**No. 10-2302**

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

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**RAYMOND M. PFEIL AND MICHAEL KAMMER,**
**Individually and on behalf of all others similarly situated,**
**Plaintiffs-Appellants,**

**v.**

**STATE STREET BANK AND TRUST COMPANY,**
**Defendant-Appellee.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**
**Case No. 09-12229**

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# BRIEF OF *AMICUS CURIAE* AMERICAN BENEFITS COUNCIL IN SUPPORT OF THE DEFENDANT-APPELLEE AND REQUESTING AFFIRMANCE OF DISMISSAL

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**March 7, 2011**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-2302 Case Name: Pfeil v. State Street Bank and Trust Co.

Name of counsel: Kent A. Mason

Pursuant to 6th Cir. R. 26.1, American Benefits Council
*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:

No.

CERTIFICATE OF SERVICE

I certify that on March 7, 2011 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/Kent A. Mason

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.

**6th Cir. R. 26.1**
**DISCLOSURE OF CORPORATE AFFILIATIONS**
**AND FINANCIAL INTEREST**

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

**(c) Form and Time of Disclosure**. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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## STATEMENT OF INTEREST, IDENTITY AND AUTHORITY TO FILE

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 335 members[1] are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

The Council limits its *amicus curiae* participation to cases that are of great significance for its member companies. This is such a case. As a means of facilitating employee stock ownership, Federal law encourages employers to include their stock as an investment in employer-maintained retirement programs. However, the use of company stock in retirement plans is threatened by a recent wave of fiduciary lawsuits – each lawsuit is filed after a sharp decline in the price of the company's stock and alleges that the stock investment was imprudent.

It is critical that the courts clearly articulate a minimum standard of pleading that appropriately weeds out meritless claims. This case presents an opportunity

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[1] A full list of the Council's members is available on the Council's website, www.americanbenefitscouncil.org.

for the Court to articulate the appropriate line and is therefore of great interest to the Council and to its member companies.

The Council respectfully submits to the Court this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to the filing of this *amicus curiae* brief.

## SUMMARY OF ARGUMENT

Federal law strongly favors employee stock ownership. Unfortunately, plan investments in company stock are threatened by lawsuits that can be filed at any time that an employer's stock price declines or performs below expectations. These "stock drop" lawsuits lead to expensive discovery and practical pressures to pay for settlements. They are having a severely detrimental effect on the voluntary employment-based retirement system and are undermining the public policy favoring investments in company stock. It is possible that, if companies continue to be effectively forced to pay tens of millions of dollars to settle meritless cases, they will stop offering company stock as an investment option.

It is critical that the courts clearly articulate a minimum standard of pleading that appropriately weeds out meritless stock drop claims. This case presents a straightforward opportunity for the Court to apply the appropriate standard. In this case, Plaintiffs have not alleged any facts that would support a conclusion that the offering of company stock as an investment option was imprudent or that the fiduciary caused Plaintiffs' alleged losses. The stock was publicly traded, participants were free to choose to invest among a substantial menu of diversified investment options other than company stock, and there is no allegation or suggestion of fraud on the market or the presence of inside information held by

fiduciaries. This is exactly the sort of case that is harming the system and we ask the Court to affirm the district court's dismissal.

# ARGUMENT

## I. Meritless ERISA Stock Drop Lawsuits Threaten the Continued Viability of Company Stock Investment Options.

Employer-sponsored retirement plans are a core element of our nation's retirement system. They successfully assist millions of American families in accumulating retirement savings. Congress has time and time again demonstrated the importance it places on the ability of workers to save for retirement through employer-sponsored plans by adopting rules that facilitate employer sponsorship of plans, encourage employee participation, promote prudent investing, allow operation of plans at reasonable cost, and safeguard plan assets and participant interests through strict fiduciary obligations and intensive regulatory oversight.

In addition, the ability to invest in company stock through a retirement plan has been encouraged by Congress and is prized by employees. Congress has consistently facilitated plan investments in company stock. *See, e.g.*, 29 U.S.C. § 1104(a)(2) (excepting individual account plans from the diversification requirements to the extent the plan is invested in company stock); 29 U.S.C. § 1107(b)(1) (excepting individual account plans from percentage limitations on investments in company stock); 29 U.S.C. §§ 1108(b)(3) and 1108(e)(3) (exempting employee stock ownership plans from certain prohibited transaction rules). Congress has even provided preferential tax treatment for plans that include, and participants who invest in, company stock. *See* 26 U.S.C.

§ 72(t)(2)(A)(vi) (exempting certain dividends paid with respect to stock of a corporation from the 10% early distribution tax); 26 U.S.C. § 402(e)(4) (taxing employees at preferential rates on "net unrealized appreciation" in employer securities); 26 U.S.C. § 404(k) (providing a deduction for dividends paid by a corporation with respect to applicable employer securities and authorizing the payment of dividends directly to employees while they work).

In short, Congress has made a judgment that employee ownership of company stock is a valuable goal. Consistent with this judgment, it is important that courts establish minimum standards of pleading that insulate fiduciaries from nuisance lawsuits. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976) (stating Congress's concern that courts should refrain from erecting barriers that would interfere with the goal of employee ownership). Otherwise, fiduciaries might well feel pressure to divest plan investments in company stock during every market downturn – undermining Congress's stated intention to encourage benefit plans that offer employer equity. As this Court explained in *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998), the "concept of employee ownership constituted a goal in and of itself." "'Congress has repeatedly expressed its intent to encourage'" the formation of plans that invest in company stock and "'has warned against judicial administrative action that would thwart that goal.'" *Id.* at 422 (quoting *Donovan v. Cunningham*, 716 F.2d 1455,

1466 (5th Cir. 1983). *See also Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995) (quoting *Donovan*, 716 F.2d at 1466).

Unfortunately, company stock investments are currently threatened by nuisance lawsuits. Plan fiduciaries have increasingly found themselves the targets of class action lawsuits alleging that they have violated their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by imprudently investing in company stock, and there is no sign that the lawsuits will let up. *See, e.g.*, Robert P. Davis, Joseph De Simone & Reginald R. Goeke, *The Outlook for ERISA 'Stock-Drop' Litigation*, N.Y.L.J., Feb. 17, 2009, http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202428198658 ("With the current economic downturn, there has been a . . . surge in filings of ERISA stock-drop class actions."); Frances Denmark, *ERISA Class-Action Suits Shape U.S. Retirement Future*, Institutional Investor, Feb. 16, 2011, http://www.iimagazine.com/Article.aspx?ArticleID=2766226 ("[i]n less than a decade, 800 of the largest U.S. corporations . . . have been sued by classes of employees"); Myron D. Rumeld & Russell L. Hirschhorn, *Employer Stock Drop Litigation . . . And the Beat Goes On*, Proskauer Rose LLP ERISA Litig. Newsl., Apr. 2010, http://www.proskauer.com/publications/newsletters/erisa-litigation-newsletter-april-2010 ("the global economic crisis has resulted in a substantial uptick in employer 'stock drop' litigation").

The stock drop cases filed to date have often lacked merit. Despite this, companies feel intense pressure to settle stock drop cases for tens of millions of dollars, because these cases could be extremely expensive to litigate and generally involve exorbitant claims for damages. *See* Samuel Estreicher & Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment* (NYU Sch. of Law Pub. Law & Legal Theory Working Paper No. 08-03, Law & Econ. Working Paper No. 08-06, Jan. 23, 2009) (finding that the mean gross settlement in ERISA cases from 1993 through 2007 was more than $31.6 million); Fiduciary Counselors Inc., *ERISA Class Action Settlements & Attorney Fees* (Feb. 2, 2010), http://www.erisasettlements.com/press/ERISA-Chart.pdf (compiling data on settlements of stock drop class actions involving some 100 different plan sponsors; in 2009 alone, at least 17 stock drop cases were settled for amounts ranging from $300,000 to $75 million). Notably, while many of these stock drop class actions have been settled and many have been won by defendants (often on summary judgment and a few at trial), not a single one of these stock drop class actions has been won by Plaintiffs on a motion or at trial.

In our experience, these stock drop cases are having a severely detrimental effect on retirement plans. Many plans have decided to stop using or offering company stock as an investment simply because of large fiduciary liability exposure, which is clearly in contravention of Congressional intent. Others have

struggled to find employees who are willing to serve as the plan fiduciaries where company stock is an investment because employees know that they will be named as defendants in a lawsuit, and fear they will be personally liable, if the stock price falls significantly. Plan fiduciaries have also faced a sharp increase in the cost of fiduciary liability insurance for plans that invest in company stock. Still other plans, including the plan in the instant case, have taken a conservative path by engaging an independent third-party fiduciary at significant cost to the plan to act as a fiduciary with respect to the company stock investments. Yet even this has not effectively walled off plan fiduciaries from exposure to stock drop class actions, as reflected in the instant case.

These increased costs are not without consequences to employees who face the prospects of reduced employer contributions and greater plan expenses. *See Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("Litigation cannot compel an employer to make plans more attractive . . . . It is possible, though, for litigation . . . to make everyone worse off."). It is even possible that if companies continue to be effectively forced to pay tens of millions of dollars, they will be forced to take dramatic action, including reducing or eliminating sponsorship of retirement plans.

The instant case involves a particularly benign and common method of facilitating employee stock ownership. Many plans, particularly those maintained

by large publicly-traded employers, including GM, offer company stock as one of many investment alternatives in a plan that provides for participant investment direction. There are no firm statistics on the number of participants who are covered by plans with company stock funds, but the Employee Benefit Research Institute's database suggests that, in 2009, almost half of all 401(k) participants were participants in plans that offered company stock as an investment option. *See* Jack VanDerhei, Sarah Holden & Luis Alonso, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2009*, Employee Benefit Research Inst. Issue Brief, no. 350, Nov. 2010 (46% of all participants in the Employee Benefit Research Institute's 2009 database, which represents approximately 10% of all 401(k) plans, are in a plan with a company stock investment option). Participants in these plans are not required to invest in company stock but may choose to do so. Meritless stock drop lawsuits have cast a pall over this benevolent method of facilitating employee stock ownership.

In the instant case, Plaintiffs have not alleged any facts that would support a conclusion that the offering of the GM stock fund was imprudent or that the availability of the fund caused participants' losses. The only facts that have been alleged are that GM was in serious financial trouble at the time the GM stock fund was made available to participants. However, the stock was publicly traded, participants were free to choose to invest in company stock or in a wide range of

non-company-stock investment options, and there is no allegation or suggestion of fraud or insider information indicating that the market was mispricing the company stock. This is exactly the sort of case that is harming the system and we ask the Court to affirm the district court's dismissal of Plaintiffs' claims and clearly establish that Plaintiffs must allege something more, at least in the context of publicly traded securities where there is no allegation of fiduciary misconduct or fraud. To permit the case to proceed would be contrary to good public policy and would place the employer-based retirement plan system at severe risk for harm.

## II. Plaintiffs' Complaint Failed to Plead That State Street Acted Imprudently or Caused Any Loss.

The Council urges the Court to affirm the district court's decision dismissing the case. This Court can affirm on any grounds supported by the record, even though they may be different than the grounds relied upon by the district court. *La. Sch. Employees' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 479 (6th Cir. 2010). As discussed below, the Council believes that Plaintiffs have failed to plead sufficient facts to suggest that State Street acted imprudently in maintaining the GM stock fund and, as the district court held, that Plaintiffs failed to plead sufficient facts showing that maintaining the GM stock fund caused Plaintiffs' loss.

### A. Plaintiffs Have Not Pled Facts That, If Proved, Would Establish That State Street Acted Imprudently in Maintaining the GM Stock Fund in the Face of GM's Financial Decline.

GM did everything the right way. So did State Street. The GM plan provided participants with complete control over the investment of their accounts among a diversified menu of investment options, including a GM stock fund. Contributions made to the plan were not invested in company stock unless a participant affirmatively elected such an investment; company stock was not a mandatory or default investment.

In light of widely publicized reports about GM's financial condition, GM appointed an independent fiduciary – State Street – to ensure that GM executives were not also trustees or investment managers for the company stock investment option and to avoid any possible appearance of a conflict of interest.

The mere fact that there was substantial risk associated with an investment in GM stock in light of GM's financial struggles is not enough to plausibly establish that the investment was imprudent at the time it was made. GM stock was publicly traded. Its price reflected the risk to shareholders associated with a GM bankruptcy as well as the upside associated with a recovery. Judge Posner of the Seventh Circuit Court of Appeals has observed that stock held at the fair market value assigned to it by the stock market is inherently prudent:

> A trustee 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 . . . . Some investors, it is true, consistently beat the market, but few of them are trustees; it would be *hubris* for a trust company like State Street to think it could predict United's future more accurately than the market could, and preposterous for a committee of union officials (the named fiduciary) to challenge the market's valuation . . . . Thus, at *every* point in the long slide of United's stock price, that price was the best estimate available either to State Street or to the Committee of the company's value . . . and so neither fiduciary was required to act on the assumption that the market was overvaluing United.

*Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 408 (7th Cir. 2006) (emphasis in original). *See also Rogers v. Baxter Int'l Inc.*, 521 F.3d 702, 706 (7th Cir. 2008) (ERISA stock drop claims "amount[] to an assertion that pension fiduciaries have a duty to outsmart the stock market, a contention with little prospect of success").

This case does not involve allegations or suggestions of fraud on the market or the presence of inside information held by plan fiduciaries. *See generally In re the Goodyear Tire & Rubber Co. ERISA Litig.*, 438 F. Supp. 2d 783 (N.D. Ohio 2006) (plaintiffs alleged that Goodyear stock lost value because of accounting improprieties and serious mismanagement); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003) (plaintiffs alleged that fiduciaries knew of accounting improprieties but did not take appropriate action). Instead, the woes of GM were broadcast in every media outlet, from national network news to the Detroit local paper. Plaintiffs themselves reference certain of

these articles in their complaint in trying to establish State Street's fault. *See, e.g.*, Record Entry No. 1, Compl. ¶¶ 23, 24, 26.

In effect, Plaintiffs want to have a "put" against State Street. Participants were free to divest themselves of their company stock holdings at any time. State Street closed the GM stock fund to new investments but did not force participants to liquidate investments in the stock fund. Forced liquidation would have locked in any losses to date and would have exposed the independent fiduciary to a lawsuit if the stock subsequently rebounded. *See Bunch v. W.R. Grace & Co.*, 532 F. Supp. 2d 283 (D. Mass. 2008) (ruling in State Street's favor that State Street did not improperly liquidate a company stock fund prior to it becoming imprudent, despite preventing participants from benefiting from later stock appreciation). Thus, by continuing to hold their company stock investments in the face of GM's widely known financial struggle, Plaintiffs sought to have the upside if GM recovered as well as downside protection in the form of a lawsuit for breach of fiduciary duty if GM did not recover. Plan fiduciaries should not be placed in the position of acting as effective guarantors of investment results merely because the investment is company stock.

It should not be enough to merely plead that there was reason to know that there was a material risk associated with GM stock. The stock was publicly traded and a prudent investor could reasonably conclude, given the potential risks and

rewards relative to the prevailing price, that the stock was an appropriate investment. The risk that GM would fail was priced into the GM stock price and the notion that State Street had a fiduciary obligation to liquidate the GM stock fund in light of the potential failure places the fiduciary in the position of having to be smarter than the market – something that is antithetical to the prudent man standard of investing. Participants could choose to incorporate GM stock into a broader portfolio of diversified investments with different risk and volatility characteristics. The mere fact that GM stock was potentially volatile during GM's financial struggles does not make the investment an imprudent one. We urge the Court to hold that, on this set of very common facts, Plaintiffs must plead some additional facts that would suggest the investment was imprudent in order to rebut the presumption of prudence. *Kuper*, 66 F.3d at 1459 (6th Cir. 1995) (establishing a presumption of reasonableness with regard to a fiduciary's decision to remain invested in company stock).

### B. The District Court Properly Ruled That Plaintiffs Did Not Plausibly Plead That State Street Caused the Alleged Harm.

For very similar reasons, the district court properly concluded that Plaintiffs did not plausibly plead that State Street caused their alleged losses. It is well established in the Sixth Circuit that there must be "[a] causal connection between the alleged breach and the alleged harm" in a successful claim for breach of fiduciary duty. *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 429 (6th

Cir. 2009). *See also Kuper*, 66 F.3d at 1459 (requiring causal link to harm); *Miller v. Yazaki N. Am., Inc.*, 254 Fed App'x 466, 466 (6th Cir. 2007) (affirming judgment for defendant on ERISA breach of fiduciary duty claim on grounds that plaintiff did not prove causation).

The district court correctly dismissed the instant case because Plaintiffs cannot plausibly plead that State Street caused their alleged losses. Participants were not restricted in their ability to divest their accounts of company stock. Thus, State Street's offering of company stock as one of many investment options under the plan did not *cause* Plaintiffs' alleged losses. Rather, Plaintiffs had every opportunity to change their investments. Where Plaintiffs had such free rein and broad investment choices, it cannot be said that their alleged losses were in fact caused by State Street.

Other circuits have ruled that the fact that the plans offered a broad range of investment options and provided investment control to participants is dispositive and affirmed dismissal of all claims against plan fiduciaries. *Howell v. Motorola, Inc.*, 2011 WL 183966, at *16 (7th Cir. Jan. 21, 2011) (affirming dismissal and noting that "participants were entitled throughout the class period . . . to move their dollars away" from the company stock fund on a daily basis); *Young v. General Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 31 (2nd Cir. 2009) (affirming motion to dismiss State Street and General Motors Investment Management Corporation;

plaintiffs cannot state an imprudence claim with respect to one stock fund where the GM "plan as a whole" offered many diversified options); *Hecker v. Deere & Co.*, 556 F.3d 575, 589 (7th Cir. 2009) (affirming dismissal of breach of fiduciary duty claim stating that a plan that offers a "sufficient range of options" gives participants "control over the risk of loss"); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 310 (5th Cir. 2007) (noting that losses in a participant-directed ERISA plan are caused as the result of both inclusion of a bad investment option *and* participants' choices to invest in the option).

Plaintiffs' allegations in this case are in the same vein as the facts in the cases cited above. The plans offered many investment options, participants could choose to invest in whatever option they wanted (but had to affirmatively choose the company stock option) and were free to move their assets out of the company stock option. There is no chance that Plaintiffs were unaware of the information regarding GM's financial troubles, and yet they consciously chose to continue to invest in company stock. Accordingly, Plaintiffs have not adequately pleaded that State Street was the legal cause of the losses and the district court's dismissal should be affirmed.

The Department of Labor's *amicus curiae* brief argues that dismissal on the grounds of causation is inappropriate because section 404(c) of ERISA, 29 U.S.C. § 1104(c), establishes the circumstances in which a fiduciary is relieved of liability

for the results of a participant's exercise of investment control and because section 404(c) should be an affirmative defense. *See* Dep't of Labor Br., 23-24. Further, the Department argues that, even if section 404(c) is applicable, plan fiduciaries have a residual duty to prudently select and monitor the investment options made available through a plan that permits participant investment direction.

Section 404(c) of ERISA provides that fiduciaries are not responsible for investment losses that are a result of a participant's exercise of investment control. Department of Labor regulations in turn define the circumstances in which a participant has an effective opportunity to exercise control. *See* DOL Reg. § 2550.404c-1(b)(2). The notion is that even though a participant may nominally have investment control, the participant may not have an effective opportunity to exercise control, for example, because the participant does not have the pertinent investment information, the plan does not provide a sufficiently diversified investment menu or the plan does not permit frequent enough investment changes.

Plaintiffs, however, did not plead any facts that would remotely suggest their decisions to invest in the GM company stock fund were not effective exercises of their control. They have not, for example, suggested that they did not receive adequate disclosure or investment information about GM stock which could potentially suggest that their exercise of control was not fully informed and

therefore ineffective. Similarly, they have not suggested that the menu was on the whole inadequate or that the frequency of investment control was too limited.

Regardless of the potential application of section 404(c) of ERISA on a motion to dismiss, Plaintiffs must plead some facts that, if proven, would indicate that the plan fiduciaries were the cause of their loss. *See Hecker*, 556 F.3d at 589 (affirming dismissal, the court stated that it saw "no plausible allegation that the [p]lans do not comply with" ERISA section 404(c)). It would stand the pleading rules on their head if Plaintiffs were able to survive a motion to dismiss in a company stock drop case without pleading any facts other than the stock became worthless and the fiduciary should have anticipated the decline. This is the very source of the confusion that is reflected in some of the company stock drop litigation, and it is one of the core reasons why the retirement system has been plagued by company stock drop lawsuits. It is essential that the Court recognize that Plaintiffs must plead additional facts that would plausibly show causation. Plaintiffs here have not, and cannot, plead any facts along those lines.

## III. Conclusion.

For the reasons discussed above, the Council respectfully urges the Court to affirm the district court's decision and clearly establish, in the context of publicly traded securities where there is no allegation of fiduciary misconduct or fraud, that Plaintiffs must allege something more than that the stock became worthless and

that there were widespread reports of the company's financial struggles in order to state a claim.

Date: March 7, 2011 Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   [X] this brief contains 4,211 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

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Date: March 7, 2011

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## CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing *Amicus Curiae* Brief to be electronically filed with the Court via the CM/ECF electronic filing system on this 7th day of March, 2011. All parties may access this document via the CM/ECF system.

Respectfully submitted,

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