Case No. 18-20379

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JEFFERY SCHWEITZER, JONATHAN SAPP AND RAUL RAMOS on behalf of the Phillips 66 Savings Plan and a class of all others similarly situated,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
NO. 4:17-CV-03013

PETITION FOR REHEARING EN BANC FOR APPELLANTS JEFFEREY SCHWEITZER; JONATHAN SAPP; RAUL RAMOS; and DONALD FOWLER

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the persons having an interest in the outcome of this case are:

1. JEFFERY SCHWEITZER, Plaintiff-Appellee;
2. JONATHAN SAPP, Plaintiff-Appellee;
3. RAUL RAMOS, Plaintiff-Appellee;
4. ROBERT A. IZARD, Attorney for Plaintiffs-Appellee's;
5. MARK P. KINDALL, Attorney for Plaintiffs-Appellee's;
6. DOUGLAS P. NEEDHAM, Attorney for Plaintiffs-Appellee's;
7. GREGORY Y. PORTER, Attorney for Plaintiffs-Appellee's;
8. MARK G. BOYKO, Attorney for Plaintiffs-Appellee's;
9. THOMAS R. AJAMIE, Plaintiffs-Appellee's Interim Co-Lead Class Counsel (Texas Bar No.0095240);
10. SAM FARACE, Defendant-Appellant; and
11. THE INVESTMENT COMMITTEE OF THE PHILLIPS 66 SAVINGS PLAN, Defendant—Appellant.

Fed R. App. P. 35(b)(1) statement:

(A) the panel decision conflicts with the decision of the United States Supreme Court in *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. at 1828–29 (2015), which requires fiduciaries for retirement plans to remove imprudent investments and of the Fifth Circuit in *Kopp v. Klein*, 894 F.3d 214, 220 (5th Cir. 2018), which relied on *Tibble* for that proposition. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; and

(B) the proceeding involves two questions of exceptional importance: (1) whether retirement plan fiduciaries are immune from suit under ERISA when they fail to remove an imprudent investment because the investment is closed to additional funds; and (2) whether retirement plan fiduciaries are immune from suit under ERISA where plan participants could have allocated their account to alternative funds offered in the Plan.

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I. Statement of the issue or issues asserted to merit *en banc* consideration

Where Plaintiffs have plausibly alleged a defined contribution plan investment was imprudent, are Defendants immune from suit under ERISA simply by preventing additional investment in the Fund, or does ERISA require Defendants to remove the imprudent investment?

II. Statement of the course of proceedings and disposition of the case

Plaintiffs filed their Action in the Southern District of Texas on October 9, 2017. On May 9, 2018, Judge Lake granted Defendants' Motion to Dismiss, finding that Plaintiff's breach of prudence claim was barred under the Supreme Court case of *Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409, 134 S.Ct. 2459 (2014) and that Plaintiffs' breach of diversification claim failed to plausibly state a claim because the Plan's concentration in the single stock fund was the outcome of each participants' individual decisions to remain invested in the Fund. Plaintiffs appealed. On May 22, 2020, the panel found that *Dudenhoeffer* did not apply to non-employer securities, like the Fund, and that Plaintiffs plausibly alleged that the Fund was imprudent. However, the panel affirmed the decision to dismiss the breach of prudence claim, reasoning that prudence applies only to investments "offer[ed]" in the Plan and, because the Fund was not open to new investment and

plan participants could direct their investment in the Fund to other funds offered by the Plan, the Fund was not offered in the Plan. The panel also affirmed dismissal of the Duty to Diversify claim, holding that no diversification claim lies under ERISA where a defined contribution plan offers an array of funds from which plan participants can choose.

III. Statement of any facts necessary to the argument of the issues

On April 30, 2012, Phillips 66 separated from ConocoPhillips in a series of transactions that the companies referred to as the "Separation." *See* Compl. at ¶ 24. Before the spin-off, Phillips 66 Company, Inc. was a wholly owned subsidiary of ConocoPhillips. *Id*. at ¶ 23. Phillips 66 became an independent, publicly traded company as a result of the separation. *Id*.

Phillips 66 established the Plan effective May 1, 2012. *Id*. at ¶ 26. The Plan is a spin-off from the "ConocoPhillips Savings Plan" (the "CP Plan"). *Id*. at ¶ 28. The Plan's purpose is to help its participants, employees of Phillips 66, save for retirement. *Id*. at ¶ 27. ConocoPhillips employees are not eligible to participant in the Plan. *Id*. at ¶ 26. Defendants, as Plan fiduciaries, selected the Plan's investment options. Compl. at ¶ 29. The Plan, from its inception, included a large investment in ConocoPhillips stock.

Plaintiffs allege that a prudent fiduciary would have sold ConocoPhillips stock at the time of the spin-off, or shortly thereafter, to diversify the Plan's investments. *Id*. at ¶¶ 39, 60, 64, 82. ConocoPhillips stock is highly correlated to Phillips 66 stock (NYSE:PSX), the Plan's largest investment and the stock of the employer sponsoring the Plan. *Id*. at ¶¶ 5, 39. Having the Plan's two substantial holdings be highly correlated further undermined the Plan's diversification.

At the time of the Separation, ConocoPhillips stock represented nearly 35% of the Plan's assets, and the Plan continued to invest more than 25% of its assets in ConocoPhillips through the end of 2014. *Id*. at ¶¶ 35–36. This was in addition to the Plan's investment of $1.2 billion investment in Phillips 66 stock at the end of 2014 (*see* ECF 15-5 at p. 52), a stock which had a 75% correlation to ConocoPhillips. *Id*. at ¶ 39.

Defendants did not remove ConocoPhillips stock from the Plan, or consider whether to do so. *Id*. at ¶¶ 45–47.

IV. Argument and authorities

a. The panel contradicted established law Supreme Court and Fifth Circuit precedent when it determined that the duty of prudence does not require fiduciaries to remove imprudent investments.

The panel found that Plaintiffs "plausibly alleged" that the non-company stock fund was an imprudent investment. Op. at 11. Nevertheless, the panel found that

the fiduciaries' failure to remove the imprudent investment did not violate ERISA's fiduciary duty of prudence. Op. at 7–8, 11–13. The panel reasoned that as long as the fund is frozen to new investments, it is not "offer[ed]" by the fiduciaries and, and fiduciaries are under no obligation to remove investments that are not 'offered', even if they are imprudent, since participants could have selected other investment options in the Plan.

In light of the panel's finding that Plaintiffs "plausibly alleged" that the Fund was an imprudent investment, Op. at 11, the Supreme Court requires that the Fund be removed. *Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. at 1828–29 (2015) (a fiduciary "has a continuing duty of some kind to monitor investments and remove imprudent ones."). The panel reasoned that ERISA's fiduciary duty of prudence only applies to funds that are "offer[ed]" in the Plan and that the ConocoPhillips Stock Fund was no longer being "offer[ed]" because, although tens of millions of dollars in Plan assets were invested in the single security, the Fund was closed to new investment. *Id*. at 13. ("By closing the ConocoPhillips Funds to new investments immediately after the spin-off, the Fiduciaries also ensured that they were not offering participants an imprudent investment option.")

But *Tibble* is clear: "under trust law, a fiduciary normally has a continuing duty of some kind to monitor investments and *remove* imprudent ones" (emphasis added) and "[a] plaintiff may allege that a fiduciary breached the duty of prudence

by failing to properly monitor investments and *remove* imprudent ones." *Id*. at 1828–29 (emphasis added); quoted with approval in *Kopp v. Klein*, 894 F.3d 214 (5th Cir. 2018). Indeed, the Supreme Court in *Tibble* squarely addressed "whether a fiduciary's allegedly imprudent retention of an investment is an 'action' or 'omission' that triggers fiduciary obligations" — including the duty to remove. *Tibble*, 135 S.Ct. at 1826. The Supreme Court held that it does. *Id*. at 1827–28; *see also*, *Dudenhoeffer*, 134 S.Ct. at 2464, 2471 (declining to dismiss plaintiffs' claim that the fiduciary breached its duty of prudence by "continu[ing] to allow the Plan's investment in [company stock]" when "[a] prudent fiduciary facing similar circumstances would not have stood idly by") (internal quotation marks omitted).

The duty to remove imprudent investments has been recognized by sister circuits, as well as the common law of trusts. *Cobrun v. Evercore Trust Co., N.A.*, 844 F.3d 965 (D.C. Cir. 2016); *O'Day v. Chatila*, 774 Fed.App. 708 (2d Cir. 2019); *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320 (3d Cir. 2019); *David v. Alphin*, 704 F.3d 327 (4th Cir. 2013); *Pfeil v. State Street Bank and Trust Co*., 806 F.3d 377 (6th Cir. 2015); *Allen v. GreatBanc Trust Co*., 835 F.3d 670 (7th Cir. 2016); *Davis v. Washington Univ. in St. Louis*, --- F.3d ---, 2020 WL 2609865 (8th Cir. May 22, 2020); *Wilson v. Fidelity Management Trust Co*., 755 Fed.Appx. 697 (9th Cir. 2019); *Stargel v. SunTrust Banks, Inc*., 791 F.3d 1309 (11th Cir. 2015); *Morressey v. Curran*, 567 F.2d 546, 549 n.9 (2d Cir. 1977) ("The trustee's

obligation to dispose of improper investments within a reasonable time is well established at common law."); Bogart's Trusts & Trustees § 685, at 157–59 ("[A] trustee has a duty to continue to monitor investments regularly to ensure that they are still legal and productive." and "Once an investment is determined to be imprudent…, the trustee must dispose of the assets within a reasonable time."); Uniform Prudent Investor Act § 2 cmt. (1995) ("'Managing' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments."); 4 Scott & Ascher § 19.3.1, at 1439–40 ("When the trust estate includes assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to dispose of them within a reasonable time.").

Indeed, the Fourth Circuit in *Tatum v. RJR Pension Inv. Comm*. dealt with the question of whether a prudent fiduciary would have removed an already frozen investment in a non-employer stock fund from a 401(k) Plan. *Tatum*, 855 F.3d 553 (4th Cir. 2017). After hearing expert testimony, the district court "determined that a prudent fiduciary would have made the decision to divest the non-employer funds". *Id*. at 560. The Fourth Circuit not only affirmed, but noted specifically that in making the determination quoted above "the district court did not disregard our mandate." *Id*.

If the Fund is imprudent, Defendants are obligated under *Tibble* and the common law of trusts to take affirmative steps to remove the imprudent investment. *See also, Langbecker*, at 308 n. 18, ("[u]nder ERISA, the prudence of investments or classes of investments offered by a plan must be judged individually."); see also, *Langbecker* (dissent) at 320–21 (it is "plan fiduciary's duty to ensure that each investment option is and continues to be a prudent one.").

To the extent the panel gave Defendants a free pass because "Participants were free to sell of the investments at any time and reinvest in other funds," *id*., this also conflicts with the Supreme Court and circuit law above.[1]

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[1] The Panel's decision also conflicts with authoritative decisions of other Courts of Appeals, *Tussey v. ABB, Inc*, 746 F.3d 327, 335–36 (8th Cir. 2014); *Howell v. Motorola, Inc*., 633 F.3d 552, 567 (7th Cir. 2011); *DiFelice v. U.S. Airways, Inc*., 497 F. 3d 410, 423–24 (4th Cir. 2007) ("a fiduciary cannot free himself from his duty to act as a prudent man simply by arguing that other funds ... could theoretically, in combination, create a prudent portfolio."); *Pheil v. State Street Bank and Trust Co*., 671 F.3d 585, 597–98 (6th Cir. 2012) ("A fiduciary cannot avoid liability for offering imprudent investments merely by including them alongside a larger menu of prudent investment options. Much as one bad apple spoils the bunch, the fiduciary's designation of a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty"); *see also, Hecker v. Deere*, 569 F.3d 708, 711 (7th Cir. 2009) (rejecting the notion that a fiduciary "can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them"); *Davis v. Washington Univ. in St. Louis*, --- F.3d ---, 2020 WL 2609865, *3 (8th Cir. May 22, 2020*); Howell v. Motorola, Inc.,* 633 F.3d 552, 567 (7th Cir.2011) ("It is ... the fiduciary's responsibility ... to screen investment alternatives and to ensure that imprudent options are not offered to plan participants."); *Spano v. Boeing Co*., 633 F.3d 574, 586 (7th Cir. 2011) ("It is entirely possible, after all,

V. Conclusion

In light of the panel's finding that Plaintiffs plausibly alleged the ConocoPhillips stock fund was imprudent, the panel's finding that Plaintiffs failed to state a claim for breach of the duty of prudence for failing to remove the imprudent investment conflicts with Supreme Court, Fifth Circuit and decisions of sister circuits interpreting ERISA's fiduciary obligations.

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that out of the 11 options a particular plan might offer, 10 were sound and one was ill-advised and should never have been offered.").

CERTIFICATE OF SERVICE

I hereby certify that, on June 5, 2020, I caused a true and correct copy of the foregoing to be filed electronically using the UNITED STATES FIFTH CIRCUIT COURT'S CM/ECF system and to be thereby served upon all registered participants identified in the Notice of Electronic Filing in this matter on this date.

/s/ Gregory Y. Porter
Gregory Y. Porter