*, the Supreme Court considered the duty of prudence within the context of publicly traded securities and concluded 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." *Dudenhoeffer*, 134 S. Ct. at 2471. Correlatively, the Supreme Court concluded that "a fiduciary usually is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him." *Id.* at 2471 (citation and internal quotation marks omitted).

Courts have applied the pronouncements in *Dudenhoeffer* broadly to breach of fiduciary duty claims other than those based on *value* based prudence claims. *See Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 862 (6th Cir. 2017) (reasoning that "[t]he plaintiffs in *Dudenhoeffer* similarly argued that the fiduciary should have known that the company's stock was 'overvalued *and excessively risky*.' ") (quoting *Dudenhoeffer*, 134 S. Ct. at 2464); *See Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 65 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1067 (2017) (rejecting arguments that *Dudenhoeffer* only applies to claims concerning market value); *Coburn v. Evercore Tr. Co., N.A.*, 844 F.3d 965, 971 (D.C. Cir. 2016) ("Without

preamble, the Supreme Court disposed of the risk-based claims through its broad rule that '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.' ") (quoting *Dudenhoeffer*, 134 S.Ct. at 2471). Although the Fourth Circuit has not specifically addressed this issue, the Court concludes that the holding in *Dudenhoeffer* applies to Plaintiff's breach of fiduciary duty claims, even though those claims appear to be based on aspects of the Plan's investment in TEGNA stock other than purely market value. For these reasons, Plaintiff's breach of fiduciary duty claim is implausible absent "special circumstances."

Plaintiff attempts to distinguish *Dudenhoeffer* based on Fourth Circuit precedent. First, Plaintiff relies on *DiFelice*, decided before *Dudenhoeffer*, to argue that *Dudenhoeffer's* "relaxed" fiduciary duty requirements do not apply to a single-stock fund that was not employer stock. Pl.'s Opp. Mem. at 2 ("It might be true of employer stock (absent special circumstances), which enjoys special treatment under [ERISA] . . . , that some duties are relaxed."). In *DiFelice*, the plaintiff, an airline employee, filed an ERISA class action against the plan's administrator for breach of fiduciary duty based on the administrator's decision to retain airline stock fund as an investment option in the U.S. Airways 401(k) plan even though the airline faced extreme financial hardship. *DiFelice*, 497 F.3d at 410. In finding that the defendants did not breach their fiduciary duty, the Fourth Circuit expressed concern about placing retirement funds in any single-stock fund. *Id.* at 424 (explaining in dicta that any single-stock fund carries significant risk and therefore may be imprudent for ERISA purposes). But in *Tatum 5*, the Court rejected the argument that non-employer,

single-stock funds are imprudent *per se* due to the inherent risk. *Tatum 5*, 761 F.3d at 360 ("But this *per se* approach is directly at odds with our case law and federal regulations interpreting ERISA's duty of prudence."). The Fourth Circuit reasoned that in evaluating the prudence of an investment decision, *DiFelice* 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.' " *Id.* (quoting *DiFelice*, 497 F.3d at 420). More directly pertinent is that *Dudenhoeffer* itself provides that "the same standard of prudence applies to all ERISA fiduciaries, including ESOP [employee stock ownership plan] fiduciaries, except that an ESOP fiduciary is under no duty to diversity the ESOP's holding." *Dudenhoeffer*, 134 S. Ct. at 2467.

Plaintiff also argues that *Tatum 7* takes this case out from under *Dudenhoeffer*, since under *Tatum* 7, "fiduciaries can rely on the market's price when judging a stock's *value* but are not excused from evaluating whether the stock is prudent and in the best interests of participants." Pl.'s Opp. Mem. at 11. In *Tatum* 7, the plaintiff, an RJR Nabisco ("RJR") employee, sued RJR and various RJR committees following RJR's "spin-off" of the company's food business, Nabisco, from its tobacco business. *Tatum* 7, 855 F.3d at 553. Before the spin-off, participants in RJR Nabisco's retirement plan were able to hold stock in their retirement accounts in both the RJR Nabisco Common Stock Fund and the Nabisco Common Stock Fund. *Id.* at 556. Afterwards, the RJR Nabisco Common Stock Fund was divided into two separate funds which held exclusively Nabisco stock. *Id.* In order to avoid holding stock in a soon to be "non-related" company, the plan administrator informed

the participants that the Nabisco Funds would be frozen on the date of the spin-off and divested within six months. *Id.* After the spin-off, participants were able to sell their shares in the Nabisco Funds but could not make additional investments in that Fund. *Id.* Shortly after the spin-off, the Nabisco stock declined in value. *Id.* However, two months after divestment occurred, Nabisco received a bid to take over the company, which ultimately had the effect of increasing the price of both companies' stock. *Id.* at 557. Plaintiff claimed that RJR and the committee breached its fiduciary duties by failing to conduct a thorough investigation before eliminating Nabisco stock from the plan at its all-time low, despite the likelihood that the Nabisco stock prices would recover. *Id.* The district court held that none of the alleged losses were caused by the alleged fiduciary breach because a prudent fiduciary would have made the same divestment decision at the same time and in the same manner. *Id.* at 556.

On appeal, *Tatum 7* only addressed the narrow issue of loss causation; and affirmed the District Court's decision. *Tatum* 7, 855 F.3d at 566 (finding that *Dudenhoeffer* did not directly apply and that a loss causation analysis "requires consideration of more than the value of a stock in determining what a prudent fiduciary would have done"). Nevertheless, the Fourth Circuit squarely embraced the core principles in *Dudenhoeffer* "that a fiduciary is *not required* to divest a high-priced stock based on public information that shows a risk of price decrease[,]" *id.* at 565 (citing *Dudenhoeffer*, 134 S. Ct. at 2471–72); and that *Dudenhoeffer*, as applied to the facts of the case, "teaches that a prudent fiduciary would have relied on the low market price of the Nabisco stock as the current value of the stock." *Id.* Nothing in *Tatum*

7 supports Plaintiff's contention that the pronouncements in *Dudenhoeffer* do not control his claims.

For the above reasons, Plaintiff has failed to state facts that make plausible his breach of fiduciary duty claims absent "special circumstances." "Special circumstances" include factors that affect the "reliability of the market price as an unbiased assessment of the security's value in light of all public information." *Dudenhoeffer*, 134 S. Ct. at 2471 (citation and quotation marks omitted).

The Plaintiff does not explicitly allege any "special circumstances" sufficient to support the contention that the market price was not an unbiased assessment of the security's value. The Complaint, construed liberally, appears to allege that "special circumstances" exist in light of the volatility of TEGNA stock, which is alleged to have been approximately 90% more volatile than the market as a whole. Compl. ¶¶ 6(c), 61. While the Fourth Circuit has not considered whether facts comparable to those alleged in the Complaint constitute "special circumstances" under *Dudenhoeffer*, others Circuits have and have concluded that they do not, as does this Court in this case. *See Singh v. RadioShack Corp.*, 882 F.3d 137 (5th Cir. 2018); *Rinehart*, 817 F.3d at 56; *Saumer*, 853 F.3d at 855; *Coburn v. Evercore Tr. Co.*, 844 F.3d at 965; *Smith v. Delta Air Lines Inc.*, 619 F. App'x 874, 876 (11th Cir. 2015); *Pfeil v. State St. Bank & Tr. Co.* 806 F.3d 377, 386 (6th Cir. 2015). Accordingly, Plaintiff has failed to allege facts that make plausible that there existed "special circumstances" that resulted in a breach of fiduciary duty and his breach of duty of prudence claim based on publicly available information is dismissed.

2. Duty to Diversify

Pursuant to 29 U.S.C. § 1104(a)(C), ERISA fiduciaries are required to diversify plan investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." "To enforce these duties, the court focuses not only on the merits of a transaction, but also on the thoroughness of the investigation into the merits of that transaction." *DiFelice*, 497 F.3d at 418 (quotation marks and alterations omitted). Moreover, "the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary." *Dudenhoeffer*, 134 S. Ct. at 2468. Section 1104(a)(2) exempts an employee-owned stock fiduciary from "§ 1104(a)(1)(B)'s duty of prudence, but only to the extent that it requires diversification." *Id.* (quotation marks omitted). Accordingly, "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Plaintiff alleges that Defendants breached their duty to diversify the plan by investing too heavily in the TEGNA stock. *See* Compl. ¶¶ 60, 108. Defendants move for dismissal of Plaintiff's breach of duty to diversify claim because the "Plan offered a broad menu of investment options that was amply diversified." Defs.' Mem in Supp. at 9.

Plaintiff has failed to allege facts that make plausible any claim that the Plan's fiduciaries breach their duties to diversify under ERISA. In effect, Plaintiff's claim is not that the Plan failed to offer investment options sufficient to allow participants to diversify their investments but rather that the

Defendants were required to force the participants to diversify their investments. Plaintiff has failed to allege facts that make that claim plausible. Although Plaintiff alleges that TEGNA stock comprised 20% of the total plan's holding at the time of the spin-off, the Plan as a whole was comprised of various options for the participants to select. Here, participants had the choice to allocate their contributions among different plan investments, as compared with those plans where the fiduciaries controlled the allocation of assets among various options. *Cf. Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan*, 712 F.3d 705 (2d Cir. 2013). Accordingly, Plaintiff's claim for breach of duty to diversify will be dismissed.[4]

3. Duty to Investigate

The Complaint also alleges that Defendants breached their fiduciary duty by failing to "conduct an appropriate investigation of continued investment in TEGNA common stock." Compl. ¶ 107. The Complaint also alleges that that "Defendants did not follow an appropriate process in evaluating the prudence of TEGNA common stock . . . [and] did not perform an

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[4] Relying on *DiFelice*, Plaintiff argues that the duty to diversify must be considered individually rather than on the portfolio as a whole. Pl.'s Opp. Mem. at 14. In *DiFelice*, on review of the district court's application of the "modem portfolio theory," the Court determined that the district court correctly determined that a Company Fund was a prudent option for investment over the class period. *DiFelice*, 497 F.3d at 423–24. On review, the Court noted that "[u]nder ERISA, the prudence of investments or classes of investments must be judged individually." *Id.* at 423 (citation and quotation marks omitted). The Court noted that "the relevant 'portfolio' that must be prudent is *each* available Fund considered on its own, including the Company Fund, not the full menu of Plan funds." *Id.* The Court's conclusions, however, did not address the duty to diversify, but rather the duty of prudence; and does not control plaintiff's failure to diversify claim.

independent review, as they were required to do." *Id.* ¶ 63. There are no allegations concerning what "special circumstances" an investigation would have uncovered; and Plaintiff has therefore failed to allege facts that make plausible that any failure to conduct an adequate investigation caused any harm to the Plan. *See Rinehard v. Lehman Bros. Holdings Inc.*, 817 F. 3d 56, 67 (2d Cir. 2016) ("[P]laintiffs must allege facts that, if proved, would have revealed to a reasonable fiduciary that the investment at issue was imprudent.").

B. Plaintiff fails to allege a Co-fiduciary liability.

The Court having found that there was no underlying breach of fiduciary duty as to any of the Defendants, Count II pursuant to ERISA § 405, 29 U.S.C. § 1105(a) will be dismissed.

IV. CONCLUSION

For the reasons stated above, it is hereby

ORDERED that Defendants' Motion to Dismiss [Doc. No. 21] be, and the same hereby is, GRANTED; and it is further

ORDERED that this action be, and the same hereby is, DISMISSED.

The Clerk is directed to enter judgment in favor the Defendant in accordance with Fed. R. Civ. P. 58 and to forward a copy of this Order to all counsel of record.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1212
(1:18-cv-00325-AJT-JFA)

CHRISTINA STEGEMANN,
Appellant,

JEFFREY QUATRONE,
on Behalf of Gannett Co., Inc. 401(k) Savings Plan
and all others similarly situated,
Plaintiff-Appellant,

v.

GANNETT COMPANY, INC.;
THE GANNETT BENEFIT PLANS COMMITTEE,
Defendants-Appellees,

and

JOHN AND JANE DOES 1-10,
Defendant.

FILED: September 22, 2020

CORRECTED ORDER

Appellees Gannett Company and the Gannett Benefit Plans Committee filed a petition for rehearing

en banc, and Appellant Quatrone filed a response in opposition.

A poll of the court resulted in Chief Judge Gregory, Judge King, Judge Keenan, Judge Wynn, Judge Diaz, and Judge Floyd voting to deny rehearing en banc in this case. Judge Niemeyer, Judge Quattlebaum, and Judge Rushing voted to grant. Judge Wilkinson, Judge Motz, Judge Agee, Judge Thacker, Judge Harris, Judge Richardson were recused and did not participate.

Accordingly, the petition for rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

STATUTORY PROVISIONS INVOLVED

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29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant—

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

* * *

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

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

(A) for the exclusive purpose of:

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

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

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

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

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

securities (as defined in section 1107(d)(4) and (5) of this title).

* * *

(c) Control over assets by participant or beneficiary

(1)

(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

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

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

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

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

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

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

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

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. ______
CLASS ACTION

JEFFREY QUATRONE on behalf of the GANNETT CO., INC. 401(k) SAVINGS PLAN and all others similarly situated,

Plaintiff,

vs.

GANNETT CO., INC., THE GANNETT BENEFIT PLANS COMMITTEE, and JOHN/JANE DOES 1–10,

Defendants.

COMPLAINT

Plaintiff Jeffrey Quatrone ("Plaintiff"), on behalf of the Gannett Co., Inc. 401(k) Savings Plan (the "Plan" or "Gannett Plan") and a class of similarly situated participants in the Plan, brings this action against Gannett Co., Inc. ("Gannett"), the Gannett Benefit Plans Committee ("the Committee"), which is the Plan's administrator, and the individual members of the Committee, pursuant to § 502, and alleging violations of §§ 404, 405, 409, of the Employee Retirement Income Security Act of 1974 ("ERISA") (codified, respectively, at 29 U.S.C. §§ 1132, 1104, 1105, and 1109). Plaintiff alleges the following based

upon the investigation conducted by his counsel, including, among other things, a review of filings by Gannett and TEGNA Inc. ("TEGNA") with the United States Securities and Exchange Commission and the United States Department of Labor; press releases and other public statements issued by Gannett and TEGNA; analyst reports; and media reports about Gannett and TEGNA. Plaintiff believes that substantial additional evidentiary support exists for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION AND SUMMARY OF CLAIMS

1. This action concerns TEGNA's June 29, 2015 (the "date of separation") spinoff of its publishing business into a new entity, Gannett, and the failure of the Plan's fiduciaries to decrease the Plan's significant holdings in TEGNA common stock. Defendants' decision to concentrate Plan investments in TEGNA common stock was a breach of their fiduciary duties, and these breaches have caused the Plan and the Class approximately $135 million in losses.

2. Plaintiff is a participant in the Plan. He brings this action concerning the Plan's investment in the common stock of TEGNA on behalf of the Plan and a class of participants in the Plan whose retirement assets were invested in TEGNA common stock, including the "TEGNA Stock Fund," from June 29, 2015 (the "Class Period").

3. Defendants caused the Plan concentrate investments in TEGNA common stock (traded on the New York Stock Exchange under the ticker "TGNA"), and maintained the TEGNA Stock Fund—an undiversified fund invested exclusively in TEGNA common stock—as a Plan investment option, through

at least June 14, 2017 and perhaps longer (whether the Plan held TEGNA common stock longer will be determined through discovery or when the Plan's 2017 financial statements are filed with the Department of Labor).

4. Defendants' decision to invest Plan assets so heavily in a single company's common stock during the Class Period was a breach of their duties of loyalty, prudence, and diversification under ERISA § 404, 29 U.S.C. § 1104.

5. TEGNA common stock is not an "employer security" as that term is defined under ERISA, and thus, the investments are not exempt from ERISA's diversification requirements.

6. Defendants breached their fiduciary duties by permitting the Plan to invest in TEGNA common stock for several reasons, including, but not limited to, the following:

(a) *First*, Defendants caused the Plan to be undiversified by their failure to decrease the Plan's substantial holdings of TEGNA common stock following the separation, thereby subjecting the Plan and its participants to the risks associated with being too heavily invested in one company ("company risk") and industry ("industry risk"). At the end of 2015 and 2016, TEGNA common stock represented over 80% and 74%, respectively, of the Plan's total common stock holdings (excluding Gannett stock)—an imprudent and unnecessary undiversified risk for the workers and retirees who depend on the Plan for their retirement savings.

(b) *Second*, Defendants' failure to decrease the Plan's TEGNA common stock holdings subjected participants to additional risks because the Plan was already heavily invested in Gannett common stock

and both TEGNA and Gannett are "consumer-cyclical" stocks—their performance is heavily dependent on the business cycle and economic conditions ("sector" or "cyclical risk"). Thus, Gannett and TEGNA stock exhibit high correlation. At the end of 2015 (more than six months following the separation), the Plan's TEGNA and Gannett common stock holdings collectively comprised more than 26% of the Plan's total assets (18% was TEGNA; 8.4% was Gannett).

(c) *Third*, the imprudence of Defendants in holding such massive amounts of TEGNA common stock is further evidenced by the fact that TEGNA is a volatile stock. Indeed, toward the end of 2015, TEGNA common stock was approximately 90% more volatile than the stock market as a whole.

(d) *Fourth*, to the extent Defendants liquidated the Plan's holdings of TEGNA common stock during 2017 (this will not be known until the Plan files its financial statements with the Department of Labor), the timing of such liquidation was unreasonable. Defendants knew long in advance of the date of separation that TEGNA stock should be sold. The Plan's holdings of TEGNA common stock should have been liquidated on or shortly after the date of separation.

7. Gannett is liable for the acts of the Committee in that the Committee and its members were acting within the scope of their employment with Gannett. Moreover, Gannett failed to adequately monitor the Committee and its members to ensure that they were meeting their fiduciary obligations.

8. Prudent fiduciaries of retirement plans would not have permitted such a concentrated investment in the volatile stock of a single company, particularly for

so long. Defendants breached their duties under ERISA to diversify the Plan's investments by allowing the Plan to have an unreasonably high percentage of its assets invested in TEGNA common stock during the Class Period.

9. Because of the lack of diversification, Defendants should have been particularly attentive to the numerous warning signs that showed TEGNA stock was an imprudent investment for retirement assets, but they failed to take action as the price of TEGNA stock dropped from $20.24 on the day of the spin-off to its current price of approximately $14. The Plan's overly concentrated position caused participants to lose over $100 million as the price of TEGNA stock fell dramatically during the Class Period.

10. As a result of these breaches, each Defendants are liable to the Plan for all losses resulting from each of their breaches of fiduciary duty. Plaintiff also seeks equitable relief.

JURISDICTION AND VENUE

11. Subject Matter Jurisdiction. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

12. Personal Jurisdiction. This Court has personal jurisdiction over all Defendants because they are all residents of the United States and ERISA provides for nation-wide service of process pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

13. Venue. Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because it was where the Plan is administered and some or all of

the fiduciary breaches for which relief is sought occurred.

PARTIES

14. Plaintiff Jeffery Quatrone is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7), and held shares of TEGNA common stock in his Plan account during the Class Period. He is a resident of Phoenix, Arizona. During the Class Period, the value of the TEGNA common stock held in Plaintiff's accounts diminished considerably and Plaintiff, like thousands of other Plan participants, suffered losses resulting from Defendants' breaches of fiduciary duty.

15. Gannett Co. Inc. is a Delaware Corporation with its principal place of business in McLean, Virginia.

16. Gannett is a fiduciary because it exercised discretionary authority or control over management of the Plan, exercised authority or control over the management or disposition of Plan assets and/or had discretionary authority, and because it had discretionary authority to appoint and monitor Plan fiduciaries who had authority or control over management or disposition of Plan assets.

17. The Committee is an unincorporated association with a principal place of business in McLean, Virginia. At all relevant times, the Committee administered the Plan and was a fiduciary of the Plan.

18. The Committee is a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercised discretionary authority or control over management of the Plan, exercised authority or control over the management or disposition of Plan assets and/or had discretionary

authority to appoint and monitor Plan fiduciaries who had authority or control over management or disposition of Plan assets.

19. The Plan's Summary Plan Description (SPD) states that the Committee "has full responsibility for administering the Plan." *See* SPD at p. 29. The Committee's responsibilities included "[s]upervising the management of Plan assets…" *Id*.

20. John/Jane Does 1 through 10, inclusive, are the individual members of the Committee, and any other committee(s) responsible for carrying out the provisions of the Plan or serving as Plan Financial fiduciary during the Class Period. Their names and identities are currently not known. Upon information and belief, one or more of John/Jane Does 1 through 10 are senior executive officers of Gannett and/or TEGNA who knew or should have known the facts alleged herein.

THE SPINOFF OF GANNETT

21. On August 5, 2014, TEGNA—which was named "Gannett Co., Inc." before the spinoff—announced that its board of directors had authorized the spin-off of its publishing segment into a new, independent, publicly-traded company, which would take the Gannett name.

22. TEGNA completed the spinoff on June 29, 2015, more than ten months later. The result of the spinoff was two publicly traded companies: (1) TEGNA, which is a broadcasting and digital company and (2) the new Gannett—taking the name "Gannett Co., Inc." previously used by TEGNA—which is a publishing company with affiliated digital assets. TEGNA distributed one common share of Gannett common stock for every two shares of TEGNA common stock held by TEGNA stockholders.

23. Because the entities had not traded separately, the market had not established the relative value of each of the two separated entities, and therefore, the price paid by the Plan for TEGNA stock was not, as an initial matter, set by market forces.

DESCRIPTION OF THE PLAN

24. TEGNA established the Plan in 1990. On June 10, 2015, the Plan was re-stated to make Gannett the sponsor of the Plan and its related trust effective on the date of the separation. On the date of the separation, the Plan held approximately 10.9 million shares of TEGNA stock valued at approximately $220.8 million.

25. The Plan is an employee benefit plan within the meaning of ERISA §§ 3(3) and 3(2)(A), 29 U.S.C. §§ 1002(3) and 1002(2)(A).

26. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34) because it provides individual accounts for each participant and benefits based upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which could be allocated to such participants' accounts.

27. The Plan's purpose is "to help (participants) build a nest egg for (their) retirement." *See* SPD at p. 1.

28. The Plan had over 15,000 participants as of December 31, 2016.

29. At all times since the date of separation, June 29, 2015, the Committee has been responsible for selecting, monitoring, administering, and removing the Plan's investment options.

SUBSTANTIVE ALLEGATIONS

30. Defendants breached their fiduciary duties by causing the Plan to invest a significant portion of its assets in TEGNA common stock for an unreasonable amount of time following the separation.

31. At the time of the separation, the Plan had at least $220.8 million invested in TEGNA common stock. This massive, concentrated holding in a single-stock investment option exposed Plan participant to the risk of large losses that ERISA fiduciaries like the Committee are under a duty to prevent.

32. At December 31, 2015—more than six months after the separation—and well over a year after Defendants knew about the separation—the Plan was still heavily invested in TEGNA common stock, owning more than $178 million in TEGNA common stock. TEGNA common stock was the Plan's largest holding by far. The following table summarizes the Plan's ten largest common stock holdings as of December 31, 2015:

Company	Vale [sic] as of 12/31/15	% of common stock holdings (including Gannett stock)
TEGNA Inc.	**$178,145,839**	**58.56%**
Gannett Co., Inc.	$83,142,323	27.33%
Amazon.com Inc.	$1,294,329	0.43%
Visa Inc.	$1,145,103	0.38%
Facebook Inc.	$939,847	0.31%
Apple Inc.	$827,344	0.27%
Royal Dutch Shell Plc (ADRs)	$747,918	0.25%
Celgene Corp.	$720,716	0.24%
Nike Inc. Cl B	$694,625	0.23%
Alphabet Inc.	$694,375	0.23%

33. To put the Plan's December 31, 2015 holdings of TEGNA common stock in perspective, other than Gannett and TEGNA, the Plan held only approximately $42.9 million in the common stock of all other companies in the world. Accordingly, as of December 31, 2015, **the value of the Plan's TEGNA common stock holdings was 415% greater than the value of all other non-company stock combined.**

34. By the end of 2015, **TEGNA common stock made up over 80.6% of the Plan's total non-Gannett common stock holdings**. To put this concentration into perspective, other non-company stocks made up on average only 0.18% of total common stock holdings. The next largest non-Company stock, Amazon common stock, made up only 0.43% of total non-Company common stock holdings.

35. More than eighteen months after the separation, the Plan still held a massive amount of TEGNA common stock—more than $115 million. Although the value of the Plan's TEGNA common stock holdings decreased over 2016, a large portion of this decrease was caused by the share price's 16% decrease during 2016 rather than liquidation. The following table summarizes the Plan's ten largest common stock holdings as of December 31, 2016:

Company	Value as of 12/31/16	% of common stock holdings (Inc. Gannett stock)
TEGNA Inc.	**$115,658,682**	**52.15%**
Gannett Co., Inc.	$64,955,403	29.29%
Visa Inc.	$904,720	0.41%
Apple Inc.	$887,181	0.40%
Amazon.com.	$873,599	0.39%
JPMorgan Chase & Co.	$848,403	0.38%
Voya Fin'l Inc.	$817,188	0.37%
Royal Dutch Shell Plc (ADRs)	$756,383	0.34%
Citigroup Inc.	$746,560	0.34%
Morgan Stanley	$714,617	0.32%

36. To put the Plan's December 31, 2016 holdings of TEGNA common stock in perspective, other than Gannett and TEGNA, the Plan held approximately $41.2 million in common stock. Thus, as of December 31, 2016, **the value of the Plan's TEGNA common stock holdings was 281% greater than the value of all other non-company stock combined.**

37. **TEGNA common stock made up over 73.75% of the Plan's total non-Gannett common stock holdings**. To put this concentration into perspective, other non-company stocks made up on average only 0.25% of total common stock holdings. The next largest non-Company stock holding, Visa common stock, made up only 0.41% of total non-Company common stock holdings.

38. The following table summarizes relevant Plan's holdings at the end of 2015 and 2016.

Value of:	12/31/15	12/31/16
TEGNA common stock holdings	$178,145,839	$115,658,682
Other non-Gannett common stock (combined)	$42,917,175	$41,173,623
Average of other non-Company stock holdings	$401,095	$399,744

39. The sheer size of the Plan's holdings in TEGNA common stock was unreasonable by any measure.

40. According to Morningstar, out of all mutual funds available in the market, the fund with the highest concentration of TEGNA stock was the Cove Street Capital Small Cap Value Fund, which held only 5.8% of TEGNA stock as of December 31, 2017.[1]

41. Thus, the fact that the Plan as of December 31, 2015 owned ***almost three times*** the concentration of TEGNA stock as the concentrated fund with largest holdings of TEGNA (in relation to total assets) was plainly imprudent for the investment of retirement asset.

42. The Plan's concentrated position in TEGNA, which represented more than 20% of the Plan's holdings at the time of the separation, exposed it to more "company risk" than undiversified mutual funds who concentrate investments in the common stock of companies in the media industry. For example, the largest holding of the TRowe Price Media & Telecommunications Fund, a fund which focuses "in the common stock of companies engaged in any facet of media and telecommunications," was less than 11% of the fund's portfolio as of December 31, 2017. Likewise, Reliance Media & Entertainment Fund's

[1] http://covestreetfunds.com/wp-content/uploads/2018/01/CSC-Q4-2017-Shareholder-Letter.pdf.

largest investment only represented 13% of its portfolio as of December 31, 2017. The Plan's purpose is to provide participants with retirement income and should not have held a more-concentrated position in one company's stock than non-diverse, sector-specific mutual funds.

43. The Plan's investment in TEGNA was also grossly disproportionate compared to Gannett's defined benefit plan, the "Gannett Retirement Plan" (the "DB Plan"), which the Committee also administers. The Plan, a defined contribution plan in which the risk of loss is borne by participants, had more than 20% of its assets invested in TEGNA stock at the time of the separation and a 15.8% and 10.7% concentration at the end of 2015 and 2016, respectively. In contrast, the DB Plan, for which Gannett bears the risk of loss, had only 1.8% and 1.7% of its assets invested in TEGNA stock at the end of 2015 and 2016, respectively.

44. Additionally, the Gannett Plan held significantly more TEGNA common stock *than TEGNA's own 401(k) Plan*. At December 31, 2015 and 2016, the TEGNA 401(k) Plan held only $66.5 million and $58.6 million, respectively. The following table summarizes the Plan's TEGNA common stock holdings in comparison to the TEGNA 401(k) plan:

Value of TEGNA common stock	12/31/15	12/31/16
in Gannett 401(k) Plan ($)	$178,145,839	$115,658,682
in TEGNA 401(k) Plan ($)	$66,457,269	$58,592,890

45. Defendants knew about the substantial risk of this lack of diversification. Indeed, the Plan's own auditor warned that the Plan's TEGNA holdings

created concentration risk. According to the Plan's 2015 financial statements:

> The fair value of the Plan's investment in Gannett's and TEGNA's stock as of December 31, 2015 was approximately $83.1 million and $178.1 million, respectively, **which exposes the plan to concentration risk**. (Emphasis added.)

46. The following year, the Plan's auditor again warned about the risk created by the large TEGNA common stock holdings. According to the Plan's 2016 financial statements:

> The fair value of the Plan's investment in Gannett's and TEGNA's stock as of December 31, 2016 was approximately $65.0 million and $115.7 million, respectively, **which exposes the Plan to concentration risk**. (Emphasis added.)

47. Moreover, because of the concentration risk created by the Plan's excessive holdings of TEGNA common stock, management for TEGNA and Gannett ***mandated*** in June 2015 that Defendants liquidate the Plan's TEGNA holdings. In connection with the separation, TEGNA and Gannett executed an Employee Matters Agreement, which stated in relevant part:

> After the [date of separation], all outstanding investments in the [TEGNA stock fund] under the [Gannett] Plan **shall be liquidated** and reinvested in other investment funds offered under the [Gannett Plan], on such dates and in accordance with such procedures as are determined by the [Committee]. (Emphasis added.)

48. The Plan's excessive holdings in TEGNA was costly to participants. For example, the following chart demonstrates the significant decline in the value of TEGNA common stock from the date of separation through the end of 2015.

49. Between the date of the separation through the end of 2015, the price of TEGNA stock fell $3.91 or 19.3%, causing the Plan losses of approximately $42.6 million (the difference between $220,750,729 and $178,145,839).

50. During 2016, TEGNA common stock's poor performance continued, losing another $2.64 per share. Thus, from the date of separation through the end of 2016, TEGNA stock fell $6.55 or 32.3%.

51. The Plan's 2016 financial statements imply that at year end the Plan held approximately 8.5 million shares of TEGNA common stock and thus that the Plan liquidated approximately 2.5 million shares. However, even if those shares were sold on January 1,

2016, the Plan's TEGNA common stock holdings caused the Plan losses of approximately $22.3 million.

52. Accordingly, over the eighteen months between the separation and the end of 2016, the Plan's TEGNA common stock holding had lost approximately $65 million.

53. Since 2016, TEGNA common stock has traded relatively flat, closing at approximately $13.97 on February 20, 2018.

54. TEGNA common stock has significantly underperformed the market since the date of separation. Since June 29, 2015, the price of **TEGNA common stock has declined approximately 31%** while during that same time period the **S&P index (SPX) has increased approximately 32%.**

55. The following chart demonstrates the substantial performance disparity between TEGNA common stock (lower line) and the broader domestic stock market, as measured by the S&P 500 (upper line) since the date of separation.

56. Had the $220 million invested in TEGNA common stock at the time of separation instead been invested in an investment that performed similarly to the S&P 500 index, that investment would have yielded over $70 million rather than losing approximately $65 million.

57. Based on its size, the Plan could have invested in any one of a number of mutual funds, collective investment trusts, and exchanged traded funds that would have largely mirrored the performance of the S&P 500 Index.

58. Accordingly, Defendants' fiduciary breaches have caused the Plan and the Class losses of approximately $135 million.

59. The following table summarizes the Plan's current estimated monetary losses[2] caused by Defendants' breaches:

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[2] Plaintiff reserves his right to amend his monetary loss estimate.

Period	Share Decline ($)	Estimated Losses
6/29-12/31/15	$20.24 – $16.33 = $3.91	10,909,114 shares x 3.91 = ($42,654,638)
1/1-12/31/16	$16.33 – $13.69 = $2.64	8,448,406 shares x 2.64 = ($22,303,793)
Total Losses of Plan's TEGNA common stock holdings		($64,958,430)
Estimated earnings if assets had instead been invested in market-performing investment $220,750,730 x 32% =		$70,640,234
TOTAL MONETARY LOSSES		**$135,598,664**

60. The overly concentrated position in TEGNA common stock should have been a red flag to the Defendants that they needed to diversify the Plan's assets in order to avoid the risk of large losses and ensure the Plan's assets were invested prudently. Defendants, however, failed to independently assess and monitor the Plan's holdings of TEGNA common stock to ensure they were prudent and that the Plan was reasonably diversified.

61. Additionally, according to its beta, TEGNA common stock was significantly more volatile, and thus riskier, than other more-suitable investments. Beta is a measure of a stock's volatility in comparison to the volatility of the market as a whole. It is calculated by dividing the covariance of the security's returns and the benchmark's returns by the variance of the benchmark's returns. By definition, the market has a beta of 1.0, and individual stocks are ranked according to how much they deviate from the market.

A stock that swings more than the market over time has a beta above 1.0. If a stock moves less than the market, the stock's beta is less than 1.0. High-beta stocks are supposed to be riskier but provide a potential for higher returns; low-beta stocks pose less risk but also lower returns.

62. At the time of separation, the beta for TEGNA common stock was 1.455 meaning TEGNA was 45.5% more volatile than the stock market. This risk increased toward the end of 2015 when the beta increased to approximately 1.909, meaning TEGNA was 90.9% more volatile than the stock market.

63. Defendants caused the Plan to hold massive holdings of TEGNA common stock through at least the end of 2016 and perhaps longer, because Defendants did not follow an appropriate process in evaluating the prudence of TEGNA common stock and the diversification of Plan investment options. Defendants did not perform an independent review, as they were required to do, and their failures cost the Plan participants millions of dollars.

64. TEGNA common stock was not a "qualifying employer security" for the Plan. ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2), provides that ERISA's duties of prudence and diversification are not violated "by acquisition or holding of . . . qualifying employer securities."

65. As of the date of separation, however, TEGNA stock was not a "qualifying employer security" with respect to the Plan.

66. ERISA § 3(5), 29 U.S.C. § 1002(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan."

67. ERISA § 407(d)(1), 29 U.S.C. 1107(d)(1), defines "employer security" as a "security issued by an employer of employees covered by the plan, or by an affiliate of such employer." Under ERISA, a "qualifying employer security" is an "employer security" that is either a stock, a marketable obligation (*e.g.*, a bond) or an interest in a publicly traded partnership. See ERISA § 407(d)(5), 29 U.S.C. § 1107(d)(5).

68. Gannett and TEGNA have been independent companies since they separated in 2015. The companies have separate defined contribution retirement plans covering their own employees.

69. TEGNA's employees are not eligible to participate in the Plan. *See* SPD at p. 2. As part of the Separation, the Plan transferred the account balances for current and former employees of TEGNA to the "TEGNA 401(k) Savings Plan." "As of the transfer date, employees of TENGA, Inc. and its affiliates ceased participating it the Plan." *See* Plan's 2015 11-k at p. 5.

70. TEGNA has not paid Plan participants' wages, made contributions to the Plan or otherwise acted in Gannett's interests concerning the Plan since Separation. Accordingly, TEGNA is not an "employer" for the Plan.

71. TEGNA was also not an "affiliate" of Gannett after the Separation. Under ERISA § 407(d)(7), 29 U.S.C. § 1107(d)(7), a corporation is an "affiliate" of an employer if it is a member of a "controlled group of corporations," a term defined as when a parent corporation owns stock possessing at least 50% of the subsidiary's voting power or when five or fewer individuals, estates or trusts own stock possessing at least 50% of each corporation's voting power. *Id.* (citing

26 U.S.C. § 1563). After the separation, TEGNA and Gannett were both independent, publicly traded companies. TEGNA is also not among the "Participating Affiliates" listed in the SPD. *See* SPD at p. 32. Accordingly, the companies have not been "affiliates" since the separation.

72. As TEGNA was not an "employer" or an "affiliate" for the Plan after the Separation, TEGNA stock was not a "qualifying employer security." Defendants did ***not*** classify TEGNA stock as an "employer security" in either 2015 or 2016 on the Plan's financial statements.

73. Defendants had a continuing duty to assess the appropriateness of the Plan's holdings of TEGNA common stock and the TEGNA Stock Fund under *Tibble v. Edison International*, 135 S. Ct. 1823 (2015). As alleged above, Defendants breached their fiduciary duties by allowing the Plan to continue to hold and invest in the TEGNA common stock and the TEGNA Stock Fund.

74. ERISA requires prudent fiduciaries to diversify the plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." *See* ERISA § 404(a)(1)(C) [29 U.S.C. § 1104(a)(1)(C)]. ERISA's legislative history indicates that a fiduciary should not invest an "unreasonably large percentage" of plan assets in a "single security," in "one type of security," or in "various types of securities that are dependent upon success of one enterprise or upon conditions in one locality." *See* ERISA Conference Report on H.R. 2, H.R. Rep. No. 1280, 93d Cong., 2d Sess. 300, 304 (Aug. 12, 1974).

75. Because the value of any single stock is tied to the fortunes of one company, holding a single stock is

unduly risky. By contrast, investors who hold a diverse portfolio of stocks and bonds face less risk because they have only a small stake in each company. *See* N. Gregory Mankiw, Principles of Economics 546 (1998); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 415 (4th Cir. 2007); *Steinman v. Hicks*, 352 F.3d 1101, 1104 (7th Cir. 2003).

76. Defendants recognized the importance of diversification. The SPD states that "[s]preading your assets among different types of investments can help (participants) achieve a favorable rate of return, while minimizing (participants') overall risk of losing money." *See* SPD at p. 13. According to the SPD, retirement savings are not "properly diversified" if more than 20% are invested "in any one company or industry…" *Id.*

77. Even a 20% concentration in any one company or industry was excessively risky. Under ERISA, the benchmark for the amount of a single security that a retirement plan should own is only 10%, not 20%, as set forth in ERISA 407(a)(2), 29 U.S.C. § 1107(a)(2).

78. Defendants permitted the Plan to invest far too much in TEGNA stock, as alleged above. As further alleged above, when combined with the Gannett stock held by the Plan, the holding of TEGNA stock was even more egregiously undiversified because the two securities are in the same industry.

79. Because of the Plan's concentrated position in TEGNA common stock, numerous other red flags during the relevant period should have demonstrated to Defendants that the Plan should no longer be invested in TEGNA stock.

80. During 2015 several investment banks downgraded and/or were bearish about TEGNA common stock. For example, Evercore downgraded

TEGNA to a "Hold" in July and Jefferies did so in August.

81. In 2016, several other investment banks likewise downgraded their views on the prospects of TEGNA's common stock. For example, Barclays downgraded TEGNA to "Underweight" in April and JP Morgan downgraded to Neutral in November.

82. Based on the negative outlook on TEGNA common stock, a prudent and loyal fiduciary would have reviewed the Plan's significant holdings of TEGNA common stock as part of any review and liquidated or significantly reduced such holdings from the Plan if it had not already done so.

83. Given these risks, coupled with the lack of diversification, Defendants failed to take action that a prudent fiduciary would have taken to stop these losses, and the risk of future large loss, that Plan participants were or could be suffering. Defendants did not liquidate the Plan's holdings of TEGNA common stock or remove the TEGNA Stock Fund as a Plan investment or otherwise act to save the Plan from losing millions of dollars in hard-earned retirement savings.

84. Unfortunately, the Defendants' breach of their fiduciary duties caused the Plan and its participants to suffer millions of dollars in losses.

DEFENDANTS' FIDUCIARY DUTIES

85. Under ERISA, those responsible for the management and operation of a plan are fiduciaries and these fiduciaries owe participants the highest duties known to law. These duties include, among others, the duty of loyalty, the duty of prudence, the duty of diversification, and the duty to monitor. *See* ERISA § 404, 29 U.S.C. § 1104.

86. Duty of Loyalty. Under ERISA § 404(a)(1)(A)(i) 29 U.S.C. § 1104(a)(1)(A), "a fiduciary shall discharge his duties with respect to a plan **solely in the interest of the participants** and beneficiaries and . . . for **the exclusive purpose of . . . providing benefits to participants** and their beneficiaries." (emphasis added). Thus, a fiduciary must act with one and only one purpose and must act to further one and only one interest. This is often called the "exclusive benefit rule."

87. Duty of Prudence. Under ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with **the care, skill, prudence, and diligence** under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." (emphasis added).

88. Duty of Diversification. Under ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C), "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . 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."

89. Duty to Monitor. In addition to the duty to prudently select investments, a fiduciary has "a continuing duty of some kind to monitor investments and remove imprudent ones" and "a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829 (2015).

DEFENDANTS WERE FIDUCIARIES

90. ERISA requires that every plan name one or more fiduciaries who have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

91. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who perform fiduciary functions for a retirement plan. A person or entity is considered a fiduciary to the extent:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

ERISA § 3(21)(A)(i) [codified at 29 U.S.C. § 1002(21)(A)(i)].

92. Each of the Defendants was a fiduciary during the Class Period within the meaning of ERISA § 3(21)(A)(i) [29 U.S.C. § 1002(21)(A)(i)] as either a named or a *de facto* fiduciary with respect to the Plan, and each owed fiduciary duties to the Plan and its participants under ERISA.

93. The Committee is a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercised discretionary

authority or control over management of the Plan. In particular, it had the fiduciary duty to select and monitor Plan investment options, including the TEGNA stock fund.

94. Gannett is a fiduciary because it had the duty to monitor the Committee to ensure that it was properly meeting its fiduciary duties. It is also a fiduciary because it is responsible for the acts of the Committee and its members who were acting within the scope of their employment.

CLASS-ACTION ALLEGATIONS

95. Plaintiff brings this action derivatively on the Plan's behalf pursuant to ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132, and as a class action pursuant to Rules 23(a), (b)(1), and/or (b)(2) of the Federal Rules of Civil Procedure on behalf of the Plan, Plaintiff, and the following class of similarly situated persons (the "Class"):

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Gannett Co., Inc. 401(k) Savings Plan at any time from June 29, 2015, inclusive (the "Class Period"), and whose Plan accounts included investments in TEGNA common stock (including the TEGNA Stock Fund).

96. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, the Plan had over 15,000 participants at the end of 2016. Accordingly, Plaintiff believes there are thousands of Plan participants whose Plan accounts included

investments in the TEGNA common stock during the Class Period.

97. Multiple questions of law and fact common to the Class exist, including:

(a) whether Defendants each owed a fiduciary duty to the Plan, Plaintiff, and members of the Class;

(b) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries;

(c) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries with care, skill, prudence, and diligence;

(d) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries 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);

(e) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries by monitoring investments and removing imprudent ones;

(f) whether the Plan's massive holdings in TEGNA stock were imprudently undiversified;

(g) whether TEGNA stock qualified as an Employer Security for purposes of exempting the Plan's holdings in TEGNA stock from the duty to diversity under ERISA § 404;

(h) whether Defendants otherwise violated ERISA; and

(i) whether the Plan, Plaintiff, and members of the Class have sustained damages and, if so, what is the proper measure of damages.

98. Plaintiff's claims are typical of the claims of the members of the Class because the Plan, Plaintiff, and the other members of the Class each sustained damages arising out of Defendants' uniform wrongful conduct in violation of ERISA as complained of herein.

99. Plaintiff will fairly and adequately protect the interests of the Plan and members of the Class because they have no interests antagonistic to or in conflict with those of the Plan or the Class. In addition, Plaintiff has retained counsel skilled and experienced in class-action litigation, complex litigation, and ERISA litigation.

100. Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

101. Class action status is also warranted under Rule 23(b)(1)(A) and (b)(2) because: (i) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; and (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

CAUSES OF ACTION

COUNT I
Breaches of Fiduciary Duties
Violations of ERISA §§ 404 and 409
[29 U.S.C. §§ 1104 and 1109]

102. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

103. During the Class Period, the Defendants were named fiduciaries pursuant to ERISA § 402(a)(1) [29 U.S.C. § 1102(a)(1)], or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A) [29 U.S.C. § 1002(21)(A)], or both.

104. Defendants breached their fiduciary duties by wrongfully allowing the Plan to hold massive amounts of TEGNA common stock.

105. The scope of the Defendants' fiduciary duties and responsibilities included managing the assets of the Plan for the sole and exclusive benefit of participants and beneficiaries and with the care, skill, diligence, and prudence required by ERISA. Defendants were responsible for, among other things, selecting and offering only prudent investment options, eliminating imprudent options, evaluating the merits of the Plan's investments on an ongoing basis, administering the operations of the Plan and taking all necessary steps to ensure that the Plan's assets were diversified and invested prudently.

106. According to Department of Labor regulations and cases interpreting this statutory provision, a fiduciary's investment or investment course of action is prudent if he has: (a) given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the

particular investment or investment course of action involved, and (b) acted accordingly.

107. Defendants had a duty to follow a regular, appropriate systematic procedure to evaluate TEGNA common stock as investments in the Plan. They breached that duty and failed to conduct an appropriate investigation of continued investment in TEGNA common stock.

108. As alleged above, Defendants breached their fiduciary duties by failing to diversify Plan investments. Defendants were bound by the duty to diversify the Plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." *See* ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C).

109. Despite the power and ability to do so, Defendants took no actions to diversify the Plan's assets and reduce the Plan's risky investment in TEGNA common stock. 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.

110. Additionally, Defendants failed to act prudently when they caused the Plan to continue to hold significant amounts of TEGNA common stock and to offer the TEGNA Stock Fund as Plan investment options because, among other reasons:

(a) they knew or failed to understand that TEGNA stock was not a qualifying employer security;

(b) they knew of and/or failed to investigate TEGNA; and;

(c) the risk associated with the investment in TEGNA common stock during the Class Period was

by far above and beyond the normal, acceptable risk for retirement plan investments.

111. Moreover, to the extent any members of the Committee were employees or directors of TEGNA or were also on the Committee of a TEGNA retirement plan during the Class Period, such a dual role would create conflicts of interest that cause such members to breach their duties of loyalty to Gannett Plan participants.

112. Gannett breached its fiduciary duty to monitor the Committee in that it failed to ensure that the Committee followed its fiduciary duties concerning the Plan's investment in TEGNA stock.

113. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT II
Co-Fiduciary Liability
Violations of ERISA § 405 [29 U.S.C. § 1105]

114. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

115. ERISA § 405(a), 29 U.S.C. § 1105(a), imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. Defendants breached all three provisions.

116. ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3), imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if he has

knowledge of a breach by the other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. As alleged above, each Defendant knew of the breaches by the other fiduciaries and made no efforts, much less reasonable effort, to remedy those breaches.

117. The Committee and its individual members were the administrators of the Plan.

118. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan 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. Defendants knowingly participated in each other's breaches because, as alleged above, they participated in the management of the Plan's improper investment in TEGNA common stock and, upon information and belief, knowingly participated in the improper management of those investments by the other Defendants.

119. ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), imposes liability on a fiduciary if, by failing to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

120. As a direct and proximate result of these breaches of fiduciary duties, the Plan, and indirectly Plaintiff and other participants and beneficiaries, lost millions of dollars of retirement savings.

121. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), each of the Defendants is liable to restore the losses to the Plan

caused by his or her breaches of the fiduciary duties and to provide other equitable relief as appropriate.

CAUSATION

122. The Plan suffered millions of dollars in losses because Plan assets were imprudently invested TEGNA common stock in breach of the Defendants' fiduciary duties.

123. Had the Defendants properly discharged their fiduciary duties and/or their co-fiduciary duties, the Plan and its participants would have avoided a substantial portion of the losses suffered through the Plan's continued investment in TEGNA common stock. Defendants should have liquidated (or significantly reduced) the Plan's holdings in TEGNA common stock within a short period following the separation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

A. A Declaration that the Defendants have breached their ERISA fiduciary duties to the participants;

B. An Order compelling the Defendants to make good to the Plan all losses to the Plan resulting from their breaches of their fiduciary duties, including loss of vested benefits to the Plan resulting from imprudent investment of the Plan's assets; to restore to the Plan all profits Defendants made through use of the Plan's assets; and to restore to the Plan all profits which the Plan and participants would have made if Defendants had fulfilled their fiduciary obligations;

C. An Order enjoining each of the Defendants from any further violations of their ERISA fiduciary obligations;

D. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plan's investments;

E. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

F. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

G. An Order awarding attorneys' fees pursuant to the common fund doctrine, 29 U.S.C. § 1132(g), and other applicable law; and

H. An Order for equitable restitution and other appropriate equitable and injunctive relief against all Defendants.

DATED: March 22, 2018

Respectfully Submitted,

/s/ Gregory Y. Porter

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APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1:18-cv-00325-AJT-JFA
CLASS ACTION

CHRISTINA STEGEMANN, on behalf of the GANNETT CO., INC. 401(k) SAVINGS PLAN and all others similarly situated,

Plaintiff,

vs.

GANNETT CO., INC. and THE GANNETT BENEFIT PLANS COMMITTEE,

Defendants.

AMENDED COMPLAINT

Plaintiff Christina Stegemann ("Plaintiff"), on behalf of the Gannett Co., Inc. 401(k) Savings Plan (the "Plan" or "Gannett Plan") and a class of similarly situated participants in the Plan, brings this action against Gannett Co., Inc. ("Gannett") and the Gannett Benefit Plans Committee ("the Committee"), which is the Plan's administrator, pursuant to § 502, and alleging violations of §§ 404, 405, 409, of the Employee Retirement Income Security Act of 1974 ("ERISA") (codified, respectively, at 29 U.S.C. §§ 1132, 1104, 1105, and 1109). Plaintiff alleges the following based upon the investigation conducted by his counsel,

including, among other things, a review of filings by Gannett and TEGNA Inc. ("TEGNA") with the United States Securities and Exchange Commission and the United States Department of Labor; press releases and other public statements issued by Gannett and TEGNA; analyst reports; media reports about Gannett and TEGNA; and information obtained through discovery. Plaintiff believes that further discovery, which is ongoing, will provide substantial additional evidentiary support for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION AND SUMMARY OF CLAIMS

1. This action concerns TEGNA's June 29, 2015 (the "date of separation") spinoff of its publishing business into a new entity, Gannett, and the failure of the Plan's fiduciaries to timely liquidate the Plan's significant holdings in TEGNA common stock. Defendants' decision to concentrate Plan investments in TEGNA common stock was a breach of their fiduciary duties, and these breaches have caused the Plan and the Class more than $38 million in losses.

2. Plaintiff is a participant in the Plan. She brings this action concerning the Plan's investment in the common stock of TEGNA on behalf of the Plan and a class of participants in the Plan whose retirement assets were invested in TEGNA common stock, including the "TEGNA Stock Fund," from July 1, 2016 until the present (the "Class Period").

3. Defendants maintained the TEGNA Stock Fund—an undiversified fund invested exclusively in TEGNA common stock (traded on the New York Stock Exchange under the ticker "TGNA"), as a Plan investment option, through at least July 31, 2018.

4. Defendants' decision to invest Plan assets so heavily in a single company's common stock during the Class Period was a breach of their duties of loyalty, prudence, and diversification under ERISA § 404, 29 U.S.C. § 1104.

5. TEGNA common stock is not an "employer security" as that term is defined under ERISA, and thus, the TEGNA Stock Fund was subject to ERISA's diversification requirements.

6. Defendants breached their fiduciary duties by permitting the Plan to invest in TEGNA common stock for several reasons, including, but not limited to, the following:

(a) *First*, Defendants improperly allowed the Plan to continue offering the TEGNA Stock Fund, even though they knew that the Fund was undiversified and, as a result, more volatile and riskier for Plan Participants than alternative investment options;

(b) *Second*, Defendants caused the Plan to be undiversified by their failure to liquidate the Plan's substantial holdings of TEGNA common stock following the separation, thereby subjecting the Plan and its participants to the risks associated with being too heavily invested in one company ("company risk") and industry ("industry risk"). At the end of 2015 and 2016, TEGNA common stock represented over 80% and 74%, respectively, of the Plan's total common stock holdings (excluding Gannett stock)—an imprudent and unnecessary undiversified risk for the workers and retirees who depend on the Plan for their retirement savings.

(c) *Third*, Defendants' prolonged failure to liquidate the Plan's TEGNA common stock holdings subjected participants to additional risks because the Plan was already heavily invested in Gannett

common stock and both TEGNA and Gannett are "consumer-cyclical" stocks—their performance is heavily dependent on the business cycle and economic conditions ("sector" or "cyclical risk"). Thus, Gannett and TEGNA stock exhibit high correlation. At the end of 2015 (more than six months following the separation), the Plan's TEGNA and Gannett common stock holdings collectively comprised more than 26% of the Plan's total assets (18% was TEGNA; 8.4% was Gannett).

(d) *Fourth*, the imprudence of Defendants in holding such massive amounts of TEGNA common stock is further evidenced by the fact that TEGNA is a volatile stock. Indeed, toward the end of 2015, TEGNA common stock was approximately 90% more volatile than the stock market as a whole.

(e) *Fifth*, while Defendants ultimately decided to close the TEGNA stock fund, they unreasonably delayed the decision for two years after the spinoff of Gannett, and even after they made the decision, took over a year longer to implement it. Defendants knew long in advance of the date of separation that TEGNA stock should be sold. In fact, the Employee Matters Agreement ("EMA") between TEGNA and Gannett, which dealt with, *inter alia,* issues affecting the benefits of the employees of the formerly unified company who became Gannett employees after spin-off, specifically mandated that the TEGNA Stock Fund be terminated. In light of the TEGNA Stock Fund's undiversified nature, its volatility, and the facts that it represented the largest investment in the Plan by far, was positively correlated with another major, undiversified Plan investment (Gannett company stock), and was no longer was an "employer security" exempt from ERISA's diversification requirements, Defendants

should have immediately commenced a process for effectuating the EMA's mandate to liquidate the Plan's investment in the TEGNA Stock Fund. Had they done so, all or at least most Plan Participants would have divested their TEGNA Stock Fund holdings by the beginning of the Class Period.

7. Gannett is liable for the acts of the Committee in that the Committee and its members were acting within the scope of their employment with Gannett. Moreover, members of Gannett's board of directors, including its CFO, shared discretionary authority with the Committee to determine if and when to liquidate the TEGNA Stock Fund. Gannett also failed to adequately monitor the Committee and its members to ensure that they were meeting their fiduciary obligations.

8. Prudent fiduciaries of retirement plans would not have permitted such a concentrated investment in the volatile stock of a single company, particularly for so long. Defendants breached their duties under ERISA to diversify the Plan's investments by allowing the Plan to have an unreasonably high percentage of its assets invested in TEGNA common stock during the Class Period.

9. Because of the lack of diversification, Defendants should have been particularly attentive to the numerous warning signs that showed TEGNA stock was an imprudent investment for retirement assets generally and the Plan specifically, but they failed to take action as the price of TEGNA stock dropped from $20.24 on the day of the spin-off to its current price of approximately $11. The Plan's overly concentrated position caused participants to lose over $43 million as the price of TEGNA stock fell dramatically during the Class Period.

10. As a result of these breaches, each Defendants are liable to the Plan for all losses resulting from each of their breaches of fiduciary duty. Plaintiff also seeks equitable relief.

JURISDICTION AND VENUE

11. Subject Matter Jurisdiction. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

12. Personal Jurisdiction. This Court has personal jurisdiction over all Defendants because they are all residents of the United States and ERISA provides for nation-wide service of process pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

13. Venue. Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because it was where the Plan is administered and some or all of the fiduciary breaches for which relief is sought occurred.

PARTIES

14. Plaintiff Christina Stegemann is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7), and held shares of TEGNA common stock in her Plan account during the Class Period. She is a resident of Phoenix, Arizona. During the Class Period, the value of the TEGNA common stock held in Plaintiff's accounts diminished considerably and Plaintiff, like thousands of other Plan participants, suffered losses resulting from Defendants' breaches of fiduciary duty.

15. Defendant Gannett Co. Inc. is a Delaware Corporation with its principal place of business in McLean, Virginia.

16. Gannett is a fiduciary because it exercised discretionary authority or control over management of the Plan, exercised authority or control over the management or disposition of Plan assets and/or had discretionary authority, and because it had discretionary authority to appoint and monitor Plan fiduciaries who had authority or control over management or disposition of Plan assets.

17. Defendant Committee is an unincorporated association with a principal place of business in McLean, Virginia. It consists of five members appointed by the Gannett Board. The Board appointed Jon Held, Lori Locke, Caryn McGarry and Minakshi Sundaram on June 22, 2015, and appointed David Harmon chair effective July 13, 2015. Patrick McClanahan replaced Jon Held sometime between September 15, 2016 and November 17, 2016, and Stacey Cunningham replaced Caryn McGarry sometime in the first quarter of 2017.

18. The Committee is the named fiduciary of the Plan. In addition, the Committee is a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercised discretionary authority or control over management of the Plan, exercised authority or control over the management or disposition of Plan assets and/or had discretionary authority to appoint and monitor Plan fiduciaries who had authority or control over management or disposition of Plan assets.

19. The Plan's Summary Plan Description (SPD) states that the Committee "has full responsibility for administering the Plan." *See* SPD at p. 29. The Committee's responsibilities included "[s]upervising the management of Plan assets…" *Id.*

THE SPINOFF OF GANNETT

20. On August 5, 2014, TEGNA—which was named "Gannett Co., Inc." before the spinoff—announced that its board of directors had authorized the spin-off of its publishing segment into a new, independent, publicly-traded company, which would take the Gannett name.

21. TEGNA completed the spinoff on June 29, 2015, more than ten months later. The result of the spinoff was two publicly traded companies: (1) TEGNA, which is a broadcasting and digital company and (2) the new Gannett—taking the name "Gannett Co., Inc." previously used by TEGNA—which is a publishing company with affiliated digital assets. TEGNA distributed one common share of Gannett common stock for every two shares of TEGNA common stock held by TEGNA stockholders.

22. Because the entities had not traded separately, the market had not established the relative value of each of the two separated entities, and therefore, the price paid by the Plan for TEGNA stock was not, as an initial matter, set by market forces.

23. Along with the documents formalizing the spinoff, the two new entities—TEGNA and Gannett Co., Inc.—simultaneously entered into the EMA "to set forth the terms and conditions of certain employment, compensation and benefit matters" that were ancillary to the separation agreement. EMA at Recitals, Gannett-0002831.

24. The EMA specifically provided that, after the effective date of the spinoff, "all outstanding investments in" the TEGNA Stock Fund "***shall*** be liquidated and reinvested in other investment funds offered" in the Plan, "on such dates and in accordance with such procedures as are determined by the administrator of the" Plan. EMA § 5.03(f), Gannett-

0002852 (emphasis added). The Plan document dated June 10, 2015, which remains the operative version, specifically provides that the EMA "may be used as an aid in interpreting the terms of the transitions" involving the spin-off of Gannett from TEGNA. Plan Document at Preamble, Gannett-0000151.

DESCRIPTION OF THE PLAN

25. TEGNA established the Plan in 1990. On June 10, 2015, the Plan was re-stated to make Gannett the sponsor of the Plan and its related trust effective on the date of the separation. On the date of the separation, the Plan held over 13 million shares of TEGNA stock valued at approximately $269 million.

26. The Plan is an employee benefit plan within the meaning of ERISA §§ 3(3) and 3(2)(A), 29 U.S.C. §§ 1002(3) and 1002(2)(A).

27. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34) because it provides individual accounts for each participant and benefits based upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which could be allocated to such participants' accounts.

28. The Plan's purpose is "to help (participants) build a nest egg for (their) retirement." *See* SPD at p. 1.

29. The Plan had over 15,000 participants as of December 31, 2016.

30. At all times since the date of separation, June 29, 2015, the Committee has been responsible for selecting, monitoring, administering, and removing the Plan's investment options.

SUBSTANTIVE ALLEGATIONS

31. Defendants breached their fiduciary duties by causing the Plan to invest a significant portion of its assets in TEGNA common stock for an unreasonable amount of time following the separation.

A CHRONOLOGY OF INACTION

32. At the time of the separation, the Plan held $269 million invested in TEGNA common stock, representing more than 21.7% of the Plan's total assets. This massive, concentrated holding in a single-stock investment option exposed Plan participant to the risk of large losses that ERISA fiduciaries like the Committee are under a duty to prevent.

33. In August of 2015, in the course of the Committee's search for a consultant, Committee chair David Harmon and Committee member Minakshi Sundaram received materials from Tejera & Associates, LLC, an investment firm, which specifically noted that the Plan had a "significant holding" in TEGNA stock that was "problematic . . . ." Letter from M. Tejera to A. Sendowski, August 4, 2015, Gannett-0006204. Sundaram testified that he received the letter but did not discuss it with any other members of the Committee. Deposition of Minakshi Sundaram, July 13, 2018 ("Sundaram Tr.") at p. 41.

34. Moreover, in October of 2015, Stuart Potter, who worked for Sundaram, prepared a presentation for Sundaram's immediate supervisor, Gannett's CFO, that listed "Remove TEGNA stock fund" as a "next step" for the Plan. Gannett-0010036; Gannett-0006398. However, this presentation was not provided to the Committee. Other members of the Committee had no knowledge of the EMA or the requirement that the TEGNA Stock Fund be terminated. Deposition of Committee Member Caryn McGarry, July 18, 2018

("McGarry Tr.") at 46: 16-20. Even Committee Chair David Harmon could not recall receiving a copy of the EMA. Deposition of David Harmon, July 17, 2018 ("Harmon Tr.") at 19: 15-18.

35. By the end of 2015, more than six months after the spinoff of Gannett, and well over a year after Defendants knew about the separation, Defendants had taken no steps to commence a process for liquidating the TEGNA Stock Fund. The Committee had met at least five times, but took no action to even evaluate the continued prudence of the Fund, the performance of TEGNA stock or if it was an appropriate investment for the Plan's participants. In light of the Committee's inaction, it is unsurprising that the Plan remained heavily invested in TEGNA common stock at the end of 2015, owning more than $178 million in TEGNA common stock. TEGNA common stock was the Plan's largest holding by far. The following table summarizes the Plan's ten largest common stock holdings as of December 31, 2015:

Company	Vale [sic] as of 12/31/15	% of common stock holdings (including Gannett stock)
TEGNA Inc.	**$178,145,839**	**58.56%**
Gannett Co., Inc.	$83,142,323	27.33%
Amazon.com Inc.	$1,294,329	0.43%
Visa Inc.	$1,145,103	0.38%
Facebook Inc.	$939,847	0.31%
Apple Inc.	$827,344	0.27%
Royal Dutch Shell Plc (ADRs)	$747,918	0.25%
Celgene Corp.	$720,716	0.24%
Nike Inc. Cl B	$694,625	0.23%
Alphabet Inc.	$694,375	0.23%

36. To put the Plan's December 31, 2015 holdings of TEGNA common stock in perspective, other than Gannett and TEGNA, the Plan held only approximately $42.9 million in the common stock of all other companies in the world. Accordingly, as of December 31, 2015, **the value of the Plan's TEGNA common stock holdings was 415% greater than the value of all other non-company stock combined.**

37. By the end of 2015, **TEGNA common stock made up over 80.6% of the Plan's total non-Gannett common stock holdings**. To put this concentration into perspective, other non-company stocks made up on average only 0.18% of total common stock holdings. The next largest non-Company stock, Amazon common stock, made up only 0.43% of total non-Company common stock holdings.

38. In November of 2015, the Committee hired Towers Watson (now Willis Towers Watson) to provide investment consulting services to the Plan. During the first Committee meeting that Towers Watson attended on January 26, 2016, the consultant provided a timeline of the projects recommended for completion in 2016, but liquidation of the TEGNA Stock Fund was not included as one of the projects. Gannett BPC Proposed Project Plan: January 2016, Gannett-0002428-31.

39. On February 26, 2016, Towers Watson provided fiduciary training for members of the Committee. Minutes from Committee Meeting on February 26, 2017, Gannett-0002442. The minutes from this meeting indicate there was a discussion about "best practices in removing . . . spinoff stock from the 401(k)," but no actions were taken at the meeting; nor was there a vote taken for how the TEGNA Stock Fund

should be monitored, evaluated or liquidated as the EMA required.

40. At the Committee's March 26, 2016 meeting, Towers Watson gave a presentation titled "Stock Fund Options in 401(k) Plans: Thoughts and Considerations," that had a section about "Non-Affiliated Single Stock Funds." Stock Fund Options in 401(k) Plans: Thoughts and Considerations," Gannett-0000450-68. The presentation mentioned that single stock funds "lack several characteristics that are typical of funds in [Defined Contribution] plan menus which are designed with a view to good governance practices," specifically noting that "[s]ingle company stocks are inherently undiversified, therefore posing unique risks." Gannett-0000452. The presentation also indicated that it is "difficult to monitor the performance of a single stock fund", noting the difficulty of selecting performance metrics and benchmarks, and recommended that the Committee "seek objective expert financial and legal advice" concerning "whether or not to divest and the timing of divestiture." Gannett-0000458. . . . ." The presentation concluded with suggestions for possible next steps, including reviewing the purpose of offering the Fund as an investment, hiring an independent fiduciary, considering new procedures for monitoring the Fund and determining whether to liquidate the Fund. *Id.* The presentation did not mention that the EMA mandated liquidation of the TEGNA Stock Fund.

41. The Committee made no decisions at the March 26, 2016 meeting concerning the TEGNA Stock Fund.

42. On June 28, 2016, Ernst & Young, LLP, the Plan's independent auditors, warned Gannett that the Plan's TEGNA stock holdings "exposes the Plan to a concentration risk."

43. In June and July 2016, Potter and Sundaram prepared numerous drafts of a presentation that was ultimately sent to Harmon, Lori Locke, another member of the Committee as well as Gannett's CFO and General Counsel titled "Gannett 401(k) Single Stock Options." The presentation stated that the Committee and Gannett's management should "evaluate a sunsetting process for eliminating the TEGNA Company Stock Fund." Gannett 401(k) Single Stock Options," Gannett-0011999. However, at the remaining Committee meetings in 2016, Towers Watson assisted the Committee on reviewing potential investments and investment managers for the Plan's mutual fund lineup that went into effect on January 31, 2017 even though the TEGNA Stock Fund remained the Plan's largest investment and the price of TEGNA stock had declined by over 30% since the time of the separation. The changes removed 25 funds from the Plan's investment lineup but did not remove the TEGNA Stock Fund. Participants were notified about changes to the Plan's investment lineup on December 21, 2016 with a brochure and fund fact sheets of the changes that occurred on January 31, 2017.

44. The Committee did not consider liquidating the TEGNA Stock Fund in 2016.

45. Thus, at the end of 2016, more than eighteen months after the separation, the Plan still held a massive amount of TEGNA common stock—more than $115 million. Although the value of the Plan's TEGNA common stock holdings decreased over 2016, a large portion of this decrease was caused by the share price's 16% decrease during 2016 rather than liquidation. The following table summarizes the Plan's ten largest common stock holdings as of December 31, 2016:

Company	Value as of 12/31/16	% of common stock holdings (Inc. Gannett stock)
TEGNA Inc.	**$115,658,682**	**52.15%**
Gannett Co., Inc.	$64,955,403	29.29%
Visa Inc.	$904,720	0.41%
Apple Inc.	$887,181	0.40%
Amazon.com.	$873,599	0.39%
JPMorgan Chase & Co.	$848,403	0.38%
Voya Fin'l Inc.	$817,188	0.37%
Royal Dutch Shell Plc (ADRs)	$756,383	0.34%
Citigroup Inc.	$746,560	0.34%
Morgan Stanley	$714,617	0.32%

46. To put the Plan's December 31, 2016 holdings of TEGNA common stock in perspective, other than Gannett and TEGNA, the Plan held approximately $41.2 million in common stock. Thus, as of December 31, 2016, **the value of the Plan's TEGNA common stock holdings was 281% greater than the value of all other non-company stock combined.**

47. **TEGNA common stock made up over 73.75% of the Plan's total non-Gannett common stock holdings**. To put this concentration into perspective, other non-company stocks made up on average only 0.25% of total common stock holdings. The next largest non-Company stock holding, Visa common stock, made up only 0.41% of total non-Company common stock holdings.

48. In a memorandum dated February 22, 2017 to Gannett's board of directors, Committee Chair David Harmon stated that the Committee had up until that point "handled" the TEGNA Stock Fund by simply

having participants sell their shares. Memorandum from David Harmon to Gannett Board of Directors, Gannett-0002995. The Committee had not decided to liquidate the TEGNA Stock Fund as the EMA required as of February 22, 2017—or even started the process to evaluate what liquidating the Fund would involve.

49. The Committee finally to steps to address the TEGNA Stock Fund in April of 2017, when Towers Watson made a second presentation to the Committee, updating the one it had made to the Committee at the meeting on March 28, 2016. "Update on Stock Fund Options in 401(k) Plans: Thoughts and Considerations," Gannett-0001270-81. Tellingly, the "Possible Next Steps for Consideration" in Towers Watson's April 2017 presentation were almost identical to those in its presentation of over a year earlier, indicating that the Committee had effectively wasted a year. The meeting minutes indicate that Towers Watson told the Committee that the TEGNA common stock had a "beta over 1.00", meaning that it had greater price swings in both up and down markets as compared to a diversified index fund, and that "single stock funds do not fit well in Gannett Co., Inc. 401(k)'s new investment lineup…" In addition to Towers Watson, Evercore Trust Company ("Evercore") also gave a presentation to the Committee about liquidating the TEGNA Stock Fund, noting that "the sunset of a stock fund" would generally not cause an adverse reaction to the stock's price. Minutes from April 25, 2017 Committee Meeting, Gannett-0001442, 0001443.

50. Despite these presentations, however, the Committee did not decide to liquidate the TEGNA Stock Fund at the April 2017 meeting, instead delegating to the newly formed "Gannett 401(k) Plan

Subcommittee" the tasks of investigating what a plan for sunsetting the TEGNA stock fund would entail.

51. On June 6, 2017, Potter (the Secretary for the Subcommittee) sent a memorandum to the full committee recommending that the TEGNA stock fund be liquidated twelve months after providing notice to Plan Participants. Potter's memorandum discussed a number of factors in recommending a twelve-month sunset period. The memorandum states that a 12-month sunset would "mitigate any potential effect of seasonality" on TEGNA's stock price, although there is no indication the Subcommittee attempted to measure whether the price of TEGNA stock would in fact be affected by seasonality. The memorandum noted that a 12-month period could potentially reduce the "blackout period,"—the time it would take to sell the TEGNA stock of participants who had not sold during the sunset period. The memorandum also discussed sunsetting a second single-stock fund, this one holding shares of Cars.com that had been issued to Plan Participants in the TEGNA Stock Fund when TEGNA sold Cars.com, and noted that "Cars.com is a new stock fund and participants had not had any time to make their own investment decision." In contrast, however, the Committee provided Plan Participants with only *two* months to "make their own investment decisions" when the Committee approved the change to its mutual fund investment lineup in 2016.

52. The Committee approved the Subcommittee's recommendation to liquidate the TEGNA stock fund with a 12-month sunset period on June 8, 2017, but did not hire Evercore to oversee the sunsetting process until July 27, 2017, and Plan Participants were not notified of the decision until July 31, 2017. In consequence, the TEGNA Stock Fund has not been fully liquidated, even three years after the spinoff of

Gannett. Reasonably prudent fiduciaries should have completed the task within a year. Accordingly, the Class Period begins on July 1, 2016.

53. As this chronology makes clear, Defendants felt no urgency to address the single-stock concentration risk posed by the TEGNA stock fund, even though liquidation was mandated by the Plan Sponsor in the EMA.

54. Committee members appear to have believed that exposing Plan Participants to the concentration risk of a single stock fund was not imprudent so long as participants were able to select other Plan options for their investments. Sundaram Tr. 82:19-83:16 & 86:2-88:5; Harmon Tr. 38:21-39:14. Nor did the Committee evaluate the possibility that the Plan's decision to invest in two individual stocks—TEGNA and Gannett—might expose participants to even greater risk, since the performance of the two media company's stocks might be correlated. Harmon Tr. 77:2-7.

55. Moreover, the Committee appears to have simply assumed that TEGNA was a prudent investment. McGarry testified that "There was no reason at that time [after spinoff] to think that it wouldn't be [prudent]. The—it was a company we believe was—had every reason to believe would be successful . . . ." McGarry Tr. at 22:17-23:1;

56. The Committee received quarterly reports from Towers Watson on each of the investment options of the Plan. These were the reports that the Committee used to monitor the prudence of the TEGNA Stock Fund. Sundaram Tr. at 100:18-103:18; Harmon Tr. 27:14-32:5; McGarry Tr. at 46:21-47:15. (Q: "So it was just the Towers Watson reports that your remember reviewing?" A: "Yes."). However, while the Towers

Watson quarterly reports provided highly detailed information on the mutual funds in which the Plan was invested, including information about the fund managers, performance relative to established benchmarks over three month and one, three, five and ten year periods, returns versus standard deviations, sector allocation, summary of risk statistics and risk/return statistics, the reports provided ***no*** analysis of the TEGNA stock fund. The fund was only listed as an asset of the Plan, with its current market value and a calculation of the percentage of Plan assets invested in it. *See, e.g.,* Gannett Co., Inc. 401(k) Savings Plan Performance Monitoring Report for Periods Ending March 31, 2016, Gannett_0000631, 0000650. The Committee thus made no effort to obtain any meaningful information that could be used to assess or monitor the prudence of TEGNA stock.

57. There was no reason to delay liquidating the TEGNA Stock Fund. The only rationale for including it as a Plan option in the first place was that Plan Participants had formerly been part of the corporate entity that became TEGNA. Sundaram testified that the "TEGNA Stock Fund was a legacy stock option that, you know, after the spinoff there were a lot of employees who knew the company well and we see—we saw that that was a big participant interest to have that option in the Plan." Sundaram Tr. at 54:19-55:2. Potter testified that "there was an affiliation with the former company, people wanted to own TEGNA . . . ." and that, absent an affiliation with the employer, he would not recommend a single stock as an investment option in a 401(k) plan. Potter Tr. at 28:13-17 and 33:19-34:4. McGarry testified that "we felt that people would still want the option to be able to invest in" TEGNA since they had a "close affiliation" with the company. McGarry Tr. at 22:21-23:6. Yet the

Committee took no steps to ascertain whether this was true. They did not survey employees (Sundaram Tr. 59:8-22; Harmon Tr. 73:11-13; McGarry Tr. at 34:22-35:6), nor did they attempt to determine whether the large concentration of Plan investment in the TEGNA Stock Fund at the time of the spinoff was the result of the pre-spinoff company's practice of matching employee 401(k) contributions with company stock. McGarry Tr. 27:13-21 (pre-spinoff, "Old" Gannett match was in company stock); Potter Tr. 29:5-19 (did not know what percentage of TEGNA stock was due to prior company match). Even if Defendants had verified that employees actually ***wanted*** to invest in TEGNA stock—which they did not—that would not have provided a basis for concluding that the TEGNA Stock Fund was a prudent option for the Plan.

THE PLAN'S MASSIVE INVESTMENT IN TEGNA STOCK WAS IMPRUDENT

58. The following table summarizes relevant Plan's holdings at the end of 2015 and 2016.

Value of:	12/31/15	12/31/16
TEGNA common stock holdings	$178,145,839	$115,658,682
Other non-Gannett common stock (combined)	$42,917,175	$41,173,623
Average of other non-Company stock holdings	$401,095	$399,744

59. The sheer size of the Plan's holdings in TEGNA common stock was unreasonable by any measure.

60. According to Morningstar, out of all mutual funds available in the market, the fund with the highest concentration of TEGNA stock was the Cove

Street Capital Small Cap Value Fund, which held only 5.8% of TEGNA stock as of December 31, 2017.[1]

61. Thus, the fact that the Plan as of December 31, 2015 owned ***almost three times*** the concentration of TEGNA stock as the concentrated fund with largest holdings of TEGNA (in relation to total assets) was plainly imprudent for the investment of retirement assets.

62. The Plan's concentrated position in TEGNA, which represented more than 20% of the Plan's holdings at the time of the separation, exposed it to more "company risk" than undiversified mutual funds who concentrate investments in the common stock of companies in the media industry. For example, the largest holding of the TRowe Price Media & Telecommunications Fund, a fund which focuses "in the common stock of companies engaged in any facet of media and telecommunications," was less than 11% of the fund's portfolio as of December 31, 2017. Likewise, Reliance Media & Entertainment Fund's largest investment only represented 13% of its portfolio as of December 31, 2017. The Plan's purpose is to provide participants with retirement income and should not have held a more-concentrated position in one company's stock than non-diverse, sector-specific mutual funds.

63. The Plan's investment in TEGNA was also grossly disproportionate compared to Gannett's defined benefit plan, the "Gannett Retirement Plan" (the "DB Plan"), which the Committee also administers. The Plan, a defined contribution plan in which the risk of loss is borne by participants, had more than 20% of its assets invested in TEGNA stock

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[1] http://covestreetfunds.com/wp-content/uploads/2018/01/CSC-Q4-2017-Shareholder-Letter.pdf.

at the time of the separation and a 15.8% and 10.7% concentration at the end of 2015 and 2016, respectively. In contrast, the DB Plan, for which Gannett bears the risk of loss, had only 1.8% and 1.7% of its assets invested in TEGNA stock at the end of 2015 and 2016, respectively.

64. Additionally, the Gannett Plan held significantly more TEGNA common stock *than TEGNA's own 401(k) Plan*. At December 31, 2015 and 2016, the TEGNA 401(k) Plan held only $66.5 million and $58.6 million, respectively. The following table summarizes the Plan's TEGNA common stock holdings in comparison to the TEGNA 401(k) plan:

Value of TEGNA common stock	12/31/15	12/31/16
in Gannett 401(k) Plan ($)	$178,145,839	$115,658,682
in TEGNA 401(k) Plan ($)	$66,457,269	$58,592,890

65. Defendants knew about the substantial risk of this lack of diversification. Indeed, the Plan's own auditor warned that the Plan's TEGNA holdings created concentration risk. According to the Plan's 2015 financial statements:

> The fair value of the Plan's investment in Gannett's and TEGNA's stock as of December 31, 2015 was approximately $83.1 million and $178.1 million, respectively, **which exposes the plan to concentration risk**. (Emphasis added.)

66. The following year, the Plan's auditor again warned about the risk created by the large TEGNA common stock holdings. According to the Plan's 2016 financial statements:

> The fair value of the Plan's investment in Gannett's and TEGNA's stock as of December 31, 2016 was approximately $65.0 million and $115.7

> million, respectively, **which exposes the Plan to concentration risk**. (Emphasis added.)

67. The overly concentrated position in TEGNA common stock should have been a red flag to the Defendants that they needed to diversify the Plan's assets in order to avoid the risk of large losses and ensure the Plan's assets were invested prudently. Defendants, however, failed to independently assess and monitor the Plan's holdings of TEGNA common stock to ensure they were prudent and that the Plan was reasonably diversified.

68. Additionally, according to its beta, TEGNA common stock was significantly more volatile, and thus riskier, than other more-suitable investments. Beta is a measure of a stock's volatility in comparison to the volatility of the market as a whole. It is calculated by dividing the covariance of the security's returns and the benchmark's returns by the variance of the benchmark's returns. By definition, the market has a beta of 1.0, and individual stocks are ranked according to how much they deviate from the market. A stock that swings more than the market over time has a beta above 1.0. If a stock moves less than the market, the stock's beta is less than 1.0. High-beta stocks are supposed to be riskier but provide a potential for higher returns; low-beta stocks pose less risk but also lower returns.

69. At the time of separation, the beta for TEGNA common stock was 1.455 meaning TEGNA was 45.5% more volatile than the stock market. This risk increased toward the end of 2015 when the beta increased to approximately 1.909, meaning TEGNA was 90.9% more volatile than the stock market.

70. Defendants caused the Plan to hold massive holdings of TEGNA common stock through at least

July 31, 2018 and perhaps longer, because Defendants did not follow an appropriate process in evaluating the prudence of TEGNA common stock and the diversification of Plan investment options. Defendants did not perform an independent review, as they were required to do, and their failures cost the Plan participants millions of dollars.

71. TEGNA common stock was not a "qualifying employer security" for the Plan. ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2), provides that ERISA's duties of prudence and diversification are not violated "by acquisition or holding of . . . qualifying employer securities."

72. As of the date of separation, however, TEGNA stock was not a "qualifying employer security" with respect to the Plan.

73. ERISA § 3(5), 29 U.S.C. § 1002(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan."

74. ERISA § 407(d)(1), 29 U.S.C. 1107(d)(1), defines "employer security" as a "security issued by an employer of employees covered by the plan, or by an affiliate of such employer." Under ERISA, a "qualifying employer security" is an "employer security" that is either a stock, a marketable obligation (*e.g.*, a bond) or an interest in a publicly traded partnership. See ERISA § 407(d)(5), 29 U.S.C. § 1107(d)(5).

75. Gannett and TEGNA have been independent companies since they separated in 2015. The companies have separate defined contribution retirement plans covering their own employees.

76. TEGNA's employees are not eligible to participate in the Plan. *See* SPD at p. 2. As part of the Separation, the Plan transferred the account balances for current and former employees of TEGNA to the "TEGNA 401(k) Savings Plan." "As of the transfer date, employees of TENGA, Inc. and its affiliates ceased participating it the Plan." *See* Plan's 2015 11-k at p. 5.

77. TEGNA has not paid Plan participants' wages, made contributions to the Plan or otherwise acted in Gannett's interests concerning the Plan since Separation. Accordingly, TEGNA is not an "employer" for the Plan.

78. TEGNA was also not an "affiliate" of Gannett after the Separation. Under ERISA § 407(d)(7), 29 U.S.C. § 1107(d)(7), a corporation is an "affiliate" of an employer if it is a member of a "controlled group of corporations," a term defined as when a parent corporation owns stock possessing at least 50% of the subsidiary's voting power or when five or fewer individuals, estates or trusts own stock possessing at least 50% of each corporation's voting power. *Id*. (citing 26 U.S.C. § 1563). After the separation, TEGNA and Gannett were both independent, publicly traded companies. TEGNA is also not among the "Participating Affiliates" listed in the SPD. *See* SPD at p. 32. Accordingly, the companies have not been "affiliates" since the separation.

79. As TEGNA was not an "employer" or an "affiliate" for the Plan after the Separation, TEGNA stock was not a "qualifying employer security." Defendants did ***not*** classify TEGNA stock as an "employer security" in either 2015 or 2016 on the Plan's financial statements.

80. Defendants had a continuing duty to assess the appropriateness of the Plan's holdings of TEGNA common stock and the TEGNA Stock Fund under *Tibble v. Edison International*, 135 S. Ct. 1823 (2015). As alleged above, Defendants breached their fiduciary duties by allowing the Plan to continue to hold and invest in the TEGNA common stock and the TEGNA Stock Fund.

81. ERISA requires prudent fiduciaries to diversify the plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." *See* ERISA § 404(a)(1)(C) [29 U.S.C. § 1104(a)(1)(C)]. ERISA's legislative history indicates that a fiduciary should not invest an "unreasonably large percentage" of plan assets in a "single security," in "one type of security," or in "various types of securities that are dependent upon success of one enterprise or upon conditions in one locality." *See* ERISA Conference Report on H.R. 2, H.R. Rep. No. 1280, 93d Cong., 2d Sess. 300, 304 (Aug. 12, 1974).

82. Because the value of any single stock is tied to the fortunes of one company, holding a single stock is unduly risky. By contrast, investors who hold a diverse portfolio of stocks and bonds face less risk because they have only a small stake in each company. *See* N. Gregory Mankiw, Principles of Economics 546 (1998); *DiFelice v. U.S. Airways, Inc*., 497 F.3d 410, 415 (4th Cir. 2007); *Steinman v. Hicks*, 352 F.3d 1101, 1104 (7th Cir. 2003).

83. Defendants recognized the importance of diversification. The SPD states that "[s]preading your assets among different types of investments can help (participants) achieve a favorable rate of return, while minimizing (participants') overall risk of losing money." *See* SPD at p. 13. According to the SPD,

retirement savings are not "properly diversified" if more than 20% are invested "in any one company or industry…" *Id*.

84. Even a 20% concentration in any one company or industry was excessively risky. Under ERISA, the benchmark for the amount of a single security that a retirement plan should own is only 10%, not 20%, as set forth in ERISA 407(a)(2), 29 U.S.C. § 1107(a)(2).

85. Defendants permitted the Plan to invest far too much in TEGNA stock, as alleged above. As further alleged above, when combined with the Gannett stock held by the Plan, the holding of TEGNA stock was even more egregiously undiversified because the two securities are in the same industry.

86. Because of the Plan's concentrated position in TEGNA common stock, numerous other red flags during the relevant period should have demonstrated to Defendants that the Plan should no longer be invested in TEGNA stock.

87. During 2015 several investment banks downgraded and/or were bearish about TEGNA common stock. For example, Evercore downgraded TEGNA to a "Hold" in July and Jefferies did so in August.

88. In 2016, several other investment banks likewise downgraded their views on the prospects of TEGNA's common stock. For example, Barclays downgraded TEGNA to "Underweight" in April and JP Morgan downgraded to Neutral in November.

89. Based on the negative outlook on TEGNA common stock, a prudent and loyal fiduciary would have reviewed the Plan's significant holdings of TEGNA common stock as part of any review and

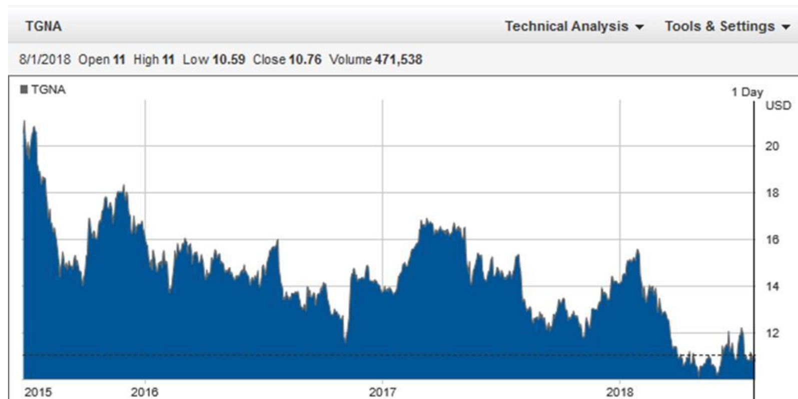
liquidated or significantly reduced such holdings from the Plan if it had not already done so.

90. Given these risks, coupled with the lack of diversification, Defendants failed to take action that a prudent fiduciary would have taken to stop these losses, and the risk of future large loss, that Plan participants were or could be suffering. Defendants did not liquidate the Plan's holdings of TEGNA common stock or remove the TEGNA Stock Fund as a Plan investment or otherwise act to save the Plan from losing millions of dollars in hard-earned retirement savings.

DEFENDANTS' IMPRUDENCE CAUSED LOSSES TO THE PLAN

91. Unfortunately, the Defendants' breach of their fiduciary duties caused the Plan and its participants to suffer millions of dollars in losses.

92. The Plan's excessive holdings in TEGNA was costly to participants. For example, the following chart demonstrates the significant decline in the value of TEGNA common stock from the date of separation through the present.



93. Between the date of the separation through the end of 2015, the price of TEGNA stock fell $3.91 or 19.3%.

94. During 2016, TEGNA common stock's poor performance continued, losing another $2.64 per share. Thus, from the date of separation through the end of 2016, TEGNA stock fell $6.55 or 32.3%.

95. The price of TEGNA common stock was relatively flat in 2017, but has dropped significantly in 2018 and is now trading at less than $11 per share.

96. TEGNA common stock has significantly underperformed the market. From the date of separation until the present, the price of TEGNA common stock has declined approximately 46% while during that same time period the S&P 500 Index (SPX) has increased approximately 36%.

During the Class Period, TEGNA stock has declined 27 percent while the S&P 500 increased 34 percent.

97. The TEGNA Stock Fund also underperformed other investment options in the Plan, including both the Plan's "default option"—a series of target date funds—and Vanguard stock market index funds offered by the Plan.

98. If Defendants had acted promptly, Plan Participants would have been notified that the TEGNA Stock Fund would be liquidated by no later than January 1, 2016, and Defendants would have

closed the Fund and liquidated it six months after that. If the assets that were in the Fund had been invested in the Plan's default investment options on July 1, 2016, the Plan's assets today would be $43 million greater, and if the Fund's assets were invested in the Vanguard Index Funds offered by the Plan during the Class Period, the Plan would have more than $57 million more in assets today. Accordingly, the Plan and its participants suffered substantial harm as a result of Defendants' breach of their fiduciary duties.

DEFENDANTS' FIDUCIARY DUTIES

99. Under ERISA, those responsible for the management and operation of a plan are fiduciaries and these fiduciaries owe participants the highest duties known to law. These duties include, among others, the duty of loyalty, the duty of prudence, the duty of diversification, and the duty to monitor. *See* ERISA § 404, 29 U.S.C. § 1104.

100. Duty of Loyalty. Under ERISA § 404(a)(1)(A)(i) 29 U.S.C. § 1104(a)(1)(A), "a fiduciary shall discharge his duties with respect to a plan **solely in the interest of the participants** and beneficiaries and . . . for **the exclusive purpose of . . . providing benefits to participants** and their beneficiaries." (emphasis added). Thus, a fiduciary must act with one and only one purpose and must act to further one and only one interest. This is often called the "exclusive benefit rule."

101. Duty of Prudence. Under ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with **the care, skill, prudence, and diligence** under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such

matters would use in the conduct of an enterprise of a like character and with like aims." (emphasis added).

102. Duty of Diversification. Under ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C), "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . 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."

103. Duty to Monitor. In addition to the duty to prudently select investments, a fiduciary has "a continuing duty of some kind to monitor investments and remove imprudent ones" and "a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1829 (2015).

DEFENDANTS WERE FIDUCIARIES

104. ERISA requires that every plan name one or more fiduciaries who have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

105. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who perform fiduciary functions for a retirement plan. A person or entity is considered a fiduciary to the extent:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to

> any moneys or other property of such plan, or has any authority or responsibility to do so, or
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

ERISA § 3(21)(A)(i) [codified at 29 U.S.C. § 1002(21)(A)(i)].

106. Each of the Defendants was a fiduciary during the Class Period within the meaning of ERISA § 3(21)(A)(i) [29 U.S.C. § 1002(21)(A)(i)] as either a named or a *de facto* fiduciary with respect to the Plan, and each owed fiduciary duties to the Plan and its participants under ERISA.

107. The Committee and its members are fiduciaries of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because they exercised discretionary authority or control over management of the Plan. In particular, they had the fiduciary duty to select and monitor Plan investment options, including the TEGNA stock fund. The Committee was also the named fiduciary for the Plan.

108. Gannett is a fiduciary because it had the duty to monitor the Committee to ensure that it was properly meeting its fiduciary duties. It is also a fiduciary because it is responsible for the acts of the Committee and its members who were acting within the scope of their employment. Gannett was also a *de facto* fiduciary because it shared authority with the Committee to decide if and when the TEGNA Stock Fund should be liquidated. "Gannett 401(k) Single Stock Options," Gannett-0011986-96.

CLASS-ACTION ALLEGATIONS

109. Plaintiff brings this action derivatively on the Plan's behalf pursuant to ERISA §§ 409 and 502, 29

U.S.C. §§ 1109 and 1132, and as a class action pursuant to Rules 23(a), (b)(1), and/or (b)(2) of the Federal Rules of Civil Procedure on behalf of the Plan, Plaintiff, and the following class of similarly situated persons (the "Class"):

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Gannett Co., Inc. 401(k) Savings Plan at any time from July 1, 2016, inclusive (the "Class Period"), and whose Plan accounts included investments in TEGNA common stock (including the TEGNA Stock Fund).

110. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, the Plan had over 15,000 participants at the end of 2016. Accordingly, Plaintiff believes there are thousands of Plan participants whose Plan accounts included investments in the TEGNA common stock during the Class Period.

111. Multiple questions of law and fact common to the Class exist, including:

(a) whether Defendants each owed a fiduciary duty to the Plan, Plaintiff, and members of the Class;

(b) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries;

(c) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries with care, skill, prudence, and diligence;

(d) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries 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);

(e) whether Defendants failed to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries by monitoring investments and removing imprudent ones;

(f) whether the Plan's massive holdings in TEGNA stock were imprudently undiversified;

(g) whether TEGNA stock qualified as an Employer Security for purposes of exempting the Plan's holdings in TEGNA stock from the duty to diversity under ERISA § 404;

(h) whether Defendants otherwise violated ERISA; and

(i) whether the Plan, Plaintiff, and members of the Class have sustained damages and, if so, what is the proper measure of damages.

112. Plaintiff's claims are typical of the claims of the members of the Class because the Plan, Plaintiff, and the other members of the Class each sustained damages arising out of Defendants' uniform wrongful conduct in violation of ERISA as complained of herein.

113. Plaintiff will fairly and adequately protect the interests of the Plan and members of the Class because they have no interests antagonistic to or in conflict with those of the Plan or the Class. In addition, Plaintiff has retained counsel skilled and experienced in class-action litigation, complex litigation, and ERISA litigation.

114. Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

115. Class action status is also warranted under Rule 23(b)(1)(A) and (b)(2) because: (i) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; and (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

CAUSES OF ACTION

COUNT I
Breaches of Fiduciary Duties
Violations of ERISA §§ 404 and 409
[29 U.S.C. §§ 1104 and 1109]

116. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

117. During the Class Period, the Defendants were named fiduciaries pursuant to ERISA § 402(a)(1) [29 U.S.C. § 1102(a)(1)], or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A) [29 U.S.C. § 1002(21)(A)], or both.

118. Defendants breached their fiduciary duties by wrongfully allowing the Plan to hold massive amounts of TEGNA common stock.

119. The scope of the Defendants' fiduciary duties and responsibilities included managing the assets of the Plan for the sole and exclusive benefit of participants and beneficiaries and with the care, skill, diligence, and prudence required by ERISA. Defendants were responsible for, among other things, selecting and offering only prudent investment options, eliminating imprudent options, evaluating the merits of the Plan's investments on an ongoing basis, administering the operations of the Plan and taking all necessary steps to ensure that the Plan's assets were diversified and invested prudently.

120. According to Department of Labor regulations and cases interpreting this statutory provision, a fiduciary's investment or investment course of action is prudent if he has: (a) given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, and (b) acted accordingly.

121. Defendants also had a duty to administer the Plan in accordance with the Plan Document. The Plan Document references the EMA which required the liquidation of the TEGNA Stock Fund. Plan Document at Preamble, Gannett-0000151 and EMA at § 5.03(f), Gannett-0002852. The EMA, however, was never distributed at a Committee meeting and a member of the Committee testified that she did not know the EMA existed—much less that it required the liquidation of the TEGNA Stock Fund.

122. Defendants had a duty to follow a regular, appropriate systematic procedure to evaluate TEGNA common stock as investments in the Plan. They breached that duty and failed to conduct an appropriate investigation of continued investment in

TEGNA common stock. For the Plan's mutual fund investment options, the Committee was provided quarterly reports showing each fund's performance and how it compared to the fund's benchmark over numerous time periods. For the TEGNA Stock Fund, however, the quarterly reports ***only*** stated the total of the Plan's investment in TEGNA stock, and did not state TEGNA stock's price or performance history, or how the stock had performed relative to any benchmark.

123. As alleged above, Defendants breached their fiduciary duties by failing to diversify Plan investments. Defendants were bound by the duty to diversify the Plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." *See* ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C).

124. Despite the power and ability to do so, Defendants took no actions to diversify the Plan's assets and reduce the Plan's risky investment in TEGNA common stock for over two years after the spinoff, and even then, used an excessively long process for winding down the Fund. Defendants' failure to timely diversify the Plan's assets caused the Plan to suffer tens of millions of dollars in losses during the Class Period.

125. Additionally, Defendants failed to act prudently when they caused the Plan to continue to hold significant amounts of TEGNA common stock and to offer the TEGNA Stock Fund as Plan investment options because, among other reasons:

(a) they knew or failed to understand that TEGNA stock was not a qualifying employer security;

(b) they knew of and/or failed to investigate TEGNA; and;

(c) the risk associated with the investment in TEGNA common stock during the Class Period was by far above and beyond the normal, acceptable risk for retirement plan investments.

126. Gannett breached its fiduciary duty to monitor the Committee in that it failed to ensure that the Committee followed its fiduciary duties concerning the Plan's investment in TEGNA stock. Gannett's CFO was told multiple times that the Committee had not liquidated the TEGNA Stock Fund as the EMA required by took no action. Sundaram and Potter told Gannett's CFO that the Plan should "Remove TEGNA stock fund" and indicated that members of "Gannett management," including Gannett's CFO and general counsel, shared authority with the Committee to decide whether and when the TEGNA Stock Fund should be liquidated.

127. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT II
Co-Fiduciary Liability
Violations of ERISA § 405 [29 U.S.C. § 1105]

128. Plaintiff incorporates by reference the allegations in the preceding paragraphs.

129. ERISA § 405(a), 29 U.S.C. § 1105(a), imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. Defendants breached all three provisions.

130. ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3), imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if he has knowledge of a breach by the other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. As alleged above, each Defendant knew of the breaches by the other fiduciaries and made no efforts, much less reasonable effort, to remedy those breaches.

131. The Committee was the administrator of the Plan.

132. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan 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. Defendants knowingly participated in each other's breaches because, as alleged above, they participated in the management of the Plan's improper investment in TEGNA common stock and, upon information and belief, knowingly participated in the improper management of those investments by the other Defendants.

133. ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), imposes liability on a fiduciary if, by failing to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

134. As a direct and proximate result of these breaches of fiduciary duties, the Plan, and indirectly Plaintiff and other participants and beneficiaries, lost millions of dollars of retirement savings.

135. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), each of the Defendants is liable to restore the losses to the Plan caused by his or her breaches of the fiduciary duties and to provide other equitable relief as appropriate.

CAUSATION

136. The Plan suffered millions of dollars in losses because Plan assets were imprudently invested TEGNA common stock in breach of the Defendants' fiduciary duties.

137. Had the Defendants properly discharged their fiduciary duties and/or their co-fiduciary duties, the Plan and its participants would have avoided a substantial portion of the losses suffered through the Plan's continued investment in TEGNA common stock. Defendants should have liquidated (or significantly reduced) the Plan's holdings in TEGNA common stock within a short period following the separation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

A. A Declaration that the Defendants have breached their ERISA fiduciary duties to the participants;

B. An Order compelling the Defendants to make good to the Plan all losses to the Plan resulting from their breaches of their fiduciary duties, including loss of vested benefits to the Plan resulting from imprudent investment of the Plan's assets; to restore to the Plan all profits Defendants made through use of the Plan's assets; and to restore to the Plan all profits which the Plan and participants would have made if Defendants had fulfilled their fiduciary obligations;

C. An Order enjoining each of the Defendants from any further violations of their ERISA fiduciary obligations;

D. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plan's investments;

E. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

F. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

G. An Order awarding attorneys' fees pursuant to the common fund doctrine, 29 U.S.C. § 1132(g), and other applicable law; and

H. An Order for equitable restitution and other appropriate equitable and injunctive relief against all Defendants.

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