No. 16-3449

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PAUL SAUMER, ET AL.,

Plaintiffs-Appellants,

v.

CLIFFS NATURAL RESOURCES INC., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio, Case No. 1:15-CV-954

BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3449 Case Name: Saumer v. Cliffs Natural Resources Inc.

Name of counsel: John M. Newman, Jr.

Pursuant to 6th Cir. R. 26.1, Cliffs Natural Resources Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Defendants are insureds under policies issued by Travelers and CNA that are potentially implicated by the claims in this case.

CERTIFICATE OF SERVICE

I certify that on November 21, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ John M. Newman, Jr.
Jones Day, 901 Lakeside Avenue
Cleveland, OH 44114

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3449 Case Name: Saumer v. Cliffs Natural Resources Inc.

Name of counsel: John M. Newman, Jr.

Pursuant to 6th Cir. R. 26.1, Northshore Mining Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Northshore Mining Company is an affiliate of Cliffs Natural Resources Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Defendants are insureds under policies issued by Travelers and CNA that are potentially implicated by the claims in this case.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3449 Case Name: Saumer v. Cliffs Natural Resources Inc.

Name of counsel: John M. Newman, Jr.

Pursuant to 6th Cir. R. 26.1, Employee Benefits Administration Dept. of Northshore Mining Co
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Employee Benefits Administration Dept. of Northshore Mining Co. is an affiliate of Cliffs Natural Resources Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3449 Case Name: Saumer v. Cliffs Natural Resources Inc.

Name of counsel: John M. Newman, Jr.

Pursuant to 6th Cir. R. 26.1, Cliffs Natural Resources Inc. Investment Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Cliffs Natural Resources Inc. Investment Committee is an affiliate of Cliffs Natural Resources Inc.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Defendants are insureds under policies issued by Travelers and CNA that are potentially implicated by the claims in this case.

CERTIFICATE OF SERVICE

I certify that on November 21, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Court should hear oral argument in this case. The Supreme Court's recent decisions concerning ERISA plans that offer investments in employer stock are clear and unequivocal, and make plain that dismissal was the only proper outcome here. Oral argument would give defendants the opportunity to answer any questions the Court might have regarding the nuances of the Supreme Court's recent rulings, their application to this case, and their broader implications for 401(k)-type benefit plans.

STATEMENT OF THE ISSUES

1. Regarding the claim (Count I) for breach of the duty of prudence under the Employee Retirement Income Security Act ("ERISA") for failing to ban further voluntary investment in company stock, was the district court correct in dismissing the *non*-public-facts component of that claim where the complaint did not specify any non-public information that made Cliffs an imprudent investment and, in defiance of recent Supreme Court decisions, also failed to allege an alternative to permitting voluntary investment in company stock (as required by the governing Plan documents) that was both (1) consistent with the securities and other applicable laws, and (2) so compelling that no reasonable fiduciary could have concluded that the risk of harm it posed might outweigh the possibility of good?

2. Was the district court correct in dismissing the public-information component of the prudence claim given (1) the Supreme Court's recent holding that such claims are implausible without factual allegations showing a failure of the stock market to function efficiently, and (2) that the complaint did not include any allegations of market inefficiency?

3. Was the district court correct in dismissing the claim for failure to monitor (Count III) given (1) the lack of factual allegations showing a failure to monitor; and (2) that a duty-to-monitor claim cannot be plausibly pled in the absence of an underlying, plausibly pled prudence or loyalty claim?

4. Was the district court correct in dismissing the ERISA loyalty claim (Count II), given that (1) the loyalty claim duplicated the prudence claim; and (2) the complaint alleged no facts supporting the bald allegation that defendants acted disloyally?

5. Did the district court abuse its discretion in denying plaintiffs' "motion for reconsideration" where plaintiffs asserted no "manifest injustice" (other than the district court's refusal to grant discovery that plaintiffs requested only after entry of judgment) and where plaintiffs did not argue a clear error of law, an intervening change in law, or newly discovered evidence?

STATEMENT OF THE CASE

This stock-drop case was brought by two participants in a 401(k) plan sponsored by a subsidiary of Cliffs Natural Resources, Inc. ("Cliffs"), a Cleveland-based mining company. The plan offered multiple investment options, including a fund devoted to holding Cliffs stock. Plaintiffs and other participants had full discretion to decide how to invest their plan accounts, depending on their individual circumstances and investment goals. When the price of Cliffs stock declined due to, among other things, an extended bear market in iron ore, the plaintiffs sued under ERISA, arguing that the defendants should have gone against the plan's written terms and the directives of participants by forcibly shutting off new plan purchases of Cliffs stock and removing all existing stock from plan

accounts. Following two amendments to the complaint, the district court, applying recent Supreme Court precedent, properly dismissed the Second Amended Class Action Complaint ("SAC").

<u>Facts</u>

1. The Plan.

The Northshore Mining Company and Silver Bay Power Company Retirement Savings Plan (the "Plan") is a defined-contribution benefit plan—commonly referred to as a 401(k) plan—that covers employees of the Northshore Mining Company ("Northshore") and Silver Bay Power Company (together, the "Company"). The Company is a wholly-owned subsidiary of Cliffs. ¶ 19, 23.[1]

Each participant has his or her own account in the Plan. (SAC Ex. B, RE 37-3, § 5.1.2.) A participant contributes to the Plan by directing that a percentage of his or her paycheck be deposited into the participant's account. (*Id.* § 4.1.)

Participants control how their individual accounts are invested. They can "direct the continuing investment of" all contributions "in any one or more of the investment categories specified [in the Plan] at any time" (*id.*), "change future investment directions at any time" (*id.* at § 6.3), and "direct the Trustee on any business day to sell any investments in the Participant's account" (*id.*). The Plan does not permit the Company or any Plan fiduciary to thwart a participant's

[1] All paragraph references, unless otherwise stated, are to the SAC, RE 37.

directive. (*See, e.g.*, *id.* at § 6.2 (providing that participant directives regarding investment choices "will be effective").)

The Plan provides a broad variety of investment options. During the putative class period, participants could choose from more than two dozen mutual funds. (SAC Ex. E, RE 37-6, PageID# 990 (listing investment alternatives).) The choices included stock funds, bond funds, and target-date funds, among others. (*Id.*) The Plan also, as contemplated by applicable ERISA provisions, had an employee stock ownership, or "ESOP," component through which participants could choose to invest in a fund that held Cliffs stock ("Cliffs Stock Fund"). (*Id.*) The Plan affirmatively required that the Cliffs Stock Fund be maintained as an investment option. (SAC Ex. B, RE 37-3, § 6.1 ("The following investment categories *will* be offered:…Cliffs Stock Fund." (emphasis added)); § 2.8 (Cliffs Stock Fund is to be "invested *solely* in Cliffs Stock" (emphasis added)).) No participant was required to invest in the Cliffs Stock Fund. Cliffs' stock was publicly traded on the New York Stock Exchange. (MTD Opinion, RE 44, PageID# 1240.)

While the terms of the Plan required that the Cliffs Stock Fund be offered, all other funds were selected by the Investment Committee, within broad parameters set out in the Plan. (*Id.* § 6.1.) That was the Investment Committee's only responsibility under the Plan. (*Id.*) The Committee had five members—two

appointed by Cliffs' chief financial officer, two by the chief human resources officer, and one by the general counsel. (*Id.* § 2.19.) In contrast to the narrow scope of the Investment Committee's mandate, the bulk of authority under the Plan was given to the "Plan Administrator," the Employee Benefits Administration Department of Northshore ("Benefits Department"). (*Id.* § 9.1 et seq.)[2]

2. The Parties.

Plaintiffs-appellants Paul Saumer and Walter Skalsky ("plaintiffs")—a former and current employee of Northshore, respectively—are participants in the Plan who chose to invest in the Cliffs Stock Fund. ¶ 21.

Defendants-appellees ("defendants") are Cliffs, Northshore, the Investment Committee, the Benefits Department, and 15 current and former Cliffs employees. Twelve of the individual defendants (Mses. Balazs, Cheverine, and Forrester, and Messrs. Bittner, Flanagan, Gallagher, Harapiak, Holland, Michaud, Paradie, Petish, and Raguz) were members of the Investment Committee at various times. ¶ 44. Three additional individuals (Ms. Brlas and Messrs. Graham and Tompkins), along

[2] Plaintiffs refer in passing to Plan amendments that became effective on January 1, 2016. Pl. Br. at 7-8, 45. The amendments, put in place by Northshore, which alone had the power of amendment, were not referred to in the SAC and are not part of the appellate record, nor were they ever raised by plaintiffs during the proceedings below. In any event, it is axiomatic that amending an ERISA plan is a settlor act—not a fiduciary act—and that fiduciary liability cannot be predicated on amending (or not amending) a plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("When employers undertake those actions [*i.e.*, amending, adopting or terminating plans], they do not act as fiduciaries, but are analogous to the settlors of a trust.").

with three of the initial twelve (Messrs. Harapiak, Michaud and Paradie), at one point or another held offices that, under the Plan, authorized them to appoint members of the Investment Committee. ¶¶ 48-53.

3. Cliffs' Stock Price Decline.

Over the course of several years, Cliffs dealt with a number of business challenges. Chief among them was a substantial drop in the price of iron ore, the sale of which makes up the overwhelming majority of Cliffs' business. The decline was due, in part, to a sustained slowdown in Chinese steelmaking, ¶ 135—and thus global demand for iron ore—as well as to overarching cyclical forces in commodities markets, ¶ 146. Plaintiffs say the decline was "drastic." ¶ 122. It led, naturally, to reduced revenue for mining companies, ¶¶ 121, 143, and, with that, reduced ability to pursue new, and to sustain ongoing, projects. Cliffs took over Bloom Lake, a large iron-ore mine in Quebec, Canada, shortly before the beginning of this decline. *See* ¶ 82. Sustained downward price pressure ultimately made the costs of operating and expanding Bloom Lake economically unworkable, and operations at the mine were discontinued. ¶ 117. The bear market adversely affected the entire mining sector, and mining companies' share prices all suffered accordingly.[3]

---

[3] From their 2011 highs through December 15, 2015, shares of four of the "Big Five" global mining companies lost over three-quarters of their value: Anglo-American plc (-92%), Vale, S.A. (-91%), Glencore plc (-84.5%), and BHP

4. Plaintiffs' Claims.

Plaintiffs, who had opted to invest in the Cliffs Stock Fund during this period, alleged that "the value of [Cliffs] shares in…their…Plan accounts diminished by several thousand dollars." ¶ 21. They asserted that at some unspecified point during the class period,[4] "Defendants"—*i.e.*, the undifferentiated amalgam of Cliffs, Northshore, the Investment Committee, the Benefits Department, and the 15 employees named in the SAC—became obligated both to ban them (and all Plan participants) from making further investments in the Cliffs Stock Fund and to force them (and all Plan participants) to sell the Cliffs shares they already held, despite the express Plan language giving participants exclusive control over their investments and requiring that the Cliffs Stock Fund be an investment option.

Count I alleged that, by not banning participants from investing in Cliffs stock and not forcing a sale of the stock already in participants' accounts, defendants violated a duty to handle the Plan prudently. ¶ 47. Count II alleged that this same conduct constituted a breach of loyalty. ¶ 185. Count III was a

(continued…)

Billiton Ltd. (-77%). Shares of the best performer, Rio Tinto plc, dropped 63%. (*See* MTD Br. Ex. K, RE 38-3 (2011-2015 Big Five share price charts).)

[4] Defined as running from April 2, 2012, through "the present." ¶ 12.

piggyback claim, alleging that some of the individual defendants breached a duty to monitor others. ¶ 206.

Procedural History

Plaintiffs filed their original complaint on May 14, 2015, and later amended it twice. (*See* Complaint, RE 1; Amended Complaint, RE 17; SAC, RE 37.) Defendants moved to dismiss the SAC. (*See* MTD, RE 38; MTD Br., RE 38-1; MTD Reply, RE 41.) Rather than pursue further amendment to address defendants' dismissal arguments, plaintiffs elected to stand on the SAC and, accordingly, opposed the motion. (MTD Opp., RE 40.) Following briefing, the district court granted the motion, finding that the Supreme Court's recent decisions in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), and *Amgen, Inc. v. Harris*, 136 S. Ct. 758 (2016), largely controlled the outcome. (MTD Opinion, RE 44, PageID# 1240-43.) Plaintiffs filed a "motion for reconsideration," which, after another round of briefing, the court denied. Plaintiffs timely noticed this appeal. (Notice, RE 47.)

SUMMARY OF ARGUMENT

The Supreme Court's landmark decision in *Dudenhoeffer* and its follow-on decision in *Amgen*, both rendered unanimously, dispose of this appeal. In *Dudenhoeffer*, the Court, for the first time, confronted a 401(k) stock-drop case. It set out exacting standards for pleading the claims asserted here, and encouraged

courts to employ those standards vigorously to "divide the plausible sheep from the meritless goats" and "weed[] out meritless claims." 134 S. Ct. at 2470, 2471. *Amgen* put an exclamation point on that instruction. Ensuing appellate decisions uniformly have applied the *Dudenhoeffer/Amgen* teachings to reject allegations like those in the SAC.

Just like the *Dudenhoeffer* complaint, the SAC rests on two now-discredited theories: (1) that defendants had inside information that should have led them to conclude that Cliffs' stock price was "artificially inflated," and should have acted on that information to remove the stock as a Plan investment option (contrary to the Plan's express terms); and, alternatively, (2) that, based exclusively on public information, defendants should have tried to outguess the market as to the future price of Cliffs stock, should have prognosticated the stock's decline, and should have removed it from the Plan as a consequence (again, contrary to the Plan's terms).

Prudence Claim—Non-Public Information

A prudence claim founded on a defendant's possession of non-public information must, as a predicate, identify the non-public facts supposedly in that defendant's possession. The district court correctly determined that the SAC didn't do that—even for the defendants as an undifferentiated group, let alone for

any individual defendant at a specific point in time at which he or she supposedly had authority over the Cliffs Stock Fund.

Moreover, *Dudenhoeffer* requires a plaintiff to identify an "alternative course of action"[5] (1) that would not have been illegal, *and* (2) that no reasonable fiduciary could have concluded might be more likely to harm the Plan than help it. Plaintiffs here did proffer an alternative course of action: They said defendants should have gone against the Plan's express terms by prohibiting further investments in Cliffs stock, and disregarded the participants' directions by funneling contributions earmarked for the Cliffs Stock Fund into cash or other investments.

But that alternative would have violated ERISA and the securities laws, unless defendants had also embargoed all sales from the Cliffs Stock Fund and informed Plan participants and the market of the (unspecified) non-public information that plaintiffs say showed Cliffs stock to be a bad investment. And if defendants had done that, it surely (and undisputedly on this pleading record) would have caused the value of the Cliffs stock already held by the Plan to fall dramatically (if the mystery information were as bad as plaintiffs suggest it was), thereby damaging the Plan and its participants. Removing Cliffs stock as an

[5] That is, an action other than following the Plan's requirements to maintain the company stock component and to let participants decide how to invest their accounts.

investment option while iron-ore prices were in a down cycle also would have left the Plan at peril of missing out on gains when commodity prices turned. As the district court accurately observed, the SAC lacked facts showing that no reasonable fiduciary could ever have concluded, on balance, that it would be better not to take these contra-Plan actions. *Dudenhoeffer*—and even more so *Amgen*, where the non-public-information claim mirrored the one here—thus foreclosed the prudence claim to the extent it was based on non-public information.

Prudence Claim—Public Information

As to the public-information branch of the prudence claim, *Dudenhoeffer* branded such claims ***"implausible as a general rule."*** 134 S. Ct. at 2471 (emphasis added). When a stock trades in an efficient market (which, as to Cliffs, is undisputed), all public information about it is factored into the price at any given time, and a fiduciary cannot be expected to outguess the market about the stock's future trajectory. Like any other investor, ERISA fiduciaries may rely on the market price as the best indicator of the stock's value: failing "to outsmart a presumptively efficient market…is…not a sound basis for imposing liability." *Id.* at 2471-72 (quotation marks omitted). Only where there are "special circumstances" showing that the market did not function efficiently is there a chance for a public-information-based prudence claim to proceed. Here, the SAC

failed to allege special circumstances. Thus, to the extent it was based on public information, the prudence claim failed.

Monitoring Claim

The claim of secondary liability for failure to monitor was rightly jettisoned. A monitoring claim cannot exist apart from an adequately pled claim for primary fiduciary liability. Additionally, the SAC contained no facts showing a failure to monitor.

Loyalty Claim

The claim for breach of ERISA's duty of loyalty duplicated the ill-pled prudence claim, and thus shared its fate. Further, the SAC failed to allege any disloyal acts. It alleged no transactions of any kind between the Plan and any defendant, much less ones that harmed the Plan or improperly benefitted any defendant. Allegations that defendants themselves owned Cliffs stock were inapposite, for it is well-established that an ERISA fiduciary may own stock in his employer. Any hope to sustain a loyalty claim based on misrepresentation was properly dashed, since the SAC identified no misrepresentation that any defendant made to any Plan participant, let alone on which any participant relied.

"Motion for Reconsideration"

The motion for reconsideration pointed to no overlooked factual allegations, new governing authorities, or errors of analysis. Nor was it manifestly unjust to

deny the incorporated request for post-judgment discovery, which was late and improper, given that plaintiffs sought to use discovery not to assemble proof of a validly stated claim, but to hunt for a claim in the first place.

ARGUMENT

I. THE PRUDENCE CLAIM WAS PROPERLY DISMISSED

A. The SAC Failed To Assert An Actionable Prudence Claim Based Upon Non-Public Information.

The district court properly dismissed the prudence claim to the extent it was based on non-public information. The SAC did not identify any non-public facts that made Cliffs an imprudent investment. Far less did it tie knowledge of those "facts" to the people who supposedly controlled the Plan's investment options. And the alternative-action allegations—indistinguishable from those rejected by the Supreme Court in *Amgen*—came nowhere close to the governing standard: alternatives so compelling that a reasonable fiduciary "*could not have concluded*…[that they] would do more harm than good.'" *Amgen*, 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2463). Review of the district court's dismissal of the SAC under Rule 12(b)(6) is *de novo*.

1. The Non-Public-Information Claim Failed Because The SAC Specified No Non-Public Facts.

The district court correctly found that the SAC did not specify non-public facts, let alone facts known by a particular defendant, that changed Cliffs stock into

an imprudent investment. (MTD Opinion, RE 44, PageID# 1242.) This, despite plaintiffs having had four opportunities to plead.[6] A claim that non-public facts made it imprudent for a 401(k) plan to continue offering company stock is implausible unless the complaint pinpoints the supposedly devastating inside information. *See, e.g.*, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 611 n.13 (S.D.N.Y. 2015) (dismissing for "failure to allege any material nonpublic information"), *aff'd*, 649 F. App'x 110 (2d Cir. 2016); *In re 2014 RadioShack ERISA Litig.*, No. 14-CV-959, slip op. at 25 (N.D. Tex. Sept. 29, 2016) (dismissing "because [p]laintiffs have not proffered such insider information").

Plaintiffs offer four bullet points that they say fit the bill. Pl. Br. at 17-18. Yet not one identifies contemporaneous, material inside facts that turned an investment in Cliffs stock from prudent to imprudent.

The first two bullets have the same thrust—that one defendant, Ms. Brlas (who was not even on the Investment Committee, ¶¶ 32-44), made a statement to the effect that she expected Cliffs' dividend to be sustainable, in light of anticipated cash flows from the Bloom Lake mine. *Compare* Pl. Br. at 17, Bullet One (future "operating cash generation" would be "driven primarily from increased volume from Bloom Lake," supporting a belief that the dividend would be "extremely sustainable") *with id.*, Bullet Two (unspecified officers "represented

[6] Including a chance to seek leave to amend again, once the dismissal motion had highlighted the SAC's deficiencies.

that the dividend was extremely sustainable due to the additional cash flow to be generated by Bloom Lake"). But neither of the two SAC paragraphs cited in those bullets, 89 and 90, identified a single specific fact that was known only internally, whether to Ms. Brlas or any other defendant, at the time of these forward-looking statements and that required a different belief.

Bullet Three focuses on another forward-looking comment attributed to Ms. Brlas: "The team remains confident that [the] goal [of a cash-cost of $60-65 per ton in the last month of 2012] can be achieved." Pl. Br. at 18, quoting ¶ 103. The SAC nowhere said what aspect of that statement, if any, was false at the time it was made. There was no allegation that "the team" in fact was *not* confident, or that the team did *not* believe the cost target could be achieved. All the SAC asserted was that "the Company never realized this stated goal," which is nowhere near sufficient. *Id.* No specific, contrary, internal data that existed on July 26, 2012, or at any other time, were identified.

Bullet Four is no better. It merely cites an October 2012 observation by another Cliffs officer (Mr. Paradie, who was not on the Investment Committee at the time, ¶ 34) that Cliffs "expect[ed] to exit the year producing [iron ore at Bloom Lake] at an annualized rate of 7.2 million tons and a mid-$60 cash cost per ton." Pl. Br. at 18, quoting ¶ 105. The SAC never alleged that this statement was false, *i.e.*, that Mr. Paradie or Cliffs did not in fact expect in October 2012 that the

Bloom Lake mine would finish the year producing at that rate and that cost. Nor did it allege any non-public data from October 2012 that would have contradicted such a view. If anything, the SAC's failure to state any facts about what the annualized production rate actually turned out to be at the end of 2012, and its concession that the "mid-$60" cost estimate proved to be just shy of the actual outcome ("low $70s at year-end," ¶ 112), suggest that the stated expectations were sincere and not unjustified.

Compounding this failure, the SAC made no effort to allege that any particular member of the Investment Committee—the people who plaintiffs say had the power to yank Cliffs stock from the Plan, ¶ 29—actually knew specific non-public data at any particular time. As to all but three of the defendants who served at some point on the Investment Committee, the SAC provided no information about their corporate positions, their regular duties, or even their titles, let alone what inside facts they each supposedly possessed and when. ¶¶ 35-43. Of the remaining three Investment Committee members, two were identified as having led the human resources department at different times, hardly enough to "show" knowledge of inside information about a Canadian mine project. ¶¶ 33, 51 (Michaud), 32, 52 (Harapiak). The law entitles each defendant to an individualized evaluation of the plausibility of the claim against him or her. *See Joseph v. Bernstein*, 612 F. App'x 551, 555 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 902

(2016) ("complaint failed to satisfy Rule 8; [plaintiff's] claims indiscriminately lumped all five [d]efendants together, without articulating the factual basis for each [d]efendant's liability" (quotation omitted)); *Srivastava v. Daniels*, 409 F. App'x 953, 955 (7th Cir. 2011) ("complaint[]…made it impossible for the district court to identify the specific allegations against each defendant and therefore impossible to determine whether any claims had potential merit"). With its repeated references to "Defendants" or "Investment Committee Defendants" *en masse,* the SAC offered no foundation for such an individualized evaluation of plausibility on the non-public-information claim. This is yet another reason why the non-public-information claim was properly dismissed.[7]

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[7] Although not necessary to decide this appeal, another reason to affirm dismissal of the non-public-information claim is that the SAC did not comply with Civil Rule 9(b), despite sounding in fraud. *See, e.g.*, *Smith v. Bank of Am. Corp.*, 485 F. App'x 749, 752 (6th Cir. 2012) ("to the extent [a] complaint sounds in fraud, [it] must meet Rule 9(b)'s pleading requirements at the outset"); *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (same). While the district court did not accept this argument (MTD Opinion, RE 44, PageID# 1234-35), it is a legal question open to review here.

Plaintiffs' appeal brief makes clear that the non-public-information claim wants defendants to be seen as having acted fraudulently. *E.g.*, Pl. Br. at 3 (SAC contains "substantially the same set of allegations" as securities-*fraud* case), *id.* at 18 ("corporate insiders intentionally artificially inflated Cliffs stock"), *id.* at 21-22 (discussing "[Cliffs'] fraud"). So too with the SAC. *See, e.g.*, ¶ 7 ("Defendants falsely claimed [Cliffs' dividend increase] was sustainable."); ¶ 90 ("[T]he Company, through its officers[,] falsely represented that the dividend was extremely sustainable."); ¶ 92 ("deception"); ¶ 95 ("concealment of the truth"); ¶ 103 ("false assur[ances]"); ¶ 105 ("continued to mislead the public"); ¶ 116 ("deception from the start"). Though sounding in fraud and therefore subject to

2. The SAC Must Stand Or Fall On Its Own; Pleadings In Another Case Are Irrelevant To The *Dudenhoeffer* Standard.

Perhaps aware of the SAC's failure to identify essential facts, plaintiffs look elsewhere to patch the hole. They argue the SAC passed muster because it "point[ed] to the same…information that the District Court relied upon" in denying a motion to dismiss a securities action brought against (what plaintiffs incorrectly describe as) "many of the same Defendants." Pl. Br. at 18 (referring to *Dep't of Treasury v. Cliffs Natural Resources, Inc.*, No. 1:14-cv-1031 (N.D. Ohio)). In other words, plaintiffs say their ERISA complaint should be sustained because the district court denied a motion to dismiss in a related securities lawsuit. That argument has been tried before, with notable lack of success. The Supreme Court, the Second Circuit, and the Fifth Circuit all have recently found that ERISA claims based on non-public information failed the *Dudenhoeffer* pleading standard, despite the denial of motions to dismiss in related securities cases. These examples make clear that an ERISA complaint must stand or fall on its own under

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(continued…)

Rule 9(b), the SAC did not attempt to meet the Rule's strict pleading requirements. *See* MTD Br., RE 38-1, PageID# 1052-54. In the district court, plaintiffs effectively conceded as much—they did not argue the SAC complied with Rule 9(b), and instead limited themselves to arguing that Rule 9(b) cannot apply in an ERISA case. (*See* MTD Opp., RE 40, PageID# 1115-17.)

Dudenhoeffer, and not piggyback on a separate complaint, in a separate case, making claims under a separate statute.

In *Amgen*, the Ninth Circuit reversed dismissal of an ERISA prudence claim based on non-public information, relying heavily on the fact that the same district court had denied a motion to dismiss in a related Rule 10b-5 case. *Harris v. Amgen, Inc.*, 770 F.3d 865, 877 (9th Cir. 2014). The Ninth Circuit's reasoning echoed plaintiffs' here: "If the alleged misrepresentations and omissions [in the securities action] were sufficient to state a claim," then the complaint in the ERISA action, alleging "the same…sequence of events" was *ipso facto* sufficient. *Id. See also id.* at 876-77 ("[defendants'] argument is foreclosed by the district court's decision in the federal securities class action against Amgen based on the same alleged sequence of events"). But the Supreme Court unanimously reversed the Ninth Circuit, without even needing oral argument. 136 S. Ct. 758 (2016).

The Supreme Court made clear that an ERISA complaint must be scrutinized on its own under *Dudenhoeffer*, and not on the basis of externals. The Court focused exclusively on the ERISA complaint in *Amgen*—not on the securities complaint that was not before the Court—and found that the ERISA complaint did not set forth "sufficient facts and allegations to state a claim for breach of the duty of prudence." *Id.* at 760.

The results have been the same in the two Courts of Appeals thus far presented with a similar situation post-*Amgen*. On appeal, the ERISA stock-drop plaintiffs in *Loeza v. JPMorgan Chase & Co.*, __F. App'x __, 2016 WL 4703505 (2d Cir. Sept. 8, 2016), made much of the fact that the trial court—the same judge who had granted the *Loeza* defendants' motion to dismiss—had denied a motion to dismiss in a related securities action, arguing that these opposite outcomes were evidence of error. *See* Br. for Pl.-Appellant at 20, *Loeza v. JPMorgan Chase & Co.*, No. 16-cv-222 (2d Cir. Mar. 24, 2016) (arguing dismissal of ERISA action was wrong because "[t]he District Court…omitted from its analysis its own decision in the related federal securities class action…in which it held that a plausible claim for securities fraud had been pleaded against JPMorgan and its senior officers…based on virtually the same allegations"). The Second Circuit rejected the argument and affirmed dismissal. *Loeza*, 2016 WL 4703505, at *2 (finding this argument, among others, to be "without merit"). *Loeza* was the second time this year the Second Circuit reached the same outcome. *Compare Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56 (2d Cir. 2016) (affirming dismissal of ERISA complaint) *with In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258 (S.D.N.Y. 2011) (denying motion to dismiss related securities-fraud action; same district judge).

The Fifth Circuit has done likewise. In *Whitley v. BP P.L.C.*, 838 F.3d 523 (5th Cir. 2016), it reversed the trial court and held that an ERISA stock-drop complaint had been insufficiently pled. That a companion securities-fraud case had survived a motion to dismiss was of no moment. *See In re BP P.L.C. Sec. Litig.*, 843 F. Supp. 2d 712 (S.D. Tex. 2012) (denying motion to dismiss securities action; same trial judge as ERISA case).

The result reached by these courts makes sense, given that "'ERISA and the securities laws ultimately have differing objectives pursued under entirely separate statutory schemes' such that alleged securities law violations do not necessarily trigger a valid ERISA claim." *Jander v. IBM*, __ F. Supp. 3d __, 2016 WL 4688864, at *6 (S.D.N.Y. Sept. 7, 2016) (quoting *In re Lehman Bros.*, 113 F. Supp. 3d 745, 768 (S.D.N.Y. 2015)) (rejecting argument that ERISA complaint should survive because ERISA plaintiffs are entitled to greater protections than "garden-variety shareholders" who bring securities-fraud claims). There is no logical reason why an unappealed interlocutory decision in a separate case, with a different complaint, alleging claims under a different statutory scheme, should predestine an ERISA complaint for success or failure.[8] That disconnect is

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[8] Cliffs continues to believe the decision denying the motion to dismiss in the securities case was erroneous, even though the company subsequently elected to settle the matter rather than grind through years of burdensome, costly litigation. On the current record, there would be no way for this Court to conclude that the

amplified here, where the slate of ERISA defendants differs dramatically from that in the securities action. Of the 15 individual defendants here, only *two* were defendants in the securities action, and with one partial, immaterial exception, not a single one of the Investment Committee defendants was part of that other case.[9] So, too, the time period covered by the securities case was different from that asserted here. ¶ 73 (proposed ERISA class period of April 2, 2012 "to the present"); *Dep't of Treasury*, No. 1:14-CV-1031, ECF 55, ¶ 1 (N.D. Ohio) (proposed class period in securities case of Mar. 14, 2012 to Mar. 26, 2013).

3. The SAC Failed to Plead Alternative Actions That a Prudent Fiduciary ***Could Not*** Have Assessed As Likely To Do More Harm Than Good.

Plaintiffs' position on their failure to plead an "alternative action" that "a prudent fiduciary in the same position 'could not have concluded…would do more harm than good,'" *Amgen*, 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2463), is unpersuasive and unsupported by case law.

(continued…)

decision on the dismissal motion in that case was correct, even were it inclined to undertake that inquiry.

[9] Mr. Paradie was a defendant in the securities case but was not on the Investment Committee (or, at most, was on it for a few days) during the time period at issue in the securities case (March 14, 2012 through March 26, 2013). *See* ¶ 34.

(a) *Amgen* Disposes Of This Case.

As detailed in defendants' reply brief below, every one of the SAC's alternative-action allegations was considered in *Amgen* and rejected by the Supreme Court as insufficient. (MTD Reply, RE 41, PageID# 1173-74.) On appeal, plaintiffs do not contest this point. Nor could they, for they deliberately modeled the SAC on what the Ninth Circuit in *Amgen* had said would be sufficient. (*See id.*) The Ninth Circuit approach was later repudiated by the Supreme Court, and the trial court correctly followed suit here.

Having hitched their wagon to a horse that came up lame, plaintiffs scramble to distinguish their alternative-action allegations from *Amgen*. In doing so, they are stuck arguing that the difference between the SAC and *Amgen* is that the *Amgen* complaint, unlike the SAC, neither (i) alleged, in so many words, that the proposed alternatives "would have benefitted the members of the *Amgen* plan, or not caused more harm than good," nor (ii) asserted that the small quantity of shares that would go unpurchased by the Plan in the event of a freeze, relative to normal trading activity, would escape notice by the market. Pl. Br. at 21, 24. These arguments are meritless.

First, plaintiffs have again misstated the *Dudenhoeffer/Amgen* pleading standard.[10] *Dudenhoeffer* and its progeny ask not merely whether the SAC averred that an alternative action "would…not have been more likely to harm the Company Stock Fund than to help it," ¶ 96, but rather whether the SAC pled *facts* sufficient to show plausibly that *no reasonable fiduciary could have concluded* under the circumstances that the alternative action would do more harm than good. *Amgen*, 136 S. Ct. at 760. Plaintiffs aim at the wrong target, making their argument inapposite.

Second, the idea that the only thing a complaint needs to do to survive dismissal post-*Dudenhoeffer* is baldly "allege…that…[the alternative] action… would…not [have] caused more harm than good," Pl. Br. at 21, is absurd.[11] *See, e.g.*, *Elena v. Municipality of San Juan*, 677 F.3d 1, 6 (1st Cir. 2012) ("plaintiffs' invoking…magic words does not 'nudge[] their claims across the line from conceivable to plausible'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). It was the absence not of magic words, but of supporting facts, that was fatal in *Amgen*. The *Dudenhoeffer/Amgen* standard is properly understood as a tool

[10] *See*, *e.g.*, MTD Opp., RE 40, PageID# 1119 ("the only question that remains is if there are any steps [d]efendants could have taken…which another fiduciary could conclude would not have [] done more harm than good").

[11] This is so even if the allegation were rephrased to track the *Dudenhoeffer/Amgen* language (*i.e.*, that a reasonable fiduciary *could not* have concluded that the alternative action would have done more harm than good).

to assess the sufficiency of the *facts* alleged about alternative actions that might have been taken in dealing with (in this case, unpled) non-public information. *Amgen*, 136 S. Ct. at 760 (requiring not just "allegations" but also "supporting… facts" to satisfy the plausibility requirement). *See Harris v. Amgen, Inc.*, 788 F.3d 916, 925 (9th Cir. 2015) (Kozinski, J., dissenting from denial of en banc rehearing) ("[H]ow can meritless ERISA fiduciary suits be 'weeded out' at the motion to dismiss stage, if a complaint can survive through no more than an unadorned conclusion that fiduciaries could have withdrawn the fund or disclosed information? Any complaint filed by minimally competent counsel will surely do that."). Such facts are absent from the SAC, just as they were from the *Amgen* complaint.

(b) A Reasonable Fiduciary Could Have Concluded That Freezing The Cliffs Stock Fund Would Do More Harm Than Good.

Plaintiffs argue that the SAC "clearly sets forth facts [showing] that no fiduciary…could conclude that freezing or liquidating[12] Company Stock would do

[12] Their brief says "liquidating," but the SAC did not allege that selling Cliffs stock on the basis of non-public information was an available alternative. Rather, its call for liquidation was "based solely upon public information." ¶¶ 139, 216. (The inadequacy of the public-information claim is dealt with below, in Part I(B).) Thus, in opposing dismissal, plaintiffs did not even respond to defendants' observation that the SAC "[does not] appear to allege that defendants should have sold Cliffs stock based on supposed material non-public information." (MTD Br., RE 38-1, PageID# 1046 n.11.) Of course, liquidating the Plan's holdings on the basis of non-public information would have been illegal. *Dudenhoeffer*, 134 S. Ct. at 2472.

more harm than good."[13] Pl. Br. at 24 (emphasis omitted). But they cite only two "facts" from the SAC to support that assertion. First, they point to the allegation that "[d]efendants could have taken numerous steps" that "would not have been more likely to harm the Company Stock Fund than to help it." *Id.* (quoting ¶ 96). As noted previously, that is not a fact, but a naked conclusion, a mere rewording (and even then an incorrect one) of the pleading standard. *See BP*, 838 F.3d at 529 (allegation that proposed alternatives "would not have been more likely to harm the BP Stock Fund than to help it" was an insufficient "conclusory statement"); *Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

The only other "fact" plaintiffs offer to support the argument that the SAC meets the standard is the allegation that, if the Plan had stopped buying Cliffs shares, "given the relatively small number of…shares that might not have been purchased by the Cliffs Stock Fund in comparison to the enormous volume of actively traded shares…, it is extremely unlikely that this decrease in the number

[13] Note that plaintiffs, while mentioning certain other alternative actions (*i.e.*, that defendants should have consulted the Department of Labor, SEC, or another outside party; that defendants should have resigned and/or appointed outsiders as advisors or fiduciaries for the Plan), Pl. Br. at 20, 22-23, do *not* argue that the SAC pled facts to show these actions would have changed Plan economics at all, let alone met the more-harm-than-good requirement, thus effectively (and sensibly) abandoning those points.

of shares…purchased…would have had an appreciable impact on…share price." Pl. Br. at 24-25 (citing ¶ 100). That "fact," too, cannot withstand analysis.

First, that kind of generic assertion could be made in virtually any public-company stock-drop case (as indeed it was in the Ninth Circuit's rejected analysis in *Harris v. Amgen*, 770 F.3d at 877-78), since it will nearly always be true that a stock fund would purchase, in a given time period, only a relatively small fraction of the total number of outstanding shares. The *Dudenhoeffer/Amgen* framework would vaporize if this were enough to meet the test.

Second, and more significantly, the premise of the trading-volume argument is wrong. It implies that putting a private, secret ban on further purchases of Cliffs stock by Plan participants was even an option. It was not, as a matter of law. The Plan's fiduciaries could not have unilaterally halted purchases of Cliffs stock without publicly disclosing that they had done so, and explaining the reasons why. *In re JPMorgan Chase & Co. ERISA Litig.*, No. 12-CV-4027, 2016 WL 110521 at *3 (S.D.N.Y. Jan. 8, 2016) ("Defendants could not have prevented Plan participants from making new Stock Fund purchases without public disclosures."), *aff'd*, 2016 WL 4703505 (2d Cir. Sept. 8, 2016).

As the *JPMorgan* court explained:

> If the Plan fiduciaries had sought to halt new Stock Fund purchases, ERISA would have required the plan administrator to notify Plan participants in advance. Federal securities laws, in turn, would have required [Cliffs] to disclose that

> information to the public. Defendants would expose themselves to liability under Section 10(b) and Rule 10b-5 if they failed to make such disclosures,

or if they had sold stock on the basis of inside information before making the disclosures. *Id.* *See* 29 U.S.C. § 1021(i)(2)(A) (providing that company-stock fund freeze must be accompanied by notice specifying "(i) *the reasons for the blackout period*, (ii) an identification of the investments and other rights affected, (iii) the expected beginning date and length of the blackout period, [and] (iv)…a statement that the participant…should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period." (emphasis added)); 17 C.F.R. § 243.100(a)(1) (SEC Regulation FD; barring selective disclosures of material nonpublic information—whether to Plan participants or anyone else); *In re BP P.L.C. Sec. Litig.*, No. 10-MD-2185, 2015 WL 1781727, at *14 (S.D. Tex. Mar. 4, 2015) ("it would have been consistent with the securities laws to remove the BP Stock Fund as an investment option, *so long as* Plan participants (and, by extension, the public) were so informed" (emphasis added)); *In re HP Erisa Litig.*, No. C-12-6199, 2014 WL 1339645, at *6 (N.D. Cal. Apr. 2, 2014) ("Nor could HP have prevented employees from buying stock without disclosing as much to the market.").

Thus, under plaintiffs' proposal, the Plan would have been forced to hold all its shares of Cliffs stock while the defendants publicly announced the supposed material, non-public facts. Granted, plaintiffs never pled *what* that mystery information was, but whatever it was, plaintiffs *do* say the announcement would have amounted to an assertion that "Bloom Lake was an unmitigated disaster and money pit." ¶ 7. Certainly a reasonable fiduciary could have concluded that freezing the Plan's holdings of Cliffs stock and denouncing the company might do more harm than good to the Plan, by causing a drop in the value of the Plan's shares while also locking in any participants who, absent a freeze, may have needed or wanted to sell for reasons of their own (inflicting immediate losses that those participants would not otherwise have suffered). Indeed, the SAC itself concedes that "[d]isclosure might not have prevented the Plan from taking a loss on Company Stock it already held." ¶ 94.[14]

This is precisely why other courts have found post-*Dudenhoeffer* complaints to have failed the more-harm-than-good standard. As the Fifth Circuit explained, where a proposed alternative "would likely lower the stock price…it seems that a prudent fiduciary could very easily conclude that such actions *would* do more harm than good.'" *BP*, 838 F.3d at 529. *Accord Rinehart v. Lehman Bros.*, 817 F.3d at

[14] The more-good-than-harm standard in *Dudenhoeffer* implies a comparative analysis based on well-pleaded facts, but the SAC did not attempt any such thing.

68 (affirming dismissal where alternative action of freezing company stock fund and making negative disclosures "could have had dire consequences"); *Martone v. Whole Foods Market, Inc.*, No. 15-CV-877, 2016 WL 5416543, at *8 (W.D. Tex. Sept. 28, 2016) (dismissing where "Plaintiff here acknowledges that the [alternative] actions he proposes are likely to have a negative impact on a company's stock price"); *In re JPMorgan Chase & Co. ERISA Litig.*, 2016 WL 110521, at *4 (dismissing where "Plaintiffs acknowledge that Defendants' possible concern about a stock price drop was 'well-founded'"), *aff'd*, 2016 WL 4703505 (2d Cir. Sept. 8, 2016). *Cf. Harris v. Amgen,* 788 F.3d at 926 (Kozinski, J., dissenting from denial of en banc rehearing) (noting that a freeze accompanied by negative disclosures "will punish all those employees who had previously chosen to invest in the company").[15]

Besides being concerned about the negative effect of a "freeze" on the value of Cliffs stock already in the Plan, a reasonable fiduciary could have concluded

[15] Plaintiffs characterize the Supreme Court in *Amgen* as saying that freezing purchases of company stock is an alternative that could plausibly satisfy *Dudenhoeffer*. Pl. Br. at 20-21. But that is not what the Court actually said. Rather, it attributed that view to the Ninth Circuit for the particular situation in *Amgen* (not necessarily generally), and then went on to comment that "that may [or implicitly, may not] be true" in *Amgen*. 136 S. Ct. at 760. Of greater significance, the Court went on to require that there must be "facts…in the stockholders' complaint" to support the proposition. *Id.* Who knows whether the *Amgen* situation could have yielded such "facts"? The Supreme Court certainly did not say so.

that taking such action while commodity prices were relatively low would independently pose a serious risk of harming the Plan more than helping it. Like other mining companies, Cliffs' stock price is profoundly affected by commodity prices, which are inherently unpredictable.[16] ¶¶ 121-25. Plaintiffs themselves note "the severe decline in iron ore and [metallurgical] coal prices after 2011." Pl. Br. 11, *see also id.* at 4 (referring to "collapse of iron ore and coal prices" during putative class period). Selling the Plan's Cliffs stock or removing it as an option—contrary to the Plan's terms and participants' explicit directions—at a time of lower commodity prices would unavoidably put the Plan at peril of missing out on increases in the stock price when the commodity price cycle turned. A prudent fiduciary could not know when that turn would occur, but she certainly could conclude that it eventually would, and that exiting the Stock Fund while commodity prices were down would risk harming the Plan overall—after all,

[16] *See, e.g.*, *QSI Holdings, Inc. v. Alford*, 571 F.3d 545, 549 (6th Cir. 2009) (noting "the volatile nature of the commodities…markets"); *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1093 (9th Cir. 2013) ("mining activities are sensitive to world fluctuations of commodity prices" (quotation omitted)).

As noted above, a bear market in commodities affected the entire mining sector in recent years, causing shares of four of the "Big Five" global mining companies to lose over three-quarters of their value between their 2011 highs and late 2015. *See supra* n.3.

"buy[ing] high and sell[ing] low" is a recipe for "financial disaster."[17] *Bell v. Bonneville Power Admin.*, 340 F.3d 945, 948 (9th Cir. 2003). Because the SAC alleged no facts to the contrary, it did not state an actionable prudence claim based upon non-public information.

To be sure, plaintiffs here, unlike in *Amgen*, "had the benefit of [*Dudenhoeffer*]" and tried to craft all three iterations of their complaint "to meet [*Dudenhoeffer*'s] standard." Pl. Br. at 25. But even with that advantage, they—like the plaintiffs in *BP*, *Lehman Brothers*, *JPMorgan* and *Martone*—have been unable to set forth the necessary facts to satisfy that standard.

4. It Is Plaintiffs'—Not Defendants'—Position That Contradicts Prevailing Law.

Plaintiffs' argument that dismissal of the non-public-information claim "contradict[ed] prevailing law" could hardly be more wrong. Pl. Br. at 29. To support this contention, they proffer three district-court cases and two amicus briefs submitted to the Fifth Circuit by the Department of Labor and the SEC in an ERISA stock-drop case against BP.

The amicus briefs are easily addressed. First, an agency's "amicus brief…lack[s] the force of law" and the "statutory interpretations [therein] are not afforded deference under *Chevron*." *Hughes v. McCarthy*, 734 F.3d 473, 478 (6th

[17] Indeed, between the date the SAC was filed (November 2, 2015) and November 18, 2016, Cliffs' stock price increased by 157%, as iron-ore prices rose.

Cir. 2013). *See, e.g.*, *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 927 (6th Cir. 2014) ("We decline to afford either *Chevron* or *Skidmore* deference to the Secretary's 'regulation by amicus' in this case."), *cert. denied*, 136 S. Ct. 791 (2016). Moreover, in *BP*, the Fifth Circuit *rejected* the DoL's amicus position, which, while seeking affirmance of the trial court decision denying BP's motion to dismiss, unaccountably did not even cite *Amgen*; the Fifth Circuit instead reversed. *BP*, 838 F.3d at 529. Not only that; the DoL's unsuccessful brief did not purport to describe what fiduciaries must do generally, but rather only what certain fiduciaries might have done in the "particular circumstances" of the *BP* case. Br. of Sec'y of Labor as Amicus Curiae at 11, *Whitley v. BP*, No. 15-20282 (5th Cir. Mar. 11, 2016) ("[i]n the particular circumstances of this case"; "[i]n the circumstances here"), 20 ("in the circumstances alleged here"), 24 ("on the specific facts of this case"). Notably, the DoL has not filed an amicus brief here.

The SEC's brief in *BP* offered only the agency's interpretation of the securities laws; it did not comment on what a fiduciary should or should not do to comply with ERISA. To the extent it was relevant at all, that brief bore out the points that there cannot be a one-sided freeze covering purchases only, and that an ERISA fiduciary cannot sell stock while in possession of material non-public information. *See* Br. of SEC as Amicus Curiae at 5-6, 12, *Whitley v. BP*, No. 15-20282 (5th Cir. Mar. 11, 2016) ("an ESOP manager who effects trades—either

purchases *or* sales—on the basis of material nonpublic information violates Exchange Act Section 10(b) and Rule 10b-5"). The Fifth Circuit's opinion did not mention either brief.

Plaintiffs' three lower-court cases fare no better. *Murray v. Invacare Corp.*, 125 F. Supp. 3d 660 (N.D. Ohio 2015), decided over a year ago, applied the wrong standard,[18] relied on the Ninth Circuit's now-reversed *Amgen* decision, *id.* at 669, and has not been cited by any other court. *Ramirez v. J.C. Penney Corp.*, No. 14-CV-601, 2015 WL 5766498 (E.D. Tex. Sept. 29, 2015), is of similar vintage, also has never been cited by any other court, and cannot be considered good law in its own circuit, in light of the Fifth Circuit's subsequent *BP* decision. *In re SunTrust Banks ERISA Litigation*, No. 08-CV-3384, slip op. (N.D. Ga. June 18, 2015)—decided, like *Murray* and *Ramirez*, without the benefit of the Supreme Court's *Amgen* decision—is a cursory order unavailable on Westlaw or Lexis; it analyzed the plaintiffs' non-public-information claims in a single, citation-free paragraph.

In contrast, current, on-point rulings validating the district court's decision here are abundant and growing. In fact, since *Amgen*, *every* court to consider a

[18] The *Invacare* court found that "a prudent fiduciary in [d]efendants' position *could have concluded* that stopping…further investment in Company stock…would not have caused the Plan more harm than good." 125 F. Supp. 3d at 669 (emphasis added). This inverted the *Dudenhoeffer* formulation: that "a prudent fiduciary in the same position 'could not have concluded…would do more harm than good,'" *Amgen*, 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2463). In *BP,* the Fifth Circuit identified this same error in the lower court's formulation of the *Dudenhoeffer* standard. *BP*, 838 F.3d at 528-29.

motion to dismiss a non-public-information claim against a public-company defendant has ruled for the defense.[19]

B. The SAC Failed to Assert An Actionable Prudence Claim Based Upon Public Information.

In *Dudenhoeffer*, the Supreme Court concluded that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone" that the market was not properly assessing the stock's value "are implausible as a general rule." 134 S. Ct. at 2471. That is, "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.* (quotation omitted). *Dudenhoeffer* thus "as a general rule" bars imprudence claims based on public information, like plaintiffs' here.

This rule is "general" for only one reason. It applies in all situations unless "special circumstances" exist. *Id.* *Dudenhoeffer* defines "special circumstances" narrowly. To show "special circumstances," a plaintiff must allege facts suggesting that the market for the employer's stock did not function efficiently, *i.e.*, "a special circumstance affecting the reliability of the market price as 'an

[19] *See BP*, 838 F.3d 523 (5th Cir. 2016); *In re 2014 RadioShack ERISA Litig.*, No. 14-CV-959, slip op. at 25 (N.D. Tex. Sept. 29, 2016); *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56 (2d Cir. 2016); *Loeza v. JPMorgan Chase & Co.*, __F. App'x __, 2016 WL 4703505 (2d Cir. Sept. 8, 2016); *Martone v. Whole Foods Market, Inc.*, No. 15-CV-877, 2016 WL 5416543 (W.D. Tex. Sept. 28, 2016); *Jander v. IBM*, __ F. Supp. 3d __, 2016 WL 4688864, at *6 (S.D.N.Y. Sept. 7, 2016).

unbiased assessment of the security's value in light of all public information.'" *Id.* at 2472 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014)).

Dudenhoeffer applied to plaintiffs' public-information claim here, and the SAC did not allege special circumstances undermining the efficiency of the "market price" as "an unbiased assessment of the…value [of Cliffs stock] in light of all public information." *Id.* at 2471. The district court was therefore correct in dismissing that claim.

1. ***Dudenhoeffer* Indisputably Applied.**

Plaintiffs devote the bulk of their public-information argument to the Hail-Mary proposition that—despite the plain language of *Dudenhoeffer*, this Court's own on-point precedent, and the decisions of other appellate courts—*Dudenhoeffer* does not even apply here, and plaintiffs thus had no obligation to plead "special circumstances." Pl. Br. at 31-45. They acknowledge that the district court's ruling was consistent "with other courts that have examined the issue." Pl. Br. at 31. But all were in error, plaintiffs say, because those courts applied *Dudenhoeffer*'s "limited holdings" "way too narrowly." *Id.*

For all the ink spilled on this argument, plaintiffs muster no credible support for it. They give scant attention to *Dudenhoeffer* itself or to other recent, on-point opinions. Instead, they rely on the likes of the Third (and, when more expedient,

Second) Restatement of Trusts, a lone Senator's 1974 floor comments, pre-*Dudenhoeffer*[20] and otherwise irrelevant[21] caselaw, and other dubious sources.

In contrast, the authorities rejecting plaintiffs' position are clear and binding. Most notably, only a year ago, this Court spoke definitively: "We…now hold[] that a plaintiff claiming that an ESOP's investment in a publicly traded security was imprudent ***must*** show special circumstances [as required by *Dudenhoeffer*] to

[20] Fully half of the 24 cases plaintiffs cite in this 15-page section of their brief were decided pre-*Dudenhoeffer* and thus do not address *Dudenhoeffer*'s application to prudence claims based on public information.

[21] Defendants treated most of these cases in the trial court, explaining why they offered plaintiffs no sustenance (*see* MTD Reply, RE 41, PageID# 1167-68), and plaintiffs provide no rebuttal. *See, e.g.*, *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014) (not an employer-stock case; involved decision to *sell* stock in another company; appeal from post-trial decision over standard of *proof*, not pleading); *Gedek v. Perez*, 66 F. Supp. 3d 368 (W.D.N.Y. 2014) (rejected by every court to consider its reasoning, including the Second Circuit, its own supervisory court, in *Lehman Brothers*); *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015) (not an employer-stock case; addressed statute of limitations; not a pleading case and so no occasion to apply *Dudenhoeffer*); *Borboa v. Chandler*, No. 13-CV-844, slip op. at 1 (E.D. Va. Dec. 31, 2014) (unreasoned order, denying dismissal with a four-sentence paragraph that lacked citations to *any* case law, not even *Dudenhoeffer*; never cited by any other court); *Int'l Bhd. of Teamsters Union Local No. 710 Pension Fund v. Bank of New York Mellon Corp.*, No. 13-CV-1844, 2015 WL 1234091 (N.D. Ill. Mar. 16, 2015) (not an employer-stock case; concerned a securities-lending arrangement to purchase debt issued by a third party); *United Food & Commercial Workers Int'l Union-Indus. Pension Fund v. Bank of New York Mellon*, No. 13-CV-4484, 2014 WL 4627904, at *6 (N.D. Ill. Sept. 16, 2014) (same).

The only new case plaintiffs offer—*Brannen v. First Citizens Bankshares Inc.*, No. 15-CV-30, 2016 WL 4499458 (S.D. Ga. Aug. 26, 2016)—is worthless. The opinion, poorly reasoned to begin with, did not even involve a publicly traded company. *See id.* at *6.

survive a motion to dismiss." *Pfeil v. State Street Bank & Trust Co.*, 806 F.3d 377, 386 (6th Cir. 2015) (emphasis added).[22] This unequivocal holding was hardly surprising, given that it was mandated by *Dudenhoeffer*. Plaintiffs never explain why they think a panel of this Court could override such recent Circuit precedent, and indeed it cannot. *See U.S. v. Anderson*, No. 16-1029, 2016 WL 5799672, at *2 n.1 (6th Cir. Oct. 5, 2016) ("it is well-established that a panel of this court may not overrule a prior published decision absent en banc review or an intervening and binding change in the state of the law").

Skipping over that binding Circuit precedent, plaintiffs attempt to cabin *Dudenhoeffer*, asserting the Supreme Court intended it to apply narrowly, only to cases claiming an employer's stock was "somehow 'overpriced'" or "artificially inflated." Pl. Br. at 31, 32. But neither of those expressions appears in *Dudenhoeffer*.[23] To the contrary, *Dudenhoeffer* described the plaintiff's public-information argument in broad terms: that the defendants "knew or should have known in light of publicly available information…that continuing to hold and

[22] Plaintiffs cite *Pfeil* in a manner that suggests a live certiorari petition is pending—perhaps trying subtly to make the case seem less authoritative. *See* Pl. Br. at 45. In fact, the Supreme Court denied certiorari in *Pfeil* in June 2016, three months before plaintiffs filed their brief. *See Pfeil v. State St. Bank & Trust Co.*, *cert. denied*, 136 S. Ct. 2511 (U.S. June 27, 2016) (No. 15-1199).

[23] The word "inflated" does appear once by itself in the opinion—in a discussion of the plaintiffs' *non*-public-information claims. *Dudenhoeffer*, 134 S. Ct. at 2472.

purchase [company] stock was imprudent." *Dudenhoeffer*, 134 S. Ct. at 2471. It was in this context that the Court held that "a fiduciary usually [*i.e.*, in the absence of special circumstances] is not imprudent to assume that a major stock market provides the best estimate of the value of the stocks traded on it." *Id.* "[N]othing in *Dudenhoeffer*…supports the…contention that the Supreme Court's reasoning is only relevant in cases where the stock price is alleged to have been artificially inflated." *Coburn v. Evercore Trust Co., N.A.*, 160 F. Supp. 3d 361, 367 (D.D.C. 2016) (quotation omitted).

There are no exceptions to this broad principle for, as plaintiffs would have it, "traditional," "classic," or "risk profile" ESOP imprudence claims. Pl. Br. at 32, 45. At any rate, plaintiffs never explain what constitutes a "traditional" imprudence claim (though presumably the definition is congruent with "claims to which we don't want *Dudenhoeffer* to apply"). A "classic" claim, plaintiffs say, is one "involving a company whose risk profile exceeded the reasonable bounds" for investment. *Id.* at 32.

On this point, plaintiffs are doubly wrong. Not only does *Dudenhoeffer*, by its terms, apply generally to all imprudence claims based on public information, but the specific facts of *Dudenhoeffer* involved that precise type of claim, *i.e.*, an "excessive risk" claim. The *Dudenhoeffer* complaint "allege[d] that…the [defendants] knew or should have known that Fifth Third's stock

was…excessively risky." 134 S. Ct. at 2464. Likewise, plaintiffs here base their "riskiness" argument on the proposition that "the collapse of iron ore and coal prices" "dramatically changed" Cliffs' "risk profile." Pl. Br. at 4. And in the same way, the plaintiffs in *Dudenhoeffer* based their public-information claim on "early warning signs that subprime lending, which formed a large part of [defendant's] business, would soon leave creditors high and dry as the housing market collapsed and subprime borrowers became unable to pay off their mortgages." 134 S. Ct. at 2464. *Dudenhoeffer* thus dealt with—and rejected—the same 'riskiness' argument plaintiffs say they are advancing here: that, public market price aside, the underlying fundamentals of the company's business had turned it into an imprudent investment.[24]

"[T]he purported distinction" plaintiffs try to draw "between claims involving 'excessive risk' and claims involving 'market value' is illusory."

[24] A subtext of plaintiffs' argument seems to be that ERISA plans should not be allowed to include employer stock funds, at least not "volatile" ones, among their investment options, because those funds are inherently more variable and risky than diversified investments like mutual funds. *See, e.g.*, Pl. Br. at 39 ("volatile single equity stock [fund]"). But Congress made the opposite policy judgment, and "has written into law its 'interest in encouraging'" ESOPs. *Dudenhoeffer*, 134 S. Ct. at 2463. The ERISA statute and regulations expressly contemplate inclusion of employer stock as an investment option in 401(k) plans, without reference to "volatility" (or not), and further expressly prescribe that there be a material range of "risk" among the options. *E.g.*, 29 U.S.C. § 1104(a)(2) (referring to employer stock); 29 C.F.R. § 2550.404c-1(b)(3) ("broad range of investment alternatives" with "materially different risk and return characteristics").

Rinehart v. Lehman Bros., 817 F.3d at 66.[25] *Dudenhoeffer* "foreclose[s] breach of prudence claims based on public information *irrespective of whether such claims are characterized as based on alleged overvaluation or alleged riskiness of a stock*." *Id.* (emphasis in original) (quoting *In re Lehman Bros.*, 113 F. Supp. 3d at 756). This makes eminent sense, in line with the principle that a publicly known risk, like all other public information, is incorporated into the stock price at any given moment, with no bias as to whether the next price will be higher, lower, or the same. *See In re Citigroup ERISA Litig.*, 104 F. Supp. 3d at 615 (applying *Dudenhoeffer* and dismissing complaint; "risk is accounted for in the market price, and the Supreme Court held that fiduciaries may rely on the market price, absent any special circumstances affecting the reliability of the market price"), *aff'd*, 649 F. App'x 110 (2d Cir. 2016).[26]

[25] Plaintiffs call not only for this Court to overrule the *Pfeil* panel, but also to create a circuit split with the Second Circuit's *Lehman Brothers* decision (which holds that *Dudenhoeffer* applies to all company-stock prudence claims based on public information). This Court, however, avoids establishing circuit splits whenever possible. *See*, *e.g.*, *Tyler v. Anderson*, 749 F.3d 499, 508 (6th Cir. 2014) (referring to "our general reluctance to create a split with another circuit"); *United States v. Andress*, 47 F.3d 839, 841 (6th Cir. 1995) ("If there is to be a circuit split on this issue, some other circuit will have to create it.").

[26] Besides the Supreme Court and the Second Circuit, multiple district courts have spoken as well. *See Coburn*, 160 F. Supp. 3d at 366 (dismissing complaint; rejecting argument that *Dudenhoeffer* was inapplicable because the complaint did not allege artificial inflation); *In re 2014 RadioShack ERISA Litig.*, No. 14-CV-959, slip op. at 8 (N.D. Tex. Jan. 25, 2016) (rejecting argument that "*Dudenhoeffer* only applies to claims involving inflated stock prices").

2. Plaintiffs Failed to Plead "Special Circumstances."

Plaintiffs' much shorter, secondary argument that they *have* pled special circumstances is sorely lacking. Pl. Br. at 45-48.

They start off asserting that the district court wrongly "suggest[ed]" that "public information allegations can only survive if [p]laintiffs can plausibly allege 'market inefficiency.'" Pl. Br. at 46 (quoting MTD Opinion, RE 44, PageID# 1240). But the proposition that special circumstances are limited to situations in which a market inefficiency rendered reliance on the market price imprudent was not a "suggestion" by the district court. It is a mandate from *Dudenhoeffer*. Per *Dudenhoeffer*, to show "special circumstances," a complaint must show that the "market price" for the employer's stock failed to render "an unbiased assessment of the security's value in light of all public information." 134 S. Ct. at 2471. That is, a plaintiff must plausibly plead market inefficiency.

Here, plaintiffs do not and cannot show that the market for Cliffs' stock—traded on the New York Stock Exchange—was broken such that it did not factor into the price what the SAC describes as "massive amounts of publicly-available information" about the company and its industry. ¶ 3. The SAC did not allege any facts plausibly suggesting that the market price for Cliffs stock at any particular point was not a reliable indicator of its value (*i.e.*, where a willing buyer and seller would transact) in light of all public information then available. Plaintiffs have

essentially conceded the point before this Court as well: Their brief nowhere argues that they have pled any inefficiency in the market for Cliffs stock.

The one item they do proffer as a "special circumstance" is totally unrelated to market efficiency and thus doesn't satisfy *Dudenhoeffer*: That defendants supposedly "failed to engage in a reasoned decision-making process regarding the prudence of Cliffs stock." Pl. Br. at 47. They offer no support, however, for the contra-*Dudenhoeffer* proposition that an allegation of that sort constitutes "special circumstances." Instead, they draw attention to a truncated portion of this Court's equivocation in *Pfeil* on the topic: that "a fiduciary's complete failure to investigate a publicly traded investment might constitute a circumstance sufficiently special for a claim of imprudence to survive a motion to dismiss." *Pfeil*, 806 F.3d at 386 (quoted at Pl. Br. at 47).

If anything could ever justify a lower court in deviating from Supreme Court precedent, it is not ambivalent dicta like this. Not only that, 'ambivalent dicta' overstates the strength of the statement from *Pfeil*. Despite having been called out *twice* for the same sleight-of-hand below (*see* MTD Reply, RE 41, PageID#1170; Opp. to Reconsideration, RE 49, PageID# 1382), plaintiffs once again have misrepresented this quote. What the *Pfeil* majority actually said was, "*We do not now decide* whether a fiduciary's complete failure to investigate a publicly traded investment *might* constitute [special circumstances]." *Id.* (emphasis added). That

is, the Court simply said the issue wasn't relevant to its decision. It did "*not…decide*" "*whether*" failure to investigate "*might*" constitute special circumstances. *Id.* (emphasis added).[27]

Reading an "inadequate investigation" exception into *Dudenhoeffer*'s definition of special circumstances not only would contradict the express language of *Dudenhoeffer*, but would defy its logic too. Given the Supreme Court's express holding that fiduciaries may prudently rely on the market price of a stock traded in an efficient market, it would be nonsense to say there somehow could be liability for not undertaking a good-enough "investigation" into that price. If, as *Dudenhoeffer* teaches, failing "to outsmart a presumptively efficient market…is…not a sound basis for imposing liability," 134 S. Ct. at 2471-72, then how could an asserted failure to conduct an investigation of public information thorough enough to outsmart that same market ever give rise to liability?

There is yet further reason to refuse plaintiffs' invitation unilaterally to expand *Dudenhoeffer*'s definition of special circumstances. A primary purpose of the standards established in *Dudenhoeffer* is to "divide the plausible sheep from the meritless goats" at the pleading stage. *Id.* at 2470. Allowing a bare allegation

[27] The other two cases plaintiffs cite, Pl. Br. at 48, are of no help. *Brannen* is useless, as discussed *supra* n.21. *Bunch* is pre-*Dudenhoeffer*. Justice Breyer's speculations at oral argument are likewise unavailing. It is his considered opinion for a unanimous Court that controls, not his earlier, extemporaneous ruminations from the bench.

(made upon "information and belief," ¶ 176) that fiduciaries did not conduct an appropriate investigation to replace the market-inefficiency special circumstances required by *Dudenhoeffer* would allow virtually any 401(k) stock-drop complaint to survive dismissal; future plaintiffs could simply lament, as do plaintiffs here, that they can offer no more than this bare allegation because they do not have access to the facts that might support it. *See* Pl. Br. at 52 (admitting that a discovery fishing expedition is plaintiffs' only chance of pleading facts to support their barebones "inadequate investigation" assertion). There will be goats *cum* sheep aplenty if plaintiffs' position were to be adopted.[28]

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[28] There was another reason—explained to but not reached by the district court—that the public-information claim was implausible, providing an alternate ground for affirmance. (MTD Br., RE 38-1, PageID# 1046 n.11; MTD Reply, RE 41, PageID# 1164-65.)

Taking the SAC at its word, it was legally impermissible for the defendants to cause the Plan to sell Cliffs stock on the basis of public information. That is because the SAC also alleges that the defendants possessed material non-public information about Cliffs (although it never says what that information was or which specific defendant had it and when).

SEC regulations prohibit an insider from trading while in possession of material non-public information, even if that insider also has public information that supports a purchase or sale. SEC Rule 10b5-1 defines the "manipulative and deceptive devices prohibited by Section 10(b) of the [Securities Exchange] Act" to include "the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer." 17 C.F.R. § 240.10b5-1(a). The Rule goes on to provide that "a purchase or sale of a security of an issuer is 'on the basis of' material nonpublic information about that security or issuer if the person making the purchase or sale ***was aware of*** the material nonpublic information when the person made the purchase or sale." 17 C.F.R. § 240.10b5-1(b) (emphasis added).

II. THE MONITORING CLAIM WAS PROPERLY DISMISSED.

Plaintiffs' sole argument in support of their monitoring claim is that "because [their prudence allegations] state a cognizable claim[,] it was error to dismiss [the separate duty-to-monitor claim]." Pl. Br. at 49. But because the prudence claim was insufficient, the monitoring claim necessarily failed. (*See* MTD Br., RE 38-1, PageID# 1054-55 (explaining in detail that monitoring claim is dependent on and derivative of prudence claim); MTD Reply, RE 41, PageID# 1181).

Besides, as defendants pointed out without refutation below (MTD Br., RE 38-1, PageID# 1055), the SAC pled no facts to support a conclusion that anyone had failed in a monitoring duty. It contained no allegations that committees failed to meet, that reports were not prepared or received, or the like, and, in any event, the responsibilities of the supposedly "unmonitored" Investment Committee did

(continued…)

Thus, under SEC regulations—enforceable civilly and criminally—there is no such thing as splitting one's mind in half for purposes of the insider-trading prohibition. One cannot put non-public information out of mind to trade upon public information. *See Siris v. SEC,* 773 F.3d 89, 97 (D.C. Cir. 2014) ("even if Siris had traded based on the public information his culpability would be only minimally diminished because he still violated the securities laws, *see* 17 C.F.R. § 240.10b5-1, and he knew that he was not permitted to trade while in possession of material, nonpublic information"). Because "the duty of prudence…does not require a fiduciary to break the law," *Dudenhoeffer*, 134 S. Ct. at 2472, the public-information claim was implausible. The SAC never alleged, even as an alternative, that defendants did *not* have material non-public information.

not extend to the Cliffs Stock Fund. *See supra* at 5. Merely reciting the legal standard and asserting that the "Officer Defendants" violated it does not push the claim over the line from conceivable to plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [to meet Rule 8's pleading requirements].").[29]

III. <u>THE LOYALTY CLAIM WAS PROPERLY DISMISSED.</u>

The loyalty claim was indistinguishable from the doomed prudence claim and inadequately pled to boot.

First, as the trial court observed, the loyalty claim duplicated the ill-pled prudence claim. MTD Opinion, RE 44, PageID# 1244. The loyalty claim rested on the allegation that it was *disloyal* to offer an *imprudent* investment. *See* ¶ 6 ("The thrust of plaintiffs' allegations under Counts I (breach of the duty of prudence) ***and*** II (*breach of the duty of loyalty*) is that Defendants allowed…investment…in Cliffs Stock…despite the fact that they knew or should

[29] In the facts section of their brief, Pl. Br. at 9, plaintiffs assert in passing that defendants who were not on the Investment Committee should have "informed" the Investment Committee of material non-public information as part of their monitoring obligations. They do not develop the point in their argument on the monitoring claim, and with good reason, as courts reject the proposition that ERISA imposes a duty for one alleged fiduciary to "tip" material non-public information to another for the purpose of trading on it. *See Rinehart*, 817 F.3d at 68 ("ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information.").

have known that that *investment was imprudent*." (emphasis added)); ¶ 185 (alleging "fiduciary breaches [*of loyalty*] against [defendants] for continuing to allow the investment of the Plan's assets in Cliffs Stock…despite the fact that they knew or should have known that such *investment was imprudent*." (emphasis added).). This came through in plaintiffs' briefing below as well. (*See* MTD Opp., RE 40, PageID# 1130 (defending plaintiffs' loyalty claim by asserting that "offering a knowingly *imprudent* plan investment option is a breach of [the] fiduciary duty [of *loyalty*]" (emphasis altered)).) Because the loyalty claim merely slapped a different label on the defective prudence claim, it was not error for the district court to dismiss it.

Plaintiffs have gotten wise to this flaw, and their brief here avoids directly referring to prudence in describing their loyalty claim. Instead, they argue—without citing a single fact in the SAC—that "[t]he point of [their] loyalty claims are [sic] that there is indication that [d]efendants did not have the Plan participants' best interests in mind while exercising their fiduciary duties." Pl. Br. at 51. The Court should not be taken in by this tactical shift. Even accepted at face value, an unadorned allegation of "not hav[ing] the Plan participants' best interests in mind" would be wholly insufficient under the *Twombly/Iqbal* standard.

Second, plaintiffs did not allege facts supporting a conclusion of disloyalty. The SAC did not allege, for instance, any diversion of Plan assets or *any*

transaction between any defendant and the Plan, let alone self-dealing. The closest plaintiffs came was alleging that certain defendants owned Cliffs stock and that "[b]ecause of [their] ownership in Cliffs Stock these Defendants had a conflict of interest which put them in the position of having to choose between their own interests…and the interest of the Plan Participants." ¶ 195. But it is no breach of loyalty for a Plan fiduciary also to hold company stock or to receive stock-based compensation. *E.g.*, *Coulter v. Morgan Stanley & Co. Inc.*, 753 F.3d 361, 368 (2d Cir. 2014) ("a conflict of interest claim cannot be based solely on the fact that an ERISA fiduciary's compensation was linked to the company's stock"); *Slaymon v. SLM Corp.*, 506 F. App'x 61, 65 (2d Cir. 2012) ("allegation that Defendants breached their duty to avoid conflicts—which [wa]s based predominately on stock sales and equity-based incentive compensation—[wa]s, without more, insufficient"); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 421 n.6 (4th Cir. 2007) ("Mere officer or director status does not create an imputed breach of the duty of loyalty simply because an officer or director has an understandable interest in positive performance of company stock. Nor…is the fact that retention of company stock could demonstrate an 'appearance of confidence' in one's company…sufficient to demonstrate that an officer or director acted under a conflict of interest in retaining that stock."). To the contrary, "[a]s opposed to creating a conflict, compensation in the form of company stock aligns the interests

of plan fiduciaries with those of plan participants." *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 849 n.6 (S.D. Ohio 2009).[30]

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' "MOTION FOR RECONSIDERATION."

Plaintiffs assert that the district court erroneously denied their "motion for reconsideration,"[31] but that motion fell short of the Rule 59(e) standard, a standard mentioned nowhere in their brief. This Court's review of the denial of a Rule 59(e) motion "is quite narrow." *Lommen v. McIntyre*, 125 F. App'x 655, 658 (6th Cir. 2005). It reviews only for abuse of discretion, mindful that "an appeal from denial of [a motion for reconsideration] does not bring up the underlying judgment for review." *Id.* There was no abuse here.

A trial court may exercise its discretion in favor of reconsideration only "if there is a clear error of law, newly discovered evidence, an intervening change in

[30] Plaintiffs previously attempted to assert a loyalty breach arising out of disclosures to Plan participants. They have abandoned that argument in their brief here. That is just as well, because the SAC never identified any specific communication directed to any participant that was false or misleading. (*See* MTD Br., RE 38-1, PageID# 1051 (discussing this failure in detail).) As the trial court found, "[p]laintiffs allege[d] no actual facts supporting this claim." (MTD Opinion, RE 44, PageID# 1244.)

[31] A motion filed, as plaintiffs' was, pursuant to Rule 59(e) is properly styled a "motion to alter or amend [the] judgment." Fed. R. Civ. P. 59(e). "[T]he Federal Rules of Civil Procedure do not provide for motions for reconsideration." *Westerfield v. U.S.*, 366 F. App'x 614, 619 (6th Cir. 2010). Because plaintiffs have consistently styled their motion as one for reconsideration, however, defendants use that term here.

controlling law, or to prevent manifest injustice." *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted). The trial court found none of those here. (Reconsideration Opinion, RE 51 (denying reconsideration).) In challenging the reconsideration ruling, plaintiffs do not argue that there had been an error of law (let alone a clear one), newly discovered evidence, or an intervening change in controlling law. Instead, they argue only that they suffered "manifest injustice" from the refusal of a post-dismissal request to conduct discovery. They are wrong for multiple reasons.

First, under *Iqbal*, a plaintiff gets discovery only by pleading a plausible, legally sustainable claim. 556 U.S. at 686 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."). Allowing discovery, "limited" or not, without a plausible claim under *Dudenhoeffer* would have defied Rule 8 and *Twombly/Iqbal.*[32] This is particularly so when the theory for which discovery was being sought had not even been meaningfully articulated in the SAC, much less well-pled. (MTD Opinion, RE 44, PageID# 1241.)

[32] Plaintiffs' reference to earlier "discovery" is misguided. That was a voluntary exchange of preliminary damages information in the context of an early settlement effort initiated by the trial court and had nothing to do with liability considerations, the complaint's sufficiency, standard discovery, or further pleading. (Opp. to Mot. for Recon., RE 49, PageID# 1382-83 n.6.)

Second, if the discovery really were crucial, plaintiffs should have pursued it *before* the SAC was dismissed and judgment entered, not after. Post-judgment proceedings are not a proving ground for alternative theories or a laboratory where losing parties may experiment with back-up approaches to case strategy. *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 616 (6th Cir. 2010) (plaintiffs may not, via Rules 59 and 60, "use the court as a sounding board to discover holes in their arguments, then reopen the case by amending their complaint to take account of the court's decision. That would sidestep the narrow grounds for obtaining post-judgment relief under Rules 59 and 60, make the finality of judgments an interim concept and risk turning Rules 59 and 60 into nullities." (quotation omitted)). Here, plaintiffs decided to go without, and then come back and complain if/when that strategy did not work.[33] It was no abuse to reject that approach.

Third, plaintiffs say it would be "a manifest injustice" if they were not permitted "a fair opportunity to amend the SAC." Pl. Br. at 52. They ask the Court to forget that the SAC already was their third complaint; that it had been

[33] ERISA permits plan participants to request certain plan documents outside of litigation. 29 U.S.C. § 1024(b)(4). Before filing the action, plaintiffs made requests citing the statute, but seeking data far beyond what it authorized. ¶ 73 n.4. Cliffs provided the documents to which plaintiffs were entitled. The statute did not entitle them to the material later also sought in the proposed post-judgment discovery, and they have never contended otherwise. (Opp. to Reconsideration, RE 49, PageID# 1383 n.7.)

pending for five months before the district court dismissed it; and that they could have sought leave to amend after seeing the motion to dismiss, to try to correct the deficiencies the motion had spotlighted.[34] *See, e.g.*, *Michigan Flyer, LLC v. Wayne Cty. Airport Auth.*, 162 F. Supp. 3d 584, 589 (E.D. Mich. 2016) (no "'manifest injustice' would result from the denial" of Rule 59(e) motion to amend); *Doe v. Allentown Sch. Dist.*, No. 06-CV-1926, 2008 WL 4427136, at *4 (E.D. Pa. Sept. 26, 2008) ("no manifest injustice" to deny opportunity to file second amended complaint). Besides, the amendment hypothesized by the post-judgment motion was dependent on allowance, and the results, of the discovery also sought in that motion; upon the refusal of that discovery, any foundation for granting yet another amendment disappeared also. Holding plaintiffs accountable for their tactical decisions is neither a "manifest injustice," *GenCorp*, 178 F.3d at 834, nor an abuse of discretion.

Fourth, the sole case upon which plaintiffs rely for substantive support actually provides none. *Westerfield v. U.S.*, 366 F. App'x 614 (6th Cir. 2010),

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[34] In the last clause of their memorandum opposing dismissal of the SAC, plaintiffs raised the notion of an additional amendment once the court had ruled. That was not sufficient. This tag-end reference was not accompanied by a proposed new pleading, or even an identification of subjects to be covered and changes to be made. *See, e.g.*, *Wymer v. Richland Cty. Children Servs.*, 584 F. App'x 283, 285 (6th Cir. 2014) (affirming denial of leave to amend where "brief in opposition…merely asked for a chance to amend the[] complaint if the court granted the defendants' motion").

involved a motion for reconsideration at the close of *summary judgment*. Plaintiffs neglect to point out the drastic difference between the deferential abuse-of-discretion standard applicable to a denial of a motion for reconsideration at the motion-to-dismiss stage and the more rigorous standard applicable to a denial of reconsideration following a grant of summary judgment. As *Westerfield* notes, "Generally, the denial of a motion to reconsider is reviewed for an abuse of discretion. However, when a Rule 59(e) motion seeks reconsideration of a grant of summary judgment, this Court conducts a *de novo* review using the same legal standard employed by the district court." *Id.* at 618 (quotation omitted). Further, factually speaking, this case and *Westerfield* are miles apart. Unlike dismissal proceedings, summary judgment proceedings contemplate consideration of facts beyond the pleading record, but in *Westerfield*, a § 1983 action, the trial judge had stayed all discovery all the way through summary judgment.[35]

Fifth, *Ray v. Oakland County Drain Commission*, 115 F. App'x 775 (6th Cir. 2004), is much nearer the facts of this case. There, the plaintiff sought

[35] Even under the standard applied to motions for reconsideration following a grant of summary judgment, this Court frequently affirms denials of discovery-related motions for reconsideration. *See, e.g.*, *Baker v. Stevenson*, 605 F. App'x 514, 521 (6th Cir. 2015) (affirming denial of discovery-related motion for reconsideration where plaintiff "did not raise the issue…until he filed his motion for reconsideration"); *Via The Web Designs, LLC v. BeautiControl Cosmetics, Inc.*, 148 F. App'x 483, 485 (6th Cir. 2005).

discovery as part of a Rule 59 motion filed after the trial court had granted a motion to dismiss. The trial court denied the request; this Court affirmed:

> [B]etween the time the defendants moved to dismiss the complaint and the time that the district court issued its order of dismissal, [plaintiff] did not move for discovery or seek a delay of the dismissal so as to engage in discovery. The request for discovery was not made until [plaintiff] filed her…motion for reconsideration[.] As Ray's discovery request was made only after the district court dismissed the case, the district court's decision regarding the denial of [plaintiff's] request for discovery was not an abuse of discretion.

Id. at 778.

Finally, undoing the denial of plaintiffs' reconsideration motion would contravene *Dudenhoeffer*'s goal of "readily divid[ing] the plausible sheep from the meritless goats." 134 S. Ct. at 2470. Virtually any plaintiff could keep an unworthy 'goat' on life support by claiming, post-dismissal, a right to discovery not previously sought. The law says a plaintiff becomes entitled to discovery only by presenting a sustainable complaint. *Dudenhoeffer* gave emphatic affirmation to that rule for ERISA claims of this kind. 134 S. Ct. at 2471 ("motion to dismiss for failure to state a claim" is "important mechanism for weeding out meritless claims;" "[t]hat mechanism…requires careful judicial consideration of whether the complaint states a claim"). The district court was right in line with *Dudenhoeffer* in denying reconsideration.

CONCLUSION

For the reasons set forth above, this Court should affirm.

Dated: November 21, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,995 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), I have relied on the word count of Microsoft Word in preparing this certificate.

2. I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, this Brief of Appellees was filed with the United States Court of Appeals for the Sixth Circuit via the Court's ECF System.

I further certify that on November 21, 2016, this Brief of Appellees was electronically served , via the Court's ECF system, on the following:

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RULE 30(g)(1) ADDENDUM
DESIGNATING RELEVANT DOCKET ENTRIES

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), defendants designate the following documents from the lower court record as relevant to the instant appeal:

Record Entry	Description	PageID# Range
1	Class Action Complaint	1-73
17	Amended Class Action Complaint	511-591
37	Second Amended Class Action Complaint	817-879
37-3	Exhibit B to Second Amended Class Action Complaint	887-967
37-6	Exhibit E to Second Amended Class Action Complaint	984-1000
38	Motion to Dismiss the Second Amended Complaint	1019-1021
38-1	Memorandum of Law in Support of Defendants' Motion to Dismiss the Second Amended Complaint	1022-1063
38-3	Exhibit K to Declaration of Geoffrey J. Ritts	1066-1069
40	Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss The Second Amended Complaint	1091-1139
41	Reply In Support of Defendants' Motion to Dismiss The Second Amended Complaint	1157-1186
44	Order and Opinion re Motion to Dismiss	1230-1249
45	Order of Dismissal	1250
47	Notice of Appeal	1343-1368
46-1	Memorandum of Law in Support of Plaintiffs' Motion for Reconsideration	1257-1278
49	Response in Opposition to Plaintiffs' Motion for Reconsideration and Request for Discovery	1370-1387
50	Reply in Support of Plaintiffs' Motion for Reconsideration	1388-1409
51	Opinion and Order re Motion for Reconsideration	1410-1415