IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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| JEFFREY QUATRONE<br>*On Behalf of Gannett Co., Inc. 401(k) Savings Plan and all other similar situated* | ) | |
| Plaintiff, | ) | Civil Action No. 1:18-cv-325 (AJT/JFA) |
| v. | ) | |
| GANNETT CO., INC *et al* | ) | |
| Defendants. | ) | |

**ORDER**

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

Before the spinoff, Old Gannett/TEGNA employees could invest their 401(k) plan contributions in "company stock," i.e., Old Gannett/TEGNA company stock. After the spinoff, participants in the Plan, i.e., New Gannett employees, had the option of either continuing to hold that TEGNA stock in the Plan or selling it whenever they chose and re-investing those sales

proceeds into other investments options offered by the Plan. However, they did not have the option of purchasing additional TEGNA stock.

Plaintiff alleges various breaches of fiduciary duties on the part of the Defendants in connection with Old Gannett/TEGNA's spinoff of its publishing business. Briefly summarized, Plaintiff claims in support of these allegations that "Defendants caused the Plan to be undiversified by their failure to decrease the Plan's substantial holdings of TEGNA common stock following the separation, thereby subjecting the Plan and its participants to the risks associated with being too heavily invested in one company ('company risk') and industry ('industry risk')." Compl. ¶ 6(a). In that regard, Plaintiff claims that "Defendants took no meaningful steps to monitor or review the single-stock TEGNA Stock Fund from the Plan even though the investment risk was exacerbated by TEGNA's volatility, high correlation to Gannett Co., Inc. stock, in which the Plan also held a large position, and the huge percentage of Plan assets invested in TEGNA." [Doc. No. 28] ("Pl.'s Opp. Mem." at 1). Moreover, Plaintiff claims, "Defendants included TEGNA stock in the Plan because of Gannett's 'historical relationship' with TEGNA. And, although Defendants agreed to liquidate the Plans' holdings in TEGNA in June 2015, they did nothing as the price of TEGNA plummeted over the next three years, costing the plan and its beneficiaries over $100 million." *Id.* at 1–2 (citing Compl. ¶¶ 58–60). In effect, Plaintiff contends that the Defendants should have at some point forced the employees who transferred to New Gannett to sell the TEGNA stock they had accumulated in the Plan as Old Gannett/TEGNA employees.

Defendants have filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) [Doc. No. 3] (the "Motion"). The Court held a hearing on May 18, 2018, following which it took the Motion under advisement. For the reasons stated below, the Complaint fails to state a claim for

relief under the pronouncements in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) and will be dismissed pursuant to Fed. R. Civ. 12(b)(6).

## I. FACTUAL ALLEGATIONS

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

The Complaint alleges the following in support of his claims:

TEGNA caused a spinoff of its publishing business into a new entity, Gannett, on June 29, 2015 (the "date of separation"). Compl. ¶ 1. As a result of the spin-off, two publicly traded companies were formed: (1) TEGNA, which was named "Gannett Co., Inc." before the spinoff, a broadcasting and digital company; and (2) a newly created entity, a publishing company, taking the name Gannett Co., Inc. previously used by TEGNA. *Id.* ¶ 22. The spinoff resulted in a new 401(k) plan for TEGNA employees, while the Gannett Plan became the operative 401(k) plan for New Gannett, the spun-off company.[1] *Id.* TEGNA distributed one common share of New Gannett common stock for every two shares of TEGNA stock held by TEGNA stockholders. *Id.* ¶ 22. During the putative class period, the value of the TEGNA common stock held in Plaintiff's accounts diminished considerably, resulting in losses. *Id.*

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

Plaintiff is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7) and held shares of TEGNA common stock during the putative class period. *Id.* ¶ 14. Defendant "Gannett is a fiduciary because it exercised discretionary authority or control over management of the Plan, exercised authority or control over the management or disposition of the Plan assets and/or had discretionary authority, and because it had discretionary authority to appoint and monitor Plan fiduciaries who had authority or control over management or disposition of Plan assets." *Id.* ¶ 16. The Committee administered the Plan and was also a fiduciary of the Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *Id.* ¶¶ 17, 18. Defendants John/Jane Does 1 through 10 are the individual members of the Committee, and other committee(s) responsible for carrying out the provisions of the Plan or serving as Plan Financial fiduciary during the class period. *Id.* ¶ 20.

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

Plaintiff claims Defendants are liable to the Plan for all losses resulting from each of their breaches of fiduciary duty. *Id.* ¶ 10.

## II. STANDARD OF REVIEW

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

## III. ANALYSIS

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

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

1. Breach of Prudence Claim

The Complaint alleges, *inter alia,* that Defendants breached a duty of prudence by allowing Plan participants to invest in TEGNA common stock for an unreasonable time following the date of separation. Compl. ¶¶ 6, 48–57, 61–62, 79–82, 110. Plaintiff alleges that such continued investment was a breach of duty of prudence because publicly available information (e.g. TEGNA's poor stock performance) should have informed the fiduciaries that investment into a single stock was an unnecessary risk. *See id.* ¶ 110. Defendants move for dismissal of Plaintiff's breach of duty of prudence claim on the ground that the Supreme Court's *Dudenhoeffer* decision precludes similar claims based on publicly available information absent special circumstances. Defs.'s Mem. in Supp. at 5–7. Plaintiff argues that the Fourth Circuit's *Tatum v. R.J. Reynolds Inv. Comm.*, 855 F.3d 553, 562 (4th Cir. 2017) ("*Tatum 7*"),[3] and *DiFelice*, 497 F.3d at 410, decisions hold contrary positions and therefore do not preclude Plaintiff's claims.

ERISA is "intended to 'promote the interests of employees and their beneficiaries in employee benefit plans.'" *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 417 (4th Cir. 2007) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). "Under ERISA, [benefit] plan fiduciaries are assigned a number of detailed duties and responsibilities, which include the proper management, administration and investment of plan assets, the maintenance of proper records,

[3] *Tatum* involved several cases surrounding the litigation of a putative ERISA class action against R.J. Reynolds ("RJR") and various RJR committees arising from RJR's "spin-off" of the company's food business, Nabisco, from its tobacco business. *See Tatum v. R.J. Reynolds Tobacco Co.*, 294 F.Supp.2d 776 (M.D.N.C. 2003) (dismissing complaint) ("*Tatum 1*"); *Tatum v. R.J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004) (reversing *Tatum 1*) ("*Tatum 2*"); *Tatum v. R.J. Reynolds Tobacco Co.*, 02-00373, 2007 WL 1612589 (M.D.N.C. May 31, 2007) (denying motion to dismiss in part) ("*Tatum 3*"); *Tatum v. R.J. Reynolds Tobacco Co.*, 926 F.Supp.2d 648 (M.D.N.C. 2013) (entering judgment for defendants after bench trial) ("*Tatum 4*"); *Tatum v. R.J. Reynolds Tobacco Co.*, 761 F.3d 346 (4th Cir. 2014) (reversing and vacating *Tatum 4* in part and remanding) ("*Tatum 5*"); *Tatum v. R.J. Reynolds Tobacco Co., No.* 1:02CV00373, 2016 WL 660902, at *2 (M.D.N.C. Feb. 18, 2016) (on remand, determining defendants had shown that a fiduciary acting with prudence would have divested the Nabisco Funds) ("*Tatum 6*"); and *Tatum v. R.J. Reynolds Inv. Comm.*, 855 F.3d 553 (4th Cir. 2017) (affirming *Tatum 6*) ("*Tatum 7*").

[and] the disclosure of specific information . . . ." *Id.* (internal quotation marks and citation omitted). "ERISA requires that a fiduciary shall act 'with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'" *Id.* (quoting 29 U.S.C. § 1104(a)(1)(B)).

It is the "prudent person" standard by which a fiduciary's investment decisions and disposition of assets are measured. *Dudenhoeffer*, 134 S. Ct. at 2467 (citing *Massachusetts Mut. Life Ins. Co. v. Russull*, 473 U.S. 134, 143, n.10 (1985)). Under this standard, "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828–29 (2015). Thus, "[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 1829.

In *Dudenhoeffer*, the Supreme Court considered the duty of prudence within the context of publicly traded securities and concluded that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over-or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." *Dudenhoeffer*, 134 S. Ct. at 2471. Correlatively, the Supreme Court concluded that "a fiduciary usually is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him." *Id.* at 2471 (citation and internal quotation marks omitted).

Courts have applied the pronouncements in *Dudenhoeffer* broadly to breach of fiduciary duty claims other than those based on *value* based prudence claims. *See Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 862 (6th Cir. 2017) (reasoning that "[t]he plaintiffs in *Dudenhoeffer* similarly argued that the fiduciary should have known that the company's stock was 'overvalued

*and excessively risky.*'") (quoting *Dudenhoeffer*, 134 S. Ct. at 2464); *see Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 65 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1067 (2017) (rejecting arguments that *Dudenhoeffer* only applies to claims concerning market value); *Coburn v. Evercore Tr. Co., N.A.*, 844 F.3d 965, 971 (D.C. Cir. 2016) ("Without preamble, the Supreme Court disposed of the risk-based claims through its broad rule that 'allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule.'") (quoting *Dudenhoeffer*, 134 S.Ct. at 2471). Although the Fourth Circuit has not specifically addressed this issue, the Court concludes that the holding in *Dudenhoeffer* applies to Plaintiff's breach of fiduciary duty claims, even though those claims appear to be based on aspects of the Plan's investment in TEGNA stock other than purely market value. For these reasons, Plaintiff 's breach of fiduciary duty claim is implausible absent "special circumstances."

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

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

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

However, two months after divestment occurred, Nabisco received a bid to take over the company, which ultimately had the effect of increasing the price of both companies' stock. *Id.* at 557. Plaintiff claimed that RJR and the committee breached its fiduciary duties by failing to conduct a thorough investigation before eliminating Nabisco stock from the plan at its all-time low, despite the likelihood that the Nabisco stock prices would recover. *Id.* The district court held that none of the alleged losses were caused by the alleged fiduciary breach because a prudent fiduciary would have made the same divestment decision at the same time and in the same manner. *Id.* at 556.

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

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

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

2. Duty to Diversify

Pursuant to 29 U.S.C. § 1104(a)(C), ERISA fiduciaries are required to diversify plan investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." "To enforce these duties, the court focuses not only on the merits of a transaction, but also on the thoroughness of the investigation into the merits of that transaction." *DiFelice*, 497 F.3d at 418 (quotation marks and alterations omitted). Moreover, "the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary." *Dudenhoeffer*, 134 S. Ct. at 2468. Section 1104(a)(2) exempts an employee-owned stock fiduciary from "§ 1104(a)(1)(B)'s duty of prudence, but only to the extent that it requires diversification." *Id.* (quotation marks omitted). Accordingly, "[a]ny person who is a fiduciary with respect to a plan

who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Plaintiff alleges that Defendants breached their duty to diversify the plan by investing too heavily in the TEGNA stock. *See* Compl. ¶¶ 60, 108. Defendants move for dismissal of Plaintiff's breach of duty to diversify claim because the "Plan offered a broad menu of investment options that was amply diversified." Defs.' Mem in Supp. at 9.

Plaintiff has failed to allege facts that make plausible any claim that the Plan's fiduciaries breach their duties to diversify under ERISA. In effect, Plaintiff's claim is not that the Plan failed to offer investment options sufficient to allow participants to diversify their investments but rather that the Defendants were required to force the participants to diversify their investments. Plaintiff has failed to allege facts that make that claim plausible. Although Plaintiff alleges that TEGNA stock comprised 20% of the total plan's holding at the time of the spin-off, the Plan as a whole was comprised of various options for the participants to select. Here, participants had the choice to allocate their contributions among different plan investments, as compared with those plans where the fiduciaries controlled the allocation of assets among various options. *Cf. Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan,* 712 F.3d 705 (2d Cir. 2013). Accordingly, Plaintiff's claim for breach of duty to diversify will be dismissed.[4]

3. Duty to Investigate

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

The Complaint also alleges that Defendants breached their fiduciary duty by failing to "conduct an appropriate investigation of continued investment in TEGNA common stock." Compl. ¶107. The Complaint also alleges that that "Defendants did not follow an appropriate process in evaluating the prudence of TEGNA common stock . . . [and] did not perform an independent review, as they were required to do." *Id.* ¶ 63. There are no allegations concerning what "special circumstances" an investigation would have uncovered; and Plaintiff has therefore failed to allege facts that make plausible that any failure to conduct an adequate investigation caused any harm to the Plan. *See Rinehard v. Lehman Bros. Holdings Inc.*, 817 F. 3d 56, 67 (2d Cir. 2016) ("[P]laintiffs must allege facts that, if proved, would have revealed to a reasonable fiduciary that the investment at issue was imprudent.").

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

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

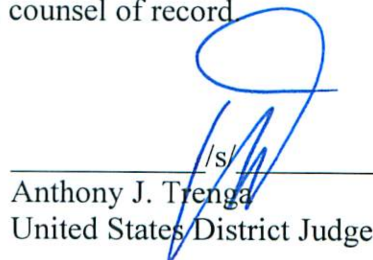
## IV. CONCLUSION

For the reasons stated above, it is hereby

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

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

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



/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
September 26, 2018