CASE NO. 25-2337

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CALVIN TRULL, on behalf of McCreary Modern, Inc. Employee Stock Ownership Plan, as the representative of a class of similarly situated persons,

Plaintiff-Appellant

v.

MCCREARY MODERN, INC.; BOARD OF TRUSTEES OF THE MCCREARY MODERN, INC. EMPLOYEE STOCK OWNERSHIP PLAN

Defendants-Appellees

ON APPEAL FROM
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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No. 25-2337 Caption: Calvin Trull v. McCreary Modern, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Calvin Trull
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Mark E. Thomson Date: 11/17/2025

Counsel for: Appellant

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INTRODUCTION

This case is about an employee stock ownership plan ("ESOP") that holds both company stock and other assets. Plaintiff's claim is about the mismanagement of those other assets. From 2019 forward, the McCreary Modern, Inc. Employee Stock Ownership Plan (the "Plan") has continuously held between $8 million and $16 million of non-company stock assets. JA9 ¶ 16. Over that period, the Plan's fiduciaries have kept all of those assets in cash rather than investing them. As a result, Plan participants have not only failed to build their retirement savings; they have lost money relative to inflation. The Plan's structure compounds the harm: even after leaving the company, participants must remain invested in the Plan for a decade before receiving their savings. Pairing the Plan's long-term investment horizon with a depreciating short-term investment is straightforward fiduciary imprudence.

This appeal can be resolved on any of three independent grounds, each sufficient to require reversal. ***First***, the Complaint plausibly alleges that Defendants did not use a prudent process to invest the Plan's non-company stock assets, which is actionable under § 1104(a)(1)(B) regardless of whether ERISA's diversification exemption is considered. In 2015, the Plan paid off the loan it took out to buy its 30% stake in McCreary Modern, Inc. ("McCreary"). JA8 ¶ 10. After that point, cash dividends began piling up in the Plan rather than being invested.

JA8 ¶ 10, JA9 ¶ 16. Between 2019 and 2023, that cash predictably earned only about 1.3% annually; millions of dollars in retirement savings sat in deposit accounts that earned no interest at all. JA9 ¶ 18. This case does not turn on imposing any particular "right" allocation (stocks versus bonds); it turns on the pleaded failure to adopt a prudent investment process for a Plan with a long-term investment horizon. As a result of Defendants' imprudence, the Plan lost approximately $17.5 million—about $15,000 per participant—relative to prudent alternative investments that were consistent with the Plan's objectives. JA26 ¶ 76.

Second, the district court's holding is based on a simple statutory interpretation error. The district court started from the uncontroversial baseline that under 29 U.S.C. § 1104(a)(2), an ESOP's company stock holdings are exempt from ERISA's duty to diversify plan assets. But the court expanded that exemption to also cover the ESOP's *non*-company stock assets. That is wrong. Congress was clear that the exemption applied only to "employer securities." *Id.*

Having misconstrued the text of ERISA's exemption, the district court compounded its error by recasting Plaintiff's prudence claim as a claim about diversification. Focusing on a diversification claim that was not made and applying a misreading of ERISA's diversification exemption, the district court held that Defendants were immune from liability. This wayward analysis has serious implications. Under the district court's logic, ESOP fiduciaries may leave non-company stock assets uninvested indefinitely, untouched by ERISA's core mandate of prudence.

Third, the dismissal independently rests on Rule 12 errors. The district court justified Defendants' failure to invest the Plan's assets by relabeling those assets as a "cash buffer" that was supposedly needed to fund future repurchases of departing participants' McCreary shares. The Court's wholesale adoption of Defendants' asserted justification for their actions is impermissible at the Rule 12 stage. Even if Defendants' alternative explanation was considered, it is specifically rebutted in the Complaint. Making matters worse, the district court applied this "cash buffer" case law even though it is premised on a heightened pleading standard that does not apply here. The district court neither acknowledged nor explained this mismatch.

The district court took a Complaint that alleges straightforward ERISA imprudence and dismissed it using impermissible factfinding and misapplication of ERISA's text and case law. As another court ruled in a similar case, the correct analysis is much simpler. This Court should reaffirm that the duty of prudence applies to all plan assets and reverse the dismissal of Plaintiff's Complaint.

JURISDICTIONAL STATEMENT

Plaintiff Calvin Trull filed this action in the United States District Court for the Western District of North Carolina pursuant to 29 U.S.C. § 1132(a)(2) and (3), which provide that participants in an employee retirement plan may pursue a civil action on behalf of the plan to remedy breaches of fiduciary duties and obtain monetary and appropriate equitable relief, as set forth in 29 U.S.C. § 1109(a). This action presents a federal question under ERISA, and therefore the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Because the Plan is administered in the Western District of North Carolina, venue is proper pursuant to 29 U.S.C. § 1132(e)(2).

Plaintiff filed his Complaint on January 17, 2025. JA5. The district court entered judgment on October 1, 2025 (JA327), granting Defendants' motion to dismiss Plaintiff's Complaint without leave to amend (JA319) (the "Order"). Plaintiff filed his notice of appeal from the judgment and from the Order on October 30, 2025. JA328.

This Court has jurisdiction under 28 U.S.C. § 1291 because Plaintiff appeals from a final judgment that disposed of all claims between the parties.

STATEMENT OF ISSUES

Did the district court err, as a matter of law, in holding that the fiduciary of an ESOP need not prudently invest the ESOP's non-company stock assets?

STATEMENT OF CASE

I. Factual Background.

A. The Plan.

McCreary is a private company. JA7-JA8 ¶ 9. The McCreary Modern, Inc. Employee Stock Ownership Plan was established in 2008 to provide retirement benefits to employees in the form of partial ownership of McCreary. *Id.* As of year-end 2023, there were over 1,000 current and former McCreary workers with accounts in the Plan. JA8 ¶ 12.

At the time the Plan was established, McCreary loaned money to the Plan in exchange for a promissory note. JA7-JA8 ¶ 9. The Plan used that money to purchase shares of McCreary stock from the company's owners, giving the Plan a 30% ownership stake in the company. JA7-JA8 ¶¶ 9–10. Between 2008 and 2015, the Plan repaid the promissory note in full using money contributed by the company to the Plan as well as dividends from the Plan's shares. JA24–JA25 ¶ 70. No further shares of McCreary have been made available to the Plan to purchase. JA9 ¶ 16.

Each year since 2015, McCreary has been profitable. *Id.* McCreary distributes its profits to its shareholders, including the Plan, in the form of cash dividends. JA9 ¶ 13. For years, these dividends have simply piled up in the Plan's bank accounts. JA9 ¶ 18. Since the start of 2019, the Plan has held between $8 million and $16 million in cash. JA9 ¶ 16. Other than the Plan's McCreary stock, all of the Plan's assets are held in cash. JA10 ¶ 20.

Between 2019 and 2023 (the most recent year Plan data was available as of the date of the Complaint), the Plan earned an average of only 1.3% per year on this cash. JA9 ¶ 18. Millions of dollars of Plan participants' retirement savings were left in bank deposit accounts that yielded no interest at all. *Id.* During the same period, even a 3-month treasury bill—the industry standard benchmark for investment earnings on cash products—averaged 1.9%, while inflation averaged nearly 4%. JA9 ¶ 18, JA15–16 ¶ 41.

Plan participants have no control over how the Plan's assets are invested. JA8 ¶ 14. The Plan's Trustees exercise total discretion and control with respect to how to invest the Plan's assets, subject to oversight by the company. *Id.*

B. The Plan's investment objective.

An ESOP is a retirement savings plan whose participants generally have a long investment time horizon. JA13 ¶ 34. In addition to the long investment time horizon inherent in investing for retirement, the Plan guarantees a long time horizon through its structure. After a participant leaves employment at McCreary, the terms of the Plan require the participant to remain fully invested in the Plan for five years and then to receive an annual distribution of one-fifth of their account balance over the subsequent five years. JA23–JA24 ¶ 67. In short, the Plan's assets have a minimum ten-year investment window for any given participant. Moreover, the Plan's participants need to grow their accounts: the average participant in this Plan does not have nearly enough retirement plan savings to fund their retirement. JA13–JA14 ¶ 36.

Because Plan participants have a long time horizon and need to grow their retirement assets, a prudent fiduciary would invest the Plan's assets to achieve capital appreciation. JA13 ¶¶ 34-35. The Plan's investment in McCreary stock fits this objective. JA14–JA15 ¶ 38. The Plan's cash investments do not.

Defendants could have satisfied the Plan's investment objective by investing its non-company stock assets in equities. The Plan's non-company stock assets could not be invested in McCreary stock because no more McCreary shares were available for the Plan to purchase. JA7–JA8 ¶¶ 9–10, JA9 ¶ 16, JA14–JA15 ¶ 38. A prudent fiduciary would seek equity returns by investing the Plan's non-company stock assets in other stocks. JA14–JA15 ¶¶ 38–39. Many such options were available to the Plan. JA16–JA17 ¶ 42. But Defendants instead invested the Plan's non-company stock assets in cash—a short-term asset that lagged far behind inflation, meaning participants suffered a negative real rate of return. JA9 ¶ 18, JA15–16 ¶ 41. By leaving the Plan's non-company stock assets in cash, Defendants failed to employ a prudent investment process consistent with the Plan's long horizon. JA9-10 ¶¶ 19-20.

C. The company's repurchase obligation.

Under the terms of the Plan, McCreary's stock is valued once a year. JA25 ¶ 71. For private company ESOPs like this Plan, ERISA gives former employee plan participants the right to sell their company stock back to the employer for fair market value. 26 U.S.C. § 409(h)(1)(B). This right to sell back one's stock is called a "put option." *Id.* Under this Plan, participants cannot exercise their put option until five years after they have left the company. JA23–JA24 ¶ 67. The company, not the plan, is obligated to satisfy this repurchase obligation. JA19 ¶ 54 (citing 26 U.S.C. § 409(h)(1)(B); 29 C.F.R. § 2550.408b-3(j)).

McCreary elects to repurchase company stock through the Plan (a practice known as "share recycling"). JA22 ¶ 65. Using Plan assets for share repurchases is a fiduciary act that can be taken only if it best serves the interests of Plan participants. JA19–JA20 ¶ 55. At the pleadings stage, Plaintiff lacks access to the evidence detailing why Defendants left all of the Plan's non-company stock assets in cash and the scope of each year's share repurchases. JA17 ¶ 44, JA21 ¶ 62, JA22 ¶ 65.

If the company's repurchase obligation caused Defendants to leave the Plan's assets in cash, Plaintiff has pled in detail why that was imprudent under the circumstances. JA22 ¶ 65, JA24–JA25 ¶¶ 70–72. Even if the Plan had been responsible for repurchasing shares (it was not—that is a corporate liability), there was no need to hold such large cash reserves in the Plan. JA20 ¶ 59. The Plan has funded repurchases substantially through new annual dividends since 2019, leaving unused dividends from prior years sitting in cash indefinitely. JA22 ¶ 65. Had Defendants invested the Plan's non-company stock assets in equities or bonds, those investments could have been used to repurchase shares if the circumstances warranted it down the line. JA15 ¶ 39.

II. Procedural Background.

Plaintiff filed his Complaint on January 17, 2025. JA5. Judgment was entered without oral argument on October 1, 2025 (JA327), granting Defendants' motion to dismiss without leave to amend (JA319).

Plaintiff filed his notice of appeal from the judgment and from the Order on October 30, 2025. JA328.

SUMMARY OF ARGUMENT

This case presents a straightforward claim of ERISA fiduciary imprudence: Defendants left millions of dollars of Plan assets sitting in cash for years, even though Plan participants were forced to hold these assets for at least a decade. As a result, these retirement savings did not even keep up with inflation. At the pleadings stage, those allegations plausibly support the inference that Defendants did not employ a reasoned process to set an investment strategy "reasonably designed . . . to further the purposes of the plan" in light of participants' investment horizons and retirement objectives. 29 C.F.R. § 2550.404a-1(b)(2)(i). That is enough to state a claim for breach of ERISA's duty of prudence.

The district court held that Defendants did not act imprudently because they are exempt from ERISA's duty to diversify. This reasoning is wrong several times over. Most fundamentally, even if the assets at issue were exempt from ERISA's duty to diversify, they are still subject to ERISA's requirement that fiduciaries employ a prudent process in selecting and monitoring all plan assets. Diversification is a red herring.

The district court also misread the plain text of 29 U.S.C. § 1104(a)(2), which limits ERISA's diversification exemption to "qualifying employer securities," *i.e.*, company stock. By expanding that exemption from just company stock to a blanket immunity for *all* assets held within an ESOP, the district court created a category of plan assets that are immune from scrutiny. This is a dangerous precedent that cannot be reconciled with ERISA's dictate that fiduciaries act with "care, skill, prudence, and diligence *under the circumstances then prevailing*." 29 U.S.C. § 1104(a)(1)(B) (emphasis added).

The district court justified its misreading of § 1104(a)(2) largely by framing the assets at issue here as a "cash buffer" needed to repurchase McCreary shares from departing Plan participants. The term "cash buffer" does not appear in the Complaint and conceptually makes no sense as applied to a private company ESOP whose stock is valued once annually. Yet this "cash buffer" concept became the conceptual engine of the Order, driving both the district court's factual inferences and its policy concern about fiduciaries being sued "either way."

The district court's reliance on cash buffer case law was fundamentally misplaced because the facts that justified the buffer in those cases do not exist here. The single "cash buffer" case the court relied upon—*Perrone v. Johnson & Johnson*, 48 F.4th 166, 171 (3d Cir. 2022)—concerns a 401(k) plan's public-company stock fund. That fund invests a small fraction of its assets in cash to create the liquidity necessary to enable participants to move money in and out of the fund on a daily basis. *Id.* That arrangement has no rational analogue to the facts here: a privately-held ESOP whose company stock is valued once a year, where participants cannot choose their investments, and where the only Plan transactions are annual and substantially funded through new dividends rather than by using the Plan's existing cash. The district court imported the holding from an idiosyncratic line of cases about the liquidity needs of public company stock funds to give categorical immunity to long-term, all-cash investment of ESOP assets. This was a category error.

Compounding that error, the district court misapplied the Rule 12 standard in two ways. First, the court drew inferences in Defendants' favor by crediting their narrative that the cash in question was a necessary "buffer" to fund share repurchases. The district court credited Defendants' alternative narrative despite well-pleaded allegations that no such daily cash buffer was necessary given the Plan's circumstances, including that the company knows of the Plan's annual stock purchases five years in advance; that the Plan's repurchases have been funded substantially through new dividends rather than the Plan's existing cash; and that the Plan's accumulated cash far exceeded any liquidity need. Defendants at best raise fact disputes that cannot be resolved on a motion to dismiss.

Second, the district court effectively imported the heightened "more harm than good" pleading standard from the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*—appropriate only for a special breed of ERISA claims not relevant here—into this ordinary prudence claim, thereby raising the pleading bar far beyond what ERISA and this Court's Rule 12 jurisprudence permit.

The judgment below should be reversed.

ARGUMENT

The dismissal should be reversed for three independent reasons that track the structure of this Argument. *First*, the Complaint plausibly alleges a prolonged failure to adopt and monitor any prudent approach for investing dividends received by the Plan despite the Plan's long investment time horizon. *Second*, the district court's diversification analysis was legal error: ERISA's duty to diversify is irrelevant to this case, and in any event ERISA's exemption from the duty to diversify does not apply to non-company stock assets. *Third*, the court compounded those legal errors by adopting Defendants' "cash buffer" fact disputes and importing a heightened "more harm than good" framework drawn from insider-information stock-drop cases—an inapposite pleading standard.

I. Standard of Review.

Every issue herein is governed by the same standard of review: this Court "review[s] *de novo* dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), assuming as true the complaint's factual allegations and construing 'all reasonable inferences' in favor of the plaintiff." *Semenova v. Maryland Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017) (quoting *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697, 702 (4th Cir. 2016)).

II. Plaintiff Has Adequately Pleaded That Defendants Acted Imprudently.

This case presents a straightforward ERISA fiduciary breach: Defendants had a fiduciary duty to prudently invest the amounts at issue, yet effectively failed to invest them at all. These allegations easily state a claim for breach of ERISA's duty of prudence.

A. Defendants' choice to leave millions of dollars of Plan assets in cash for years supports a plausible imprudence claim.

Defendants' decade-long practice of holding 100% of the Plan's non-company stock assets in cash strongly implies an imprudent process. "ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general[.]" *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412 (2014); *see also id.* at 420 ("We cannot accept the claim . . . that the content of ERISA's duty of prudence varies depending upon the specific nonpecuniary goal set out in an ERISA plan"). Prudence is a high standard that "expects more than good intentions." *Mator v. Wesco Distribution, Inc.*, 102 F.4th 172, 183 (3d Cir. 2024). *See also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) ("Good faith does not provide a defense to a claim of a breach of these fiduciary duties; 'a pure heart and an empty head are not enough.'") (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983)).

Fiduciaries must evaluate an investment in light of "appropriate investment horizons consistent with the plan's investment objectives[.]" 29 C.F.R. §

2550.404a-1(b)(4); *see also DiFelice*, 497 F.3d at 420 (prudent process "must 'depend[ ] on the character and aim of the particular plan and decision at issue and the circumstances prevailing at the time.'") (quoting *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000)). The Restatement of Trusts likewise recognizes that investment prudence necessarily entails evaluation of "the circumstances and requirements of the trust and its beneficiaries." RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. d (2007).[1]

Defendants had a duty to invest the Plan's assets consistent with the Plan's investment time horizon and objectives, as well as participants' financial circumstances. The Plan had a long-term investment time horizon. JA13 ¶ 34; *see also* 72 Fed. Reg. 60452, 60463 (Oct. 24, 2007) (finding that retirement investments made on behalf of employees "ought to and often will be long-term investments"). Like all ERISA retirement plans, the Plan's purpose was to provide participants with savings to sustain their standard of living after they retire. JA13-JA14 ¶ 36. The Plan's particular objective was to provide equity investment returns to participants. JA14–JA16 ¶ 38. This was especially necessary because the

[1] "ERISA fiduciary duties are derived from the common law of trusts, so 'courts often must look to the law of trusts' to 'determin[e] the contours of an ERISA fiduciary's duty.'" *Tibble v. Edison Intern.*, 843 F.3d 1187, 1197 (9th Cir. 2016) (quoting *Tibble v. Edison Int'l*, 575 U.S. 523, 528–29 (2015)).

average participant in this Plan does not have nearly enough retirement plan savings to fund their retirement. JA13–JA14 ¶ 36.

Because Plan participants have a long investment time horizon and need to significantly grow their retirement assets, a prudent fiduciary would have invested the Plan's assets to achieve long-term capital appreciation in accordance with the Plan's objective. JA13–JA15 ¶¶ 34-38. *See also* 29 C.F.R. § 2550.404a-1(b)(2)(i) (fiduciaries must invest plan assets in a manner that is "reasonably designed . . . to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain"); 3d Rest. § 90 cmt. e(1) (a plan's risk tolerance "largely depends" on how long funds will be held). In order to maintain investments that are suited to participants' investment objectives and risk tolerances, a prudent fiduciary must understand the risk and return characteristics of different asset classes. JA11–JA12 ¶¶ 26–31, JA15–JA17 ¶¶ 41–42. Equities generate the highest long-term average returns, though they exhibit the highest volatility. JA11 ¶ 27; *see also* 3d Rest. § 90 cmt. 1. Cash equivalents generate the lowest long-term average returns and are considered inappropriate investments for saving for retirement. JA11 ¶ 28, JA12 ¶ 31; *see also* 72 Fed. Reg. 60452, 60463 (Department of Labor warning that overallocation to capital preservation strategies will "decreas[e] the likelihood that participants . . . have adequate retirement savings").

Instead of investing for the long-term, Defendants have left all of the Plan's non-company stock assets in cash for years. JA10 ¶ 20. A prudent fiduciary would have known that cash investments would lag inflation, while equity investments historically have produced substantial gains. JA15–JA16 ¶ 41; *see also* 3d Rest. § 90, cmt. c (explaining that holding cash for substantial periods of time results in negative real rates of return). Moreover, Plan participants' investments are tied up in the Plan for years, meaning participants do not benefit even from cash investments' short-term volatility protection. JA13 ¶ 34, JA23 ¶ 67. Defendants ignored these facts.

Investing retirement assets "very conservatively" without "conduct[ing] any analysis of the participants' tolerance for risk" breaches the duty of prudence. *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 552 (D. Md. 2003), *aff'd*, 372 F.3d 261 (4th Cir. 2004);[2] *see also* 3d Rest. § 90, cmt. f ("A trustee's approach to investing must be reasonably supported in concept and must be implemented with proper care, skill, and caution."); *Toomey v. DeMoulas Super Markets, Inc.*, No. 19-11633, 2020 WL 3412747, at *3 (D. Mass. April 16, 2020) (finding plausible allegation that plan "was managed too conservatively" and fiduciaries

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[2] *Meyer* is a well-respected trial order concerning investment prudence that is cited at length in the Restatement of Trusts. Restatement (Third) of Trusts §§ 90, 100, 101.

failed to properly account for "participants' varying interests and needs"). Plaintiff has adequately pleaded a breach of ERISA's duty of prudence.

B. The district court's focus on ERISA's duty to diversify was misplaced.

The district court held that Plaintiff's claims are governed by ERISA's duty to diversify, and that non-company stock assets are exempt from that duty. JA323, JA325–JA326. Both parts of this analysis are wrong.

1. This case is about imprudent investments, not a failure to diversify.

The district court's ruling in this case was based on ERISA's duty to diversify, not the duty of prudence. The "question" the district court believed it had to answer was "whether an ESOP fiduciary may be held liable for failing to diversify the plan's cash buffer." JA326 n.2. *See also* JA325 ("[T]his is the very type of claim Congress sought to protect against when it exempted ESOPs from *the diversification obligation* arising from the fiduciary duty of prudence.") (emphasis added). This is wrong. Plaintiff does not allege a breach of the duty to diversify. Rather, this case is about ERISA's duty of prudence. The district court erred by dismissing this case based on its interpretation of the duty to diversify.

Alongside ERISA's core duties of prudence and loyalty, the statute imposes a duty to diversify a plan's investments. 29 U.S.C. § 1104(a)(1)(C). Specifically, fiduciaries must "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." *Id.* The House Conference Report on ERISA explained why Congress created the duty to diversify:

> Ordinarily the fiduciary should not invest the whole or an unduly large proportion of the trust property in one type of security or in various types of securities dependent upon the success of one enterprise or upon conditions in one locality, since the effect is to increase the risk of large losses.

In re Unisys Sav. Plan Litig., 74 F.3d 420, 438 (3d Cir. 1996) (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5085).

Plaintiff does not allege a breach of 29 U.S.C. § 1104(a)(1)(C). The problem here is not that the Plan's non-company stock assets were invested in only one type of security; there is no allegation that the cash investments risked "large losses," as § 1104(a)(1)(C) requires. Rather, Plaintiff alleges that Defendants breached ERISA's duty of prudence by investing the Plan's non-company stock assets in a way that was incompatible with the Plan's objectives and Plan participants' time horizon.

The district court's focus on a separate ERISA duty—to diversify plan assets—misapprehends the Complaint. Prudence is the only standard relevant to this case.

2. ERISA's diversification exemption is limited to company stock.

There is an additional reason that the district court erred in relying on ERISA's exemption from the duty to diversify: that exemption does not apply to non-company stock assets. This is plain from the text of the statute. After setting forth the duty to diversify in § 1104(a)(1)(C), ERISA carves out a narrow exemption from that duty in § 1104(a)(2). Specifically, Congress eliminated the duty to diversify as to the "holding of . . . *qualifying employer securities*." *Id.* (emphasis added).[3] In other words, there is no need to diversify an ESOP's investment in *employer stock*. Indeed, holding a large investment in a single employer stock is the point of an ESOP.

As the above statutory text makes clear, ERISA's exemption from the duty to diversify is limited to company stock. The exemption does not apply to ESOP assets that are *not* invested in company stock. The statutory language carefully draws this distinction. The carveout is limited to "qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title)." 29 U.S.C. § 1104(a)(2). Congress could have easily applied the exemption to the whole of an "employee stock ownership plan," another defined

[3] ERISA defines "employer security" to mean a "security issued by an employer of employees covered by the plan." 29 U.S.C. §§ 1107(d)(1), (5). That is to say: company stock.

term in ERISA. 29 U.S.C. § 1107(d)(6). It did not. By limiting the exemption to two defined terms, Congress was crystal clear that the exemption extends no further. The district court disregarded the statutory text by dismissing this case based on the idea that there is "no duty to diversify any part of the plan." JA325–JA326.

The Supreme Court has noted the care with which Congress defined the scope of the exemption to the duty to diversify. *Dudenhoeffer*, 573 U.S. at 419 ("§ 1104(a)(2) . . . modifies the [fiduciary] duties imposed by § 1104(a)(1) in a precisely delineated way"). So too has this Court, noting that "the diversification duty does not apply to investments that fall within the exemption *for employer stocks* provided for in § 1104(a)(2)." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014) (emphasis added). *See also Schultz v. Aerotech, Inc.*, No. 24-618, 2025 WL 563585, at *6 (W.D. Pa. Feb. 20, 2025) (under § 1104(a)(2), "ESOP fiduciaries are not liable for losses that result from a failure to diversify *beyond that company's stock*") (emphasis added).

The district court mischaracterized the Supreme Court's *Dudenhoeffer* opinion when overriding the plain statutory language of § 1104(a)(2). *Dudenhoeffer* is not a case about the scope of the duty to diversify. It is about whether a special presumption of prudence applies to an ESOP fiduciary's decision to buy and hold company stock. 573 U.S. at 418. The duty to diversify exemption is discussed only to explain that there is general exemption from the duty of prudence. *Id.* at 418-22. The Court was clear about the scope of the duty to diversify exemption, noting:

> Section 1104(a)(1)(C) requires ERISA fiduciaries to diversify plan assets. And § 1104(a)(2) establishes *the extent to which* those duties are loosened in the ESOP context to ensure that employers are permitted and encouraged to offer ESOPs.

Id. at 419 (emphasis added). If ESOPs were *totally* exempt from the duty to diversify, the phrase "the extent to which" would be omitted from the above passage. Elsewhere, the Court confirmed the exemption is limited to "[employer stock]." *Id.* at 417.

Defendants will likely emphasize shorthand statements from *Dudenhoeffer* such as, "ESOP fiduciaries . . . need not diversify the fund's assets." 573 U.S. at 412. But read in context, these excerpts do not expand § 1104(a)(2) beyond its text, nor could they. Rather, these are just passing references to the exemption from diversifying company stock, written in summary form because *Dudenhoeffer* has nothing to do with non-company stock assets. *Dudenhoeffer* did not secretly expand § 1104(a)(2)'s employer-stock carveout into an across-the-board immunity for all plan assets. It actually did the opposite, making a point of rejecting carveouts from the duty of prudence. 573 U.S. at 419–22.

Congress had good reason for drawing the boundaries of § 1104(a)(2)'s exemption as it did. Exempting company stock was necessary for ESOPs to exist—

absent the exemption, ESOPs could not exist as plans "designed to invest primarily in qualifying employer securities." 29 U.S.C. § 1107(d)(6). There is no comparable reason to exempt non-company stock assets from the diversification duty. And indeed, the district court's holding would create a dangerous precedent: ESOP participants would have no recourse no matter how much of their retirement savings was left in cash. The blanket exemption created by the Order contravenes ERISA's core statutory mandate that fiduciaries act with the "care, skill, prudence, and diligence *under the circumstances then prevailing*." 29 U.S.C. § 1104(a)(1)(B) (emphasis added).

The district court's own policy analysis was misguided. The district court stated that recognizing Plaintiff's claim would "risk[] subverting Congress's objective to encourage employers to establish and maintain ESOPs." JA325. Congress encouraged ESOPs by permitting concentration in company stock—hence § 1104(a)(2)'s targeted exemption. Treating § 1104(a)(2) as a wholesale exemption would not "encourage" ESOPs; it would create a safe harbor to unthinkingly stow participants' retirement savings in cash—an outcome inconsistent with ERISA's "exclusive purpose" and "prudent man" commands that *Dudenhoeffer* reaffirmed apply to ESOP fiduciaries. 573 U.S. at 419–22.

The one other court to confront a claim like Plaintiff's rejected the district court's approach. In *Schultz v. Aerotech, Inc.*, the plaintiffs brought claims like

Plaintiff's here: that an ESOP's non-company stock assets had been imprudently left in cash for years. 2025 WL 563585, at *2. *Schultz* had no trouble reading § 1104(a)(2), accurately stating that "ESOP fiduciaries are not liable for losses that result from a failure to diversify beyond *that company's stock* . . . ." *Id.* at *6 (emphasis added). *Schultz* also declined to resolve fact disputes at the motion to dismiss stage, ruling that whether a cash-heavy ESOP investment portfolio is prudent depends on plan-specific factual context that is "not apparent from the [complaint]" and "would not be appropriate for consideration at this stage." *Id.* at *9.

The district court's duty to diversify analysis was faulty for one additional reason. Even if § 1104(a)(2) did apply to OIA assets (it does not), those assets still must be invested prudently. *Dudenhoeffer*, 573 U.S. at 419–22 ("[B]ecause ESOP fiduciaries are ERISA fiduciaries and because § 1104(a)(1)(B)'s duty of prudence applies to all ERISA fiduciaries, ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are."); *Reidt v. Frontier Commc'ns Corp.*, No. 3:18-CV-1538, 2024 WL 4252646, at *7 (D. Conn. Sept. 20, 2024) ("[E]ven when ERISA expressly exempts fiduciaries from the duty to diversify under Section 404(a)(1)(C), it still requires fiduciaries to make prudent decisions regarding the selection and retention of investments.") (citing *Dudenhoeffer*, 573 U.S. at 412).

The text of § 1104(a)(2) is explicit about this, exempting fiduciaries from "the prudence requirement . . . only to the extent that it requires diversification." Indeed, even when deciding whether to further invest an ESOP's assets in company stock, the trustee of an ESOP must assure itself that the investment is a prudent one. *See Dudenhoeffer*, 573 U.S. at 420 (explaining ERISA does not automatically bless "an ESOP fiduciary's decision to buy more shares of employer stock, . . . if it would be imprudent . . . as an attempt to secure financial retirement benefits"). The same principle applies with equal force to an ESOP fiduciary's investment decisions regarding the ESOP's *non*-employer stock assets. *See Schultz*, 2025 WL 563585, at *6 (while "ESOP fiduciaries are not liable for losses that result from a failure to diversify beyond that company's stock," duty of prudence otherwise applies to their investment decisions) (citing *Dudenhoeffer*, 573 U.S. at 419). The district court erred by concluding that § 1104(a)(2) foreclosed a meaningful prudence analysis.

C. The district court erred by applying inapposite "cash buffer" case law.

The district court's Order depends on the idea that the Plan's non-company stock assets were a "cash buffer" that was needed to repurchase McCreary shares from former employee participants. This concept undergirded the district court's factual and legal analysis: the term appears 17 times across the eight-page Order. JA321–JA326. But the term "cash buffer" does not appear in the Complaint. Nor is the term "cash buffer" commonly used to refer to an ESOP's non-company stock assets. Nor did this Plan actually have a cash buffer. That is because the concept of a cash buffer comes from a wholly unrelated factual and legal setting. Rather than attempting to explain why the cash buffer in a 401(k) plan's public company stock fund is relevant to this Plan's non-company stock assets, the district court simply assumed they serve the same function. That is wrong. The district court erred by relying on this flawed analysis to dismiss the Complaint.

The district court cited just one case to support its conclusion that the Plan's non-company stock assets were a cash buffer: *Perrone v. Johnson & Johnson*, 48 F.4th 166, 171 (3d Cir. 2022). But a cash buffer refers to something else entirely: a mechanism to facilitate daily trading into and out of a 401(k) plan's public company stock fund. There can be no rational analogy between that and the Plan's non-company stock assets. Indeed, *Perrone* is so far off base that even Defendants did not cite it in their briefing.

Some background is necessary to understand why *Perrone*'s cash buffer has no relevance here. *Perrone* concerns a 401(k) plan in which one of the investment options was a company stock fund. 48 F.4th at 171.[4] That company stock fund

[4] The Order twice quotes portions of *Perrone* that quote from other decisions: *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 788 (7th Cir. 2011) and *Dormani v. Target Corp.*, 970 F.3d 910, 914 (8th Cir. 2020). Those cases likewise concern 401(k) plans that included a company stock fund invested in publicly-traded company stock as one of their investment options. *George*, 641 F.3d at 788;

invested exclusively in common stock of Johnson & Johnson, the plan sponsor's publicly-traded stock, except for a small cash buffer consisting of cash and other highly liquid investments. *Perrone*, 48 F.4th at 171. Absent the cash buffer, a participant seeking to transfer assets into or out of the company stock fund would have to wait three business days for that transaction to settle. *See George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 793 (7th Cir. 2011).[5] The cash buffer ensured that when a participant wished to transfer assets between Johnson & Johnson company stock fund and another fund in the 401(k) plan, the plan could execute the transaction the next day rather than waiting three days. *Perrone*, 48 F.4th at 171. In short, a cash buffer—which is a feature of a public-company stock fund offered in a 401(k) plan—exists to ensure participants can transfer assets into or out of that fund within a day.

Dormani, 970 F.3d at 914. The reasoning in those cases is similarly inapposite here.

[5] This is because without a cash buffer, the plan administrator would be forced to buy or sell company stock to fund the transaction. *George*, 641 F.3d at 793. The cash buffer ensures that public company stock can be bought or sold within a day—the same settlement period that applies when a participant buys or sells shares in other funds offered in a 401(k) plan. *See S.E.C. v. Pentagon Cap. Mgmt. PLC*, 612 F. Supp. 2d 241, 253 (S.D.N.Y. 2009). Absent a cash buffer, a participant transferring out of the company stock fund would have to wait for the stock sale to complete before the plan could reinvest the proceeds elsewhere—leaving the participant's proceeds out of the market in the interim. *Taylor v. United Techs. Corp.*, No. 3:06-cv-1494, 2009 WL 535779, at *9 (D. Conn. Mar. 3, 2009), *aff'd*, 354 F. App'x 525 (2d Cir. 2009).

There are five major errors in the district court's cash buffer analysis.

First, the district court erred by resolving disputed facts and making inferences in Defendants' favor at the pleading stage. The district court assumed the Plan's cash holdings were a "buffer" used to repurchase stock from employees departing the Plan. JA321, JA324–JA326. But Defendants' proposed rationales for the failing to invest between $8-$16 million in participants' retirement savings are merits disputes to be tested on an evidentiary record, not bases for dismissal. The Complaint could hardly be clearer that Plaintiff does not allege that Defendants invested the Plan's non-company stock assets to satisfy the company's repurchase obligation. JA17 ¶ 44. Nor do Plaintiff's allegations support such an inference. The Plan's cash came from stockholder dividends, not employer contributions, so there is no basis to infer a particular "purpose" for those assets. JA8 ¶ 13, JA9 ¶ 16. And the Plan's existing cash was hardly even needed for share repurchases. Annual share repurchases were substantially funded by new dividends received by the Plan each year, not the Plan's pre-existing cash. JA21 ¶ 62, JA22 ¶ 65. Defendants may pursue their "repurchase obligation" story through discovery, but it has no place on a motion to dismiss. *See Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) (reversing grant of motion to dismiss where district court "incorrectly undertook to determine whether a lawful alternative explanation appeared more likely").

Moreover, even if Defendants were granted the improper inference that the Plan's non-company stock assets were invested to serve as a cash buffer, that does not mean Defendants acted prudently. Because the cash buffer within a company stock fund exists solely to provide liquidity, it is "small." *Perrone*, 48 F.4th at 171. The cash buffer in *George* held only 5% of the company stock fund's assets. 641 F.3d at 792. By contrast, the Plan's non-company stock assets comprised up to 30% of Plan assets during the relevant period. JA9 ¶ 16, JA22–JA23 ¶ 66.

Even if the district court's cash buffer analogy made sense (it does not), whether cash holdings of this magnitude are prudent is a question of fact. No case cited by the district court or Defendants supports the proposition that holding nearly a third of a Plan's assets in cash—far in excess of any supposed liquidity need—is prudent *per se*. To the contrary, in *George* the Seventh Circuit reversed on this issue, ruling that whether fiduciaries made a "reasoned decision" regarding the investment of cash buffer assets was a genuine issue of material fact. 641 F.3d at 795–96. But here, the district court drew major inferences in Defendants' favor, concluding that the Plan's cash must have been held for purposes of repurchasing shares from departing employees, and that it was necessarily prudent for the Plan to hold between $8 and $16 million in cash for those purposes. *See, e.g.*, JA325 ("Had the cash buffer been de minimis, as Trull suggests is not just permissible but *required*, the Plan may have been unable to adequately pay departing employees or repurchase shares.") (second emphasis added). This was reversible error.

Second, the district court applied the wrong legal standard by relying on *Perrone*. *Perrone* concerned a stock-drop claim: a specific type of ERISA claim alleging that "ESOP fiduciaries 'behaved imprudently by failing to act on the basis of nonpublic information that was available to them because they were [corporate] insiders.'" 48 F.4th at 172 (quoting *Dudenhoeffer*, 573 U.S. at 427–28). In *Dudenhoeffer*, the Supreme Court held that an "insider information" claim must meet a heightened pleading standard: the plaintiff must plausibly allege an alternative action that a prudent fiduciary "could not have concluded . . . would do more harm than good." *Id.* at 174 (quoting *Dudenhoeffer*, 573 U.S. at 411).

Perrone arose out of Johnson & Johnson concealing that its baby powder was contaminated with asbestos. *Id.* at 169. The plaintiffs alleged that the fiduciaries of the Johnson & Johnson ESOP knew about the concealment, knew that Johnson & Johnson stock was overvalued given how markets would react to news of the contamination, and acted imprudently by failing to protect the ESOP from the coming stock price drop. *Id.* The plaintiffs pled that rather than buy more employer stock, the ESOP's fiduciaries should have directed new ESOP contributions to the company stock fund's "cash buffer." *Id.* at 172. The portion of *Perrone* cited by the district court concerns whether the ESOP's fiduciaries "could not have concluded" that directing new contributions to the plan's cash buffer "would do more harm than good." *Id.* at 174 (quoting *Dudenhoeffer*, 573 U.S. at 411).

This is an extraordinary pleading standard. It "places on the plaintiff 'the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it.'" *Id.* (quoting *Whitley v. BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016)). "That is a high bar to clear, even at the pleadings stage . . . ." *Id.* This stricter standard—which is meant to weed out meritless insider trading theories—was essential to *Perrone*'s holding that "[i]t is simply too much of a stretch to say that a prudent fiduciary in the Defendants' position *'could not have concluded'* that redirecting contributions to the ESOP's cash buffer *'would do more harm than good.'*" *Id.* at 177 (quoting *Amgen Inc. v. Harris*, 577 U.S. 308, 311 (2016)) (emphasis added).

The district court here did not even acknowledge that *Perrone* involved a different and higher pleading standard than this case does. The district court erred by applying this heightened "more harm than good" test for insider information claims to Plaintiff's standard prudence claim, which requires only a showing that Defendants failed to act with the care and diligence of a prudent person.

Third, the district court wrongly assumed that the Plan's non-company stock assets serve the same function as the cash buffer discussed in *Perrone*. *See* JA321 (citing Defendants' motion to dismiss to assert, "When contributed dividends exceed the cash required for repurchase obligations, the resulting surplus forms a 'cash buffer' in the account."). The purpose of the cash buffer in *Perrone* does not apply here. In the *Perrone* 401(k) plan, the cash buffer ensured that participants could transact into or out of the company stock fund in one day, at any time they chose. The Plan here has no comparable mechanism: participants are not allowed to direct the investment of their assets, the Plan has no need for regular liquidity, and McCreary shares are privately held. JA7–JA8 ¶ 9, JA8 ¶ 14, JA20 ¶ 59, JA22 ¶ 65. Far from requiring flexible daily liquidity like the *Perrone* public company stock fund, the Plan repurchases McCreary shares in a single annual transaction whose date is known months in advance. JA20 ¶ 57, JA23–JA24 ¶ 67. Because *Perrone*'s cash buffer was a structural necessity to permit daily trading while the McCreary Plan transacts only once per year, the logic of *Perrone* does not apply here.

Fourth, the district court ignored fundamental facts in this case that render *Perrone*'s analysis irrelevant. Putting aside that the district court improperly granted Defendants the inference that non-company stock assets were invested for the purpose of financing future repurchases of McCreary stock from former employee participants, *see infra* at 28-30, the facts here render *Perrone* inapplicable. In *Perrone*, the cash buffer existed to provide daily liquidity whenever a participant chose to purchase or sell company stock. Here, there was no need to use the Plan's non-company stock assets for liquidity at all. Since 2019, the Plan has funded its share repurchases substantially through *new* dividends. JA22–JA23 ¶¶ 65–66. Most of prior years' dividends have sat idle in cash for years. *Id.* Any suggestion that future years' repurchase obligations may play out differently simply creates a fact dispute that cannot be resolved at this stage.

Additionally, even if the Plan could not fund repurchases using new dividends, Defendants need not have marooned millions of dollars of participants' retirement savings in cash for years. Rather, the Plan could invest its non-company stock assets in marketable securities (like stock mutual funds) and liquidate whatever portion of them is necessary each year to fund the share repurchase. JA18 ¶¶ 47–48. Indeed, the Plan has *five years* to prepare for these repurchase transactions given that McCreary is not obligated to repurchase stock until five years after a participant leaves employment at the company. JA23–JA24 ¶ 67. The district court did not address any of these facts. The district court erred by equating a long-term pool of assets that engages in rare and pre-scheduled transactions (the Plan's non-company stock assets) with a pool of assets that must be available at all times to facilitate frequent and unpredictable transactions (*Perrone*'s cash buffer).

Finally, the district court's application of the holding of *Perrone* to this case makes no sense. In *Perrone*, the plaintiffs alleged that 401(k) plan fiduciaries should have known that Johnson & Johnson was concealing the truth about its dangerous talc products, that J&J's stock price was therefore overvalued, and that new contributions to the company stock fund should have been allocated to the cash buffer rather than used to purchase additional J&J stock. 48 F.4th at 171, 177. The Third Circuit rejected this argument after finding it was not clear at the time that J&J stock was overvalued. *Id.* at 176. Based on these facts, the court declined to put the plan's fiduciaries "between a rock and a hard place" where they could be sued regardless of whether J&J stock subsequently went up or down. *Id.* at 177 (quoting *Dormani v. Target Corp.*, 970 F.3d 910, 915 n.4 (8th Cir. 2020)).

The district court attempted to transport that logic to Plaintiff's claim, stating that if Defendants invest the Plan's non-company stock assets in cash, "plan participants might assert a duty-of-prudence claim against them for allowing the cash buffer to generate 'investment drag.'" JA325 (quoting *Perrone*, 48 F.4th at 177). The district court continued, "On the other hand, 'if the fiduciaries hold the cash buffer steady or reduce it and then the stock price drops [or payouts and repurchases are higher than anticipated], plan participants might assert a duty-of-prudence claim for not increasing the cash buffer to mitigate losses.'" *Id.*

Neither part of this reasoning makes sense. To begin, while the concept of "investment drag" makes sense for a 401(k) plan's public company stock fund, it does not compute in this case. In *Perrone*, the company stock fund was invested almost exclusively in company stock, plus a small cash buffer that necessarily lowers the company stock fund's overall return if the stock is appreciating. If the money wasn't used for the cash buffer, it could have been used to buy more company stock. That is investment drag.

In this case, the Plan's non-company stock investments are a freestanding set of assets whose returns are unconnected to the returns of McCreary stock. Since purchasing 30% of McCreary in 2008, the Plan has never had the opportunity to purchase additional McCreary shares. JA7–JA8 ¶¶ 9-10, JA9 ¶ 16, JA14–JA15 ¶ 38. There is thus no "investment drag" concern about the investment of the non-company stock assets; the Plan's company stock and non-company stock assets simply yield their own returns.

The flip side of the district court's comparison fares no better. The district court posited that if Defendants reduced the Plan's cash holdings "and then the stock price drops," a plaintiff could claim that Defendants erred by investing less in cash and more in McCreary stock. JA325. But again, the facts of *Perrone* do not translate to the facts of this case. The district court's hypothetical assumes that the Plan's cash holdings could have been used to buy more company stock if

Defendants hadn't kept so much money in cash. But that was impossible. Unlike the *public company* stock at issue in *Perrone*, no additional McCreary stock was available to the Plan for purchase. JA7–JA8 ¶¶ 9–10. The considerations here—how to invest millions of dollars of Plan assets that cannot be invested in McCreary stock—simply do not map onto *Perrone*'s question of whether a prudent fiduciary "would find it advantageous to increase the cash buffer rather than buy the company's stock." 48 F.4th at 177.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the district court's order dismissing the Complaint and remand the case for further proceedings.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), Plaintiff respectfully requests that this Court hear oral argument in connection with this appeal, in light of the importance of the issues in this case to the retirement security of ESOP participants and the financial and equitable stakes of this class action lawsuit.

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Respectfully submitted,

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ATTACHMENT TO
CERTIFICATE OF COMPLIANCE

1. The foregoing Brief for Appellant complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i), because this Brief contains 8,381 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f).

2. The foregoing Brief for Appellant 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 this Brief has been prepared in proportionally spaced typeface using Microsoft Office Word 365 in 14 point Times New Roman.