No. 12-751

IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, ET AL.,

Petitioners,

v.

JOHN DUDENHOEFFER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The complaint in this case alleges a breach of the fiduciary duties of loyalty and prudence, in violation of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), by the trustees of an employee pension benefit plan that invests in the stock of the employer. The question before the Court is whether those allegations are inadequate on their face unless they establish that the employer's financial status is dire.

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BRIEF FOR RESPONDENTS

INTRODUCTION

In a case interpreting the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001 *et seq.*), the title of the statute should be enough to demonstrate the centrality of employee retirement income to the statute's intended operations. But petitioners' careful delineation of Congress' intermittent attention to the issue of employer stock ownership portrays the protection of employees as just one of several factors that bear a general relation to ERISA. Indeed, petitioners elevate the interest in employer stock ownership almost entirely over the interests of employees. Specifically, they read ERISA to excuse the fiduciaries of funds that own employer stock from any obligations of loyalty or prudence unless the employer is on the brink of insolvency. Because that perspective (and petitioners' presentation) largely ignores the statute on which this case turns, a few introductory words about ERISA's structure and effects are appropriate.

Contrary to petitioners' portrayal of ERISA as a statute focused on employer interests, ERISA was driven by the problems of employees and enacted to provide a vigorous federal protection for employees. In the view of its drafters and proponents, the statute was "possibly the most important single piece of legislation to assist the American worker in nearly 40 years." 3 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 67 (Comm. Print 1976) [hereinafter 3 ERISA Leg. Hist.]. As this Court well knows, "ERISA is a

comprehensive statute designed ***to promote the interests of employees and their beneficiaries*** in employee benefit plans." *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983) (citation omitted) (emphasis added).

The centrality of employee interest is not something to be teased from obscure committee hearings or statements for the *Congressional Record* that presumably went unheard by most of those who voted for the statute. It appears not only in the name of the statute itself; it pervades the statute's own description of itself. Thus, the opening words of ERISA state that because "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit plans], they are affected with a national public interest." ERISA § 2(a), 29 U.S.C. § 1001(a). The opening paragraph of the statute goes on to specify the particular risk to employee welfare that motivated the statute: concerns about "the soundness and stability of plans" and the consequent likelihood that beneficiaries would be "deprived of anticipated benefits." *Id.*

ERISA was far from Congress' first response to self-dealing and imprudence in the management of employee benefit plans. Rather, the House Report explained, "[e]xperience * * * has demonstrated the inadequacy of [previous enactments that were] wholly lacking in substantive fiduciary standards." H.R. Rep. No. 93-533, 93rd Cong., 2nd Sess. 4 (1973) [hereinafter ERISA House Report]. As this Court has put it, "[o]ne of Congress' central purposes in enacting this complex legislation [*i.e.*, ERISA] was to prevent the 'great personal tragedy' suffered by employees'" under the less effective regulatory regimes and common law systems theretofore in existence. *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374 (1980)

(quoting 3 ERISA Leg. Hist., *supra*, at 12). Thus, "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Congress' strategy for remedying the situation is explicit on the face of the statute, which delineates "the policy of [ERISA] to protect * * * the interests of participants in employee benefit plans and their beneficiaries, * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b).

The centerpiece of that policy was the adoption of federal duties of loyalty and prudence in ERISA § 404, 29 U.S.C. 1104. The duty of loyalty obligates fiduciaries to "discharge [their] duties with respect to a plan ***solely in the interest of*** the participants and beneficiaries and * * * ***for the exclusive purpose of*** * * * providing benefits to participants and their beneficiaries; and * * * defraying reasonable expenses of administering the plan." ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (emphasis added).

In addition to a federally mandated duty of loyalty, Congress also adopted a "new and stringent" standard for assessing the conduct of fiduciaries, S. Rep. No. 93-127, 93rd Cong., 2nd Sess. at 2 (1973) [hereinafter ERISA Senate Report], which ERISA denotes as the "[p]rudent man standard of care," ERISA § 404(a), 29 U.S.C. § 1104(a). That duty obligates the fiduciary to use "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." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). The Senate Report emphasized "the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many." ERISA Senate Report, *supra*, at 13.

The third leg of the statutory strategy includes an explicit private right of action designed to ensure vigorous private enforcement of the new federal duties. Specifically, ERISA § 409(a), 29 U.S.C. § 1109(a) makes "a fiduciary * * * personally liable to make good * * * any losses to the plan," and Section 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes "a civil action * * * by a * * * beneficiary * * * for appropriate relief."

STATEMENT

1. Petitioner Fifth Third Bancorp ("Fifth Third") is a bank holding company with operations in a number of States. This case concerns the Fifth Third Stock Fund, which is one of the investment choices available to participants in the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan"). The Plan is a "defined contribution" retirement plan that Fifth Third sponsors for its employees. *See* ERISA § 3(34), 29 U.S.C. § 1002(34); Pet. App. 4. The introduction to the Plan documents the Plan's central aim unambiguously: "The purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries." J.A. 284.[1]

[1] The Plan's own description of its purpose is in considerable tension with petitioners' frequent description of the sole

The Fifth Third Stock Fund is designed to be an employer stock ownership plan ("ESOP") and an eligible individual account plan ("EIAP"). *See* ERISA § 407(d)(3)(A), 29 U.S.C. § 1107(d)(3)(A).[2] Under the Plan, participants may specify that a portion of their salaries be contributed to the Plan. Because it is a so-called "401(k)" plan, they also may select a specific investment from a group of options established by the Plan fiduciaries. *See* Pet. App. 4; J.A. 123-33, 140-43 (summary of Plan provisions regarding contributions and selection of investments); *see also* 26 U.S.C. § 401(k).

In the first instance, all employer contributions are made initially into the Fifth Third Stock Fund, which "is invested primarily in shares of common stock of [Fifth Third]." J.A. 141, J.A. 350-51. If employees wish to do so, they have the option, after the employer makes contributions into the Fifth Third Stock Fund, to move those contributions into other investment choices available under the Plan.[3] J.A. 141, J.A. 576-77.

"purpose" of such plans as fostering long-term investment in the employer. *E.g.*, Petitioners' Br. 20, 34, 46.

[2] Importantly, the retirement Plan as a whole is not an ESOP, because it has investment options that do not involve employer stock. Department of Labor regulations provide that if a portion of a plan invests in employer stock, that portion is to be treated as an ESOP. 29 C.F.R. § 2550.407d-6(a); *see* Brief for the United States as Amicus Curiae (responding to this Court's invitation) at 4 n.1. It is for that reason also an EIAP.

[3] It is not an accident of generosity on the part of Fifth Third that employees have the option to move their pensions out of Fifth Third stock. *See* ERISA § 204(j), 29 U.S.C. § 1054(j) (requiring employers to grant employees that option).

2. Fifth Third traditionally was a diversified financial services holding company. Confronted by the popularity of subprime mortgages in the early years of this century, Fifth Third began to lower its underwriting standards to permit it to participate in that market.[4] It also began to offer a variety of novel mortgage products characteristic of the subprime mortgage industry. Predictably, the shift in underwriting standards and product design led to increased rates of default. By 2005, industry observers had begun to express concerns that the combination of relaxed lending practices and rising defaults posed risks for the stability of subprime lenders. As the problems with the industry accelerated and deepened, more than two dozen subprime mortgage lenders had failed by the early months of 2007. In the case of Fifth Third in particular, its involvement in the industry had caused it severe structural problems. The shift in business practices, and resulting instability, made Fifth Third a much different (and more unstable) investment than it had been at the time the Plan was formed. J.A. 43-51, 55-57.

3. Despite those problems with the industry and with Fifth Third itself, neither Fifth Third nor the other fiduciaries responsible for the Plan investigated the propriety of continued investments by the Plan in Fifth Third stock. Rather, Fifth Third and the other fiduciaries offered to the market incomplete and inaccurate statements, which had the twin effects of assuaging market concerns and causing artificial

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[4] The factual setting that the Statement elaborates relies heavily on the Consolidated Amended Class Action Complaint (the "Complaint"); because the case involves the propriety of granting a motion to dismiss, we treat the allegations in the Complaint as true and accurate. *See* J.A. 15-282.

inflation of the price of Fifth Third stock. J.A. 57-79 (specific allegations of more than a dozen false statements). Indeed, even as exigent circumstances caused the price of the stock to decline, petitioners continued to invest respondents' pension funds in Fifth Third stock and took no steps to divest the Fifth Third Stock Fund of any of the shares of the stock it already held. The failure of petitioners to investigate or otherwise respond caused the participants in the Fifth Third Stock Fund (which owned more than one hundred million dollars of Fifth Third stock), to suffer massive and entirely predictable losses, including a 74% decline in the value of the Fifth Third stock the fund held. J.A. 52-55, 80-88.

4. Respondents filed a complaint in August of 2008, alleging (among other things) that the actions of petitioners as fiduciaries of the Plan violated the duties imposed on them by Section 404 of ERISA[5]; the Complaint at issue was filed in September of 2009. J.A. 15-282. Among other things, the Complaint alleges that petitioners were aware of the dire circumstances facing Fifth Third, but failed to take any action to protect participants from losses, that petitioners did not consult with independent fiduciaries regarding appropriate measures to take in order to serve the interests of the participants of the Plan, and did not resign though they could not loyally serve the Plan. J.A. 88-89.

The Complaint details the conflicts of interest between the duty of petitioners to act solely in the interests of the participants and the incentives

[5] The Complaint also alleged breaches of the co-fiduciary obligations of ERISA § 405, 29 U.S.C. § 1105, by all of the petitioners, but those claims are not directly at issue here.

petitioners had to further their own interests (including the interests of Fifth Third). J.A. 89-92. The Complaint also alleges that the conflicting incentives of petitioners impelled them to take disloyal and imprudent actions that caused devastating losses for participants in the Plan. J.A. 88. Finally, the Complaint alleges that petitioners' failure violated petitioners' duties of loyalty and prudence under ERISA § 404(a), 29 U.S.C. § 1104.

5. The district court dismissed the Complaint in November of 2010. Pet. App. 28-54. Applying the so-called *Moench* presumption (articulated in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995)), the court reasoned that the failure to allege a "dire financial predicament" required dismissal. Pet. App. 45.

6. A unanimous panel of the court of appeals reversed. Pet. App. 1-27. The court drew its standard for assessing the allegations of the Complaint from *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), considering whether the Complaint "contain[ed] sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." Pet. App. 7 (quoting *Iqbal*, 556 U.S. at 678) (internal brackets and quotation marks omitted). The court emphasized the specific "enumerat[ion]" of information that should have led petitioners to investigate the exposure of the Plan to the stock of Fifth Third, and the allegations that petitioners' knowledge of the relevant events made continued investment in company stock imprudent. Pet. App. 13-14. Accordingly, the court reversed, concluding that the Complaint adequately stated a claim for relief under ERISA. Pet. App. 15, 23-24.

7. Petitioners sought rehearing and rehearing en banc, but the court of appeals denied that request without opinion or dissent. Pet. App. 55-56.

8. Petitioners then filed a petition for a writ of certiorari, which this Court granted (as to question 1) on December 13, 2013.

SUMMARY OF ARGUMENT

Petitioners present a case for the exercise of grand judicial decision making, balancing the incommensurate interests of employees in sound investment of their retirement assets against the interests of employers in having their employees invest in employer stock. From that balancing, petitioners derive a substantive rule that the ERISA fiduciary duties apply to plans that own employer stock only when the employer is in dire financial circumstances. But the case presents no occasion for free-floating judicial balancing of unanchored statutory objectives. Three points resolve the entire case.

1. First, Congress articulated the relevant legal standard in ERISA, which requires prudent management of the Plan "solely in the interest of" the beneficiaries and for their "exclusive" benefit, without regard for any conflicting interests of the employer. Because the Complaint plausibly describes disloyal and imprudent actions by petitioners that harmed respondents, it states a cause of action for breach of ERISA § 404.

2. Second, because Congress already has specified ERISA's accommodation of the interest of pension plans investing in employer stock, there is no occasion for this Court to erect a judicial superstructure of additional accommodations for those plans. ERISA § 404(a)(2) explicitly limits the exception for plans that own employer stock to the fiduciary duties related to diversification, on which respondents do not rely. Because ERISA § 404(a)(2) does not exclude the duties

of loyalty and prudence, those duties apply to funds that own employer stock with full force.

The aspirational references in ERISA § 404(a)(1)(B) calling for attention to the management of trusts of "like" aims do not justify a bright-line rule that exempts fiduciaries of retirement plans that own employer stock from the duties of loyalty and prudence that ERISA § 404(a)(2) preserves for them. Among other things, that narrow reading of the duty imposed by paragraph (a)(1)(B) renders paragraph (a)(2) superfluous and provides no justification at all for a limitation on the duty of loyalty.

Nor should it alter the result if a plan provides for investment in employer stock. ERISA §§ 404(a)(1)(D) and 410(a) obligate fiduciaries to ignore plan provisions that are inconsistent with their fiduciary duties. In any event, the Plan in this case explicitly requires the fiduciaries to engage in ongoing monitoring of the prudence of the Plan's investments. Furthermore, nothing in the Plan documents even purport to prohibit the fiduciaries from providing truthful and accurate information regarding Plan investments to the beneficiaries; petitioners indisputably could have provided truthful information without deviating from the Plan.

Finally, even if ERISA had not required the fiduciaries to ignore the terms of the Plan, and even if the Plan directly prevented responsive action, commonplace principles of trust law would require the trustees to deviate from the written terms of the Plan to protect the beneficiaries.

3. Third, none of the problems that enforcement of ERISA poses for Fifth Third can excuse disloyal or imprudent conduct by fiduciaries. The legal standard

in all cases should ask what a non-conflicted, loyal, and prudent fiduciary would have done under the circumstances. The Complaint alleges that such a fiduciary could have taken three steps: gathering and disseminating information, ceasing investments in Fifth Third stock, and shifting investments out of Fifth Third stock. The first of those required no deviation from the Plan and well might have mitigated the losses to the beneficiaries by motivating them to accelerate transfers of their investments into parts of the Plan that did not own Fifth Third stock.

The second and third steps would have required a change in the Plan's investment practices, but nothing in ERISA suggests that is problematic. Indeed, the Plan explicitly authorized those kinds of changes. J.A. 735 (Trust Agreement § 3.3(a)). The relevant question should be how a non-conflicted, loyal, and prudent fiduciary would have responded. If such a fiduciary would have altered the Plan's investment practices, respondents are entitled to no less.

We recognize that the relations between the fiduciaries and Fifth Third make the dissemination of information or changes in investment strategy more problematic than it would have been if the Plan were managed by professional independent fiduciaries. But it was Fifth Third that chose corporate insiders to manage the Plan that holds its employees' investments. If anything, that choice suggests a *more* stringent standard of review, not a *less* stringent standard.

Nor is it relevant that enforcement of ERISA duties could lead to the filing of class actions when disloyal and imprudent conduct harms the value of employee retirement funds. If the pleading standards are too lax, Congress can step in, as it has done in other

contexts. But no plausible pleading standards would justify dismissal of the Complaint in this case, which includes a detailed and specific delineation of conduct and events that directly tracks the relevant provisions of ERISA.

At bottom, petitioners' argument reduces to the idea that the interests in employee stock ownership justify a bright-line exception from ERISA's fiduciary duties. Specifically, petitioners argue that fiduciaries of an ERISA plan that invests in employer stock have no fiduciary duties to the employees *unless* the employer is in dire financial circumstances. The language, structure, and context of ERISA preclude the judicial articulation of any such exception.

ARGUMENT

I. Because The Complaint Plausibly Describes Disloyal and Imprudent Conduct That Harmed Respondents, It States A Cause of Action Against Petitioners Under ERISA §§ 404 and 502.

Petitioners contend that Congress' solicitousness for employee investment in employer stock almost entirely outweighs the interests of employees in having their pensions managed by loyal and prudent fiduciaries. Specifically, petitioners contend that the statute creates a "substantive hurdle" (Petitioners' Br. 49) that requires dismissal of any complaint against an ERISA plan that requires investments in employee stock unless the employer is in "dire" financial circumstances. *See* Petitioners' Br. 50-52.[6] Thus, to

[6] Although petitioners in their brief on the merits retreat from the common reference to "dire" circumstances in the petition (*e.g.*, Pet. 17), we do not discern any difference between that standard

put it directly, petitioners argue that fiduciaries of an ERISA plan that invests in employer stock owe no enforceable fiduciary duties *unless* the employer is in dire financial circumstances.[7] A straightforward review of ERISA and well-settled principles of pleading shows the fallacy of that perspective.

A. Section 404 of ERISA Imposes a Mandatory Federal Duty of Loyalty and Prudence on the Fiduciaries of Plans Covered by ERISA.

This case begins and ends with the language Congress has chosen in the relevant provisions of ERISA, which explicitly describe the elements of the causes of action pleaded in the Complaint. As this Court is well aware, Congress has imposed on the fiduciaries of ERISA plans "strict standards of trustee conduct, * * * most prominently, a standard of loyalty and a standard of care," *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570

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and the somewhat less uniform references in their brief on the merits to "extraordinary circumstances, such as a serious threat to the employer's viability," Petitioners' Br. 16, to "a serious threat to the company's ongoing viability," Petitioners' Br. 17, to "a serious threat to the continued viability of the company," Petitioners' Br. 28, or to "a serious threat to the company's viability as an ongoing concern," Petitioners' Br. 34 (citation and internal quotation marks omitted). Our brief uses "dire" financial distress as a shorthand substitute for the amorphous standard that petitioners articulate.

[7] We have not conceded that Fifth Third was not in "dire" financial circumstances, whatever that might mean. *See*, *e.g.*, J.A. 83 (discussing Fifth Third's borrowing $3.4 *billion* from the government's TARP fund). We do not discuss the point because it is in our view irrelevant to the proper legal analysis of the Complaint.

(1985). To be specific, ERISA provides in relevant part:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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 with like character and with like aims;

(C) by diversifying 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; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

ERISA § 404(a), 29 U.S.C. § 1104. We present the language in detail because of our abiding conviction that attention to the specific boundaries of the language Congress chose is all that is needed to resolve this matter.

1. ERISA Section 404(a)(1)(A) imposes a mandatory federal duty of loyalty.[8] ERISA § 404 is clear and

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[8] Petitioners' brief on the merits discusses the duty of prudence much more extensively than it does the duty of loyalty. But the duty of loyalty is an important part of respondents' answer to the question that petitioners drafted, on which the Court granted review ("Whether * * * Respondents were * * * required * * * to plausibly allege in their complaint that the fiduciaries * * * abused their discretion * * * in order to overcome the presumption that their decision to invest in employer stock was reasonable"). Pet. i. As the discussion below demonstrates, the allegations of disloyalty in the Complaint are adequate to overcome any such presumption. Moreover, because the allegations related to the duties of loyalty and prudence are intertwined in this case, it would be artificially constricted to consider one without the other.

In any event, respondents' allegations of disloyal conduct are before the Court, being directly validated by the decision below, criticized in the petition, and offered in the brief in opposition to support the judgment below:

straightforward. Its opening sentence states that "a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

The text is broad and unambiguous. Of relevance to this case, it explicitly prohibits actions by fiduciaries designed to further the interests of an employer, as opposed to the employee beneficiaries of the plan. The employer's interests surely are advanced by a plan in which its employees invest in its stock, but those interests can have no place in the activities of a

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- When the court of appeals upheld Count I of the Complaint, Pet. App. 25, it upheld a claim seeking relief for "Failure to Prudently and Loyally Manage the Plans' Assets," J.A. 97.
- The body of the petition repeatedly criticizes the Sixth Circuit's analysis of the duty of loyalty. Pet. 9 (discussing Pet. App. 12-13) (contending that the Sixth Circuit's "standards of prudence and loyalty" had not been applied by any other circuit); Pet. 21 (discussing Pet. App. 12-13) ("The court of appeals went * * * further than Congress or any circuit has ever gone, when it declared that [ESOP fiduciaries] are now subject to identical standards of prudence and loyalty.") (citations and internal quotation marks omitted); Pet. 23 (arguing that Sixth Circuit "impermissibly disregarded the ESOP-specific exemptions when it * * * impose[d] identical standards of prudence and loyalty") (citations and internal quotation marks omitted) (emphasis omitted).
- The brief in opposition repeatedly emphasized the distinction between the duty of loyalty and the duty of prudence. *E.g.*, Br. in Opp. 3, 24, 27.

fiduciary acting "solely in the interest of the participants and beneficiaries" and "for the exclusive purpose of" providing benefits. If the word "exclusive" is to have any meaning in this context, it must "exclu[d]e" the interests of employers from the concerns of the ERISA-loyal fiduciary.[9]

The Restatement (Third) of Trusts recognizes a similar (albeit narrower) duty: "Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries * * *." Restatement (Third) of Trusts § 78(1) (2007).[10] Importantly, the ERISA duty is even more categorical than the common-law duty. Where the Restatement duty can be cabined by alternative "provi[sions] in the terms of the trust," the ERISA duty is absolute: "Except as provided in sections [that do not relate to the duty of loyalty],[11] any provision in an

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[9] *See* Peter J. Wiedenbeck, ERISA: Principles of Employee Benefit Law 125 (2010) [hereinafter Wiedenbeck, ERISA Principles] (characterizing the breadth of the duty of loyalty as a "momentous discrepancy between the obligations of private trustees and employee benefit plan fiduciaries").

[10] The Restatement (Second) of Trusts, which was promulgated in 1957 (before the enactment of ERISA), includes a similar duty in § 170. The Uniform Trust Code (first promulgated in 2000) includes a similar duty in § 802. More than half of the States have adopted the Uniform Trust Code. *See* Uniform Law Commission, *Legislative Fact Sheet – Trust Code*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (last visited Feb. 24, 2014).

[11] The permitted exculpatory provisions in ERISA § 410(a) relate to the obligations of co-fiduciaries and multiple investment managers responsible for the same plan and generally specify the permitted allocation of liability among those individuals. ERISA § 405, 29 U.S.C. § 1105. Exceptions to the prohibition on exculpation also appear in ERISA § 410(b), which permits certain

agreement or instrument which purports to relieve any fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." ERISA § 410(a), 29 U.S.C. § 1110(a); *see also* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (obligating fiduciaries to comply with plan terms only "insofar as [they] are consistent" with ERISA).[12]

The comments to the Restatement emphasize that the "duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships." Restatement (Third) of Trusts, *supra*, § 78 cmt. a. The comments explicitly address the particular issue of loyalty relevant to the Complaint in this case:

> *f. Actions serving the interests of third persons or non-trust objectives.* In administering a trust the trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust. Thus, it is improper for the trustee to [act] for the purpose of benefiting a third person (whether or not a party to the transaction) rather than the trust estate or for the purpose of advancing an objective other than the purposes of the trust.

Restatement (Third) of Trusts, *supra*, § 78 cmt. f.

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types of insurance that covers potential liability under ERISA. ERISA § 410(b), 29 U.S.C. § 1110(b).

[12] *See generally* Wiedenbeck, ERISA Principles, *supra*, at 124-25 (discussing distinction between ERISA bar on exculpation and common-law rules permitting it).

The problem of disloyal pension fund trustees was not purely hypothetical. Rather, this was "[a] crucible of congressional concern," *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008) (citations and internal quotation marks omitted). Congress had a long history of attention to that problem, dating to specific and notorious examples of self-interested looting of pension funds, which extensive investigative hearings publicized in the 1950's and 1960's. *See*, *e.g.*, ERISA House Report, *supra*, at 1 (discussing the 1962 amendments to the Welfare and Pension Plans Disclosure Act to address "malfeasance and improper activities by pension administrators, trustees, [and] fiduciaries"); Daniel Fischel and John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1110 (1988) (discussing specific examples of fiduciary looting).

A strict duty of loyalty is inherent in the structure of trusts. As Fischel and Langbein explain,

> The logic of imposing relatively strict fiduciary duties upon the trustee, especially the stringent duty of loyalty, follows directly from the distinctive character of the trust relationship. The trust is frequently used as a governance mechanism in situations in which * * * there is a risk that the beneficiaries may be * * * unsuited to administer the property.
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> The strict fiduciary duties of trust law act as substitutes for monitoring by the directly interested parties. The duty of loyalty is prophylactic; its purpose is to deter the trustee from engaging in self-interested conduct at the expense of the beneficiaries.

Fischel & Langbein, 55 U. CHI. L. REV. at 1114.

In sum, a fiduciary violates ERISA's duty of loyalty when its administration of the plan reflects concern for the interests of the employer, as opposed to acting "solely" and for the "exclusive" benefit of the beneficiaries and participants.

2. ERISA Section 404(a)(1)(B) imposes a mandatory federal duty of prudence. The next paragraph of ERISA imposes a duty of prudence that is no less expansive. Specifying the "prudent man standard of care" described in the title to the Section, ERISA obligates a fiduciary to 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 like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

As with the duty of loyalty, Congress drew the duty of prudence directly from common principles of trust law. Thus, the Restatement (Third) of Trusts obligates the trustee "to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." Restatement (Third) of Trusts, *supra*, § 77(1).[13] It goes on to explain that the duty of prudence "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy." Restatement (Third) of Trusts, *supra*, § 90(a).

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[13] The Restatement (Second) of Trusts, which was promulgated in 1957 (before the enactment of ERISA), includes a similar duty in §§ 174 (prudent administration) and 227 (prudent investment). The Uniform Trust Code (first promulgated in 2000) includes a similar duty in § 804.

In sum, it is a violation of ERISA's fiduciary duties when a fiduciary fails to take or consider action with the appropriate level of diligence and care, given the specific facts and circumstances of the trust known to the fiduciary at the time.

B. The Complaint Plausibly Describes Disloyal and Imprudent Conduct, Committed by Petitioners to the Detriment of Respondents, in Violation of Section 404 of ERISA.

1. <u>A complaint satisfies Federal Rule of Civil Procedure 8 if it plausibly describes conduct that includes each element of the cause of action</u>. Assessing the adequacy of the allegations of the Complaint calls for a similarly routine application of settled principles, which this Court has summarized repeatedly in recent years. The basic rule, reflected in FED. R. CIV. P. 8(a)(2), is that the complaint must include a "short and plain statement of the claim showing the pleader is entitled to relief." "'[D]etailed factual allegations'" are not necessary, but the Rule does "deman[d] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The Court's recent decisions reflect a struggle with two types of challenging cases under Rule 8 – complaints that allege the elements of a claim, but not facts to support the existence of the elements; and complaints that are adequate if read literally, yet implausible on their face. *See Iqbal*, *supra*, 556 U.S. at 678 (describing "[t]wo working principles that underlie our decision in *Twombly*"). Neither problem is present here.

(a) On the first issue, it is plain that "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, *supra*, 556 U.S. at 678 (quoting *Twombly*, *supra*, 550 U.S. at 555); *see Iqbal*, *supra*, 556 U.S. at 678 (rejecting "'naked assertion[s]' devoid of 'further factual enhancement'" (quoting *Twombly*, *supra*, 550 U.S. at 557). But the 287-paragraph Complaint before the Court (J.A. 15-282) provides much more than that.

First, with regard to the duty of loyalty, the Complaint presents a series of facts that document a conflict of interest between petitioners and their duty to respondents – specifically the close financial and employment relations between the individual petitioners and Fifth Third itself. Among other things, the Complaint describes the roles some of the petitioners have on the board of directors of Fifth Third, the stock awards given to some of the petitioners, and the system basing compensation of other petitioners on maintenance of the price of Fifth Third's stock. J.A. 89-92.

The Complaint also alleges that petitioners acted on that conflict in ways that harmed respondents. The Complaint specifically documents a shift in the riskiness of the investment, which the employees could not reasonably have expected or anticipated; it also identifies more than a dozen false, misleading, and incomplete statements that petitioners made to respondent. J.A. 57-79; *see Varity Corp.*, *supra*, 516 U.S. at 506 ("lying is inconsistent with the duty of loyalty * * * codified in section 404(a)(1) of ERISA") (brackets, citation, and internal quotation marks omitted). The Complaint goes on to allege that despite knowledge that put them in a position to protect respondents, petitioners chose not to act to protect the

retirement savings of respondents, apparently elevating their own interests over the interests of respondents. J.A. 55-57, 98-105. Finally, the Complaint identifies a specific monetary loss that flowed from the misconduct it describes. JA 80-88, 105, 113.

The allegations regarding prudence are similarly specific, largely overlapping the allegations related to loyalty. Among other things, the Complaint outlines the increasing financial distress of Fifth Third and alleges that the individual petitioners were aware (or should have been aware) of those problems, which led to the price of Fifth Third stock being substantially overvalued. J.A. 55-57. As explained above, the Complaint also alleges that the individual petitioners did not respond to the situation with the diligence and attention characteristic of a prudent manager of an investment of this magnitude (more than $100 million, out of a total in the Plan of approximately $1 billion). J.A. 55-57, 98-105; *see* Ex. 99 to Fifth Third Form 10-K at 10-11 (2008).[14] Finally, the Complaint identifies a specific monetary loss that flowed from the misconduct it describes. J.A. 80-88, 105, 113.

In sum, there is no basis for suggesting that the Complaint fails to put Fifth Third on "'fair notice'" of the allegations against it, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, *supra*, 550 U.S. at 555). Whatever criticisms petitioners have leveled at the Complaint, they cannot reasonably suggest that the Complaint is limited to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," *Iqbal*, *supra*, 556 U.S. at 678 (quoting *Twombly*, *supra*, 550 U.S. at 555).

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[14] *Available at* http://www.sec.gov/Archives/edgar/data/35527/000119312508142275/dex99.htm (last visited Feb. 24, 2014).

(b) It is even harder to suggest that the Complaint fails to move "across the line from conceivable to plausible," *Iqbal*, *supra*, 556 U.S. at 680 (quoting *Twombly*, *supra*, 550 U.S. at 570). The allegations are detailed and specific, relying for the most part on indisputable matters of public record. Indeed, what makes the allegations so plausible is that they tell such a conventional and coherent story of the effects of conflicting interests on human action: individual defendants placed by their employer in a position of direct conflict, motivated by loyalty to the employer to further the interests of the employer rather than the interests of the employees. However trite such a story might seem if it were assessed as literature, it plainly serves the purpose of a complaint – providing a plausible allegation of disloyal and imprudent conduct by petitioners.

Indeed, petitioners themselves do not contest that point directly. The only arguments directly relevant to that point are the assertions by petitioners' amici that none of the truthful public information available to petitioners could have caused the price of Fifth Third stock to be overvalued: the publication of the information ensured, they say, that the information was incorporated into a perfect market price. *E.g.*, Amicus Br. of Keycorp 9.

But nothing in ERISA obligates this Court to accept a conception of a market functioning even more perfectly than its everyday participants believe. Our financial institutions include an entire industry that analyzes investments for the purpose of determining if they are overpriced or underpriced, with a goal of advising clients whether they should buy, hold, or sell, particular investments. *See also Amgen Inc. v. Connecticut Ret. Plans*, 133 S. Ct. 1184, 1204 (2013)

(Alito, J., concurring) (noting that substantial evidence undermines the credibility of the efficient markets hypothesis).

In any event, abstract notions of market efficiency have no relevance to the Complaint. It is central to the allegations of the Complaint, and entirely plausible, that the individual petitioners did not respond to such information with the same care, attention, and investigation as an independent (that is, non-conflicted) and prudent fiduciary would have. The appropriate question is not how the information might, or might not, have affected the price of the stock, but whether a non-conflicted and prudent fiduciary would have taken any action in response to the information available to petitioners.

II. ERISA's Duties of Loyalty and Prudence Apply To The Trustees of Plans That Own Employer Stock.

Although petitioners spend little time directly discussing ERISA's duties of loyalty and prudence, their brief suggests no fundamental disagreement with our understanding of those duties in the abstract. Rather, the core of their position is that those duties do not apply to ERISA plans that own employer stock, unless the employer happens to be in dire financial straits. They reach that conclusion by balancing the interests in employee ownership of employer stock against the duties imposed by ERISA, and concluding that the former interests prevail almost to the point of employer insolvency.

The central problem with that analysis is that Congress already has specified the way in which those interests should be balanced, and Congress' balance leaves the duties of loyalty and prudence on which

respondents rely unaffected by the Plan's investment strategy. Nothing in the general language of Section 404 or the provisions of an ERISA plan can overcome Congress' determination that fiduciaries retain duties of loyalty and prudence even if the plan owns employer stock.

A. Section 404(a)(2) of ERISA Limits the Duty to Diversify for Fiduciaries of Plans That Own Employer Stock, But Does Not Remove the Duties of Prudence and Loyalty.

Because the central issue in this case is the extent to which conventional fiduciary duties obligate fiduciaries of ERISA plans that own employer stock, the most important source is the language with which Congress addressed that very issue:

> In the case of an eligible individual account plan, * * * the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is [*sic*] not violated by acquisition or holding of qualifying employer * * * securities.

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2).

Reading that provision against the structure of subsection 404(a) as a whole, there can be no doubt that the Plan's investment in employer securities affects the duty to diversify (which is not at issue here), but not the duties of prudence and loyalty on which the Complaint relies. Because the exception in paragraph 404(a)(2) follows immediately upon the substantive rules stated in paragraph 404(a)(1), it must be read against that provision. Against the creation of three separate fiduciary duties in

paragraph 404(a)(1) (in paragraphs (1)(A), (1)(B), and (1)(C)),[15] the language can only be read to exclude the exception's application to paragraph 1(A) (the duty of loyalty) or to any aspect of paragraph (1)(B) (the duty of prudence) unrelated to diversification.

Because Congress has so directly addressed the conflict between the policy of fostering employee ownership of employer stock and the policy of securing the retirement income of employees, the long paeans of petitioners and their amici to the benefits of employee ownership of employer stock[16] are wholly irrelevant. We can take for granted that Congress at various times has thought it appropriate to encourage employees to own stock in their employer. And we can accept as a given that in some instances that policy has motivated substantial limitations on the rules that ordinarily govern ERISA plans. It might even be thought by some that it would be better social policy if plans that own employer stock were immune from ERISA altogether. But none of that can justify shifting the line of demarcation that Congress specified in paragraph 404(a)(2), which calls for the continued application of the duties of loyalty and prudence on which the Complaint relies.

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[15] Because the duty related to the provisions of the Plan (paragraph 404(a)(1)(D)) is mentioned neither in the Complaint nor in paragraph 404(a)(2), it is not directly relevant to the construction issue. Its most important function in this case is providing an example of Congress' settled determination that fiduciaries should ignore plan provisions inconsistent with ERISA.

[16] *E.g.*, Petitioners' Br. 4-9, 21-22, 35-40; Amicus Br. of Chamber of Commerce 5-13; Amicus Br. of ESOP Ass'n 20-26; Amicus Br. of Securities Industry and Financial Markets Ass'n 10-11, 24-26.

B. The General Language of Section 404(a)(1) of ERISA Does Not Vitiate the Balance Between Employer and Employee Interests That Congress Specified in Section 404(a)(2).

Counsel for petitioners are far too skilled to rest such a stark limitation of the statutory fiduciary duties on unanchored concerns about the benefits of employee stock ownership. Rather, they proffer a statutory hook for their argument in the general language of paragraph (a)(1)(B). To their mind, that language establishes a balance much more favorable to employer interests than the balance Congress explicitly struck in paragraph (a)(2). Specifically, they jump from Congress' general command that the fiduciary is to act as 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***," ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (emphasis added), to the specific idea that the trustees of ERISA plans that own employer stock operate, with rare exceptions, exempt from the conventional duties of loyalty and prudence. *See* Petitioners' Br. 25-29. Several obvious problems afflict that reading of paragraph (a)(1)(B).

1. Petitioners' reading of paragraph (a)(1)(B) ignores the context provided by paragraph (a)(2). The most serious problem is that petitioners elevate the loose and aspirational language of paragraph (a)(1)(B) over the explicit line-drawing in paragraph (a)(2). As this Court recently has had occasion to recognize, it makes no sense to use general language of a statute to create an exception that authorizes conduct more explicitly prohibited elsewhere in the statute. So, for example, in *RadLAX Gateway Hotel, LLC v.*

Amalgamated Bank, 132 S. Ct. 2065 (2012), a bankrupt debtor sought to "cram down" on unconsenting creditors a plan that would sell the collateral of the creditors without allowing the creditors to enter "credit bids" at the sale. Because subparagraph (ii) of Bankruptcy Code § 1129(b)(2)(A), 11 U.S.C. § 1129(b)(2)(A), explicitly required that such sales permit credit bidding, a unanimous Court refused to read paragraph (iii) of the same provision to allow sales without credit bidding:

> We find the debtors' reading * * * to be * * * contrary to common sense. A well established canon of statutory interpretation succinctly captures the problem: it is a commonplace of statutory construction that the specific governs the general. That is particularly true, where * * * Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.

RadLAX, *supra*, 132 S. Ct. at 2070-71 (brackets, citations, and internal quotation marks omitted).

That rule is no stranger to this Court's reading of ERISA. The Court emphatically has rejected the use of unanchored "notions" of statutory "purpose" as a basis for

> overcom[ing] the words of [the] text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs.

Mertens v. Hewitt Assocs., 508 U.S. 248, 261-62 (1993) (citation and internal quotation marks omitted).

In sum, to read paragraph (a)(1)(B) as broadening the explicit exception created in paragraph (a)(2) is to "cut" the language brutally "from the moorings" of its context, *Fisher v. U.S.*, 425 U.S. 391, 401 (1976). If Congress expected courts to infer vitiation of fiduciary duties from the reference to "like aims" in paragraph (a)(1)(B), then Congress had no need to enact (a)(2) at all.

Moreover, as if the statutory language were not clear enough, the proponents of ERISA addressed the issue even more explicitly in the Senate Report discussion of the exception: "It is emphasized, however, that even with respect to the transactions expressly allowed, the fiduciary's conduct must be consistent with the prudent man standards." ERISA Senate Report, *supra*, at 31. The emphasis on continued application of fiduciary duties to employer plans was not lightly considered. The Senate Report provides a detailed discussion of prior drafts of ERISA that would have given fiduciaries more latitude, followed by the rejection of those drafts based on concerns that "fiduciary-commercial relationships * * * tend to subordinate the strict professionalism expected of fund managers to business pressures and that, inevitably, certain fund managers are bound to yield to these pressures and cause trust fund abuse." Senate Report, *supra*, at 32.

The Committee acknowledged that the language of ERISA as adopted might destabilize "various established and recognized practices * * * in connection with employee benefit plans," but nevertheless concluded that the "overriding need to protect workers' pension funds * * * out-weighed [the effects of the statute on

fiduciaries and employers].” Senate Report, *supra*, at 32.

2. Petitioners’ argument does not apply to the duty of loyalty. Another foundational problem with petitioners’ reliance on the three-fold reference to “like” in paragraph (a)(1)(B) is that it offers no response to claims (like those in the Complaint) based on the duty of loyalty. To overcome that hurdle, petitioners must read the statute in three convoluted steps: (I) Congress carved the duty of loyalty out of the employer-stock exception in paragraph (a)(2); (II) Congress included vague references to “like” in paragraph (a)(1)(B) to overturn the boundaries drawn in (a)(2); and (III) Congress left it entirely to judicial construction to remove the duty of loyalty from the application of (a)(2). Perhaps it is simpler to read the statute as written, with paragraph (a)(1) describing the three-fold fiduciary duties, and paragraph (a)(2) specifying the exceptions from those duties for plans that own employer stock.

3. Petitioners’ reading of paragraph (a)(1)(B) reads a directive for fact-specific decision making as a command for hard-and-fast bright-line rules. A third problem with petitioners’ reliance on the “like” phrasing in paragraph (a)(1)(B) is that their reading is far from natural. In context, the references to enterprises of a “like character” with “like aims” plainly are aspirational reminders that the application of fiduciary duties is necessarily and inherently a fact-specific endeavor, not susceptible of broad and crisp generalizations.

To read those loose words as creating the precise superstructure of exceptions from fiduciary duty that petitioners prescribe is to force into the words a reading no ordinary reader would give them. Petitioners do not suggest that any court previously has

applied that language (or parallel language in the Restatement)[17] to do anything of the sort, and there is no reason the Court should go out of its way here to reject the plain implications of the language Congress chose to balance the relevant interests.

In sum, the context and language of paragraph (a)(1)(B) preclude judicial articulation of the legal rules petitioners discern in that provision.

C. The Terms of the Plan Regarding Investment in Employer Stock Do Not Vitiate the Fiduciary Duties of Loyalty and Prudence.

Finally, it bears emphasizing that the provisions of the Plan that provide for investment in employer stock cannot vitiate the fiduciary duties of loyalty and prudence. Four overlapping points make that clear.

First, as with the discussion above, this is a topic on which Congress already has spoken, emphatically rejecting the idea that the terms of a plan can exempt fiduciaries from the duties ERISA imposes on them: "Except as provided in [sections not relevant here], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA] shall be void as against public policy." ERISA § 410(a), 29 U.S.C. § 1110(a); *see also* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). The same section includes three specific exceptions (in the paragraphs of subsection 410(b)), but none of them

[17] *See* Restatement (Third) of Trusts, *supra*, § 90 (calling for administration that accounts for the "purposes" and "terms" of the trust). *Compare id.* cmt. f (suggesting that a judgment about risk "is not judged in the abstract but in terms of its anticipated effect on the particular trust's portfolio").

relate to the ownership of employer stock. It would be more than odd to add an uncodified judicially discerned exception to the list Congress prescribed.

Second, the problem of fiduciaries torn between following the language of a plan and following their duties to the beneficiaries does not arise in this particular case, because the Plan in this case permits the fiduciaries to alter the investment practices of the trust. Among other things, Trust Agreement § 3.3(a) gives the Administrator "the duty of monitoring [the investments of the Plan] to determine the continued prudence of offering such funds," and provides that "the Administrator shall change the investment funds if and when it deems it prudent to do so." J.A. 735. *See also* Pet. App. 4 (discussion of Plan terms by the court of appeals).

Third, and most importantly, the claims stated in the Complaint would create a basis for relief even if the terms of the Plan did require continued investment in Fifth Third stock and bar disinvestment in the stock already purchased. For one thing, nothing in the Plan documents bars the fiduciaries from truthfully advising respondents of public information (of which the fiduciaries were or should have been aware) indicating that investments in Fifth Third stock might have become imprudent. Thus, even if the Plan categorically prohibited changes in the investment strategy, nothing other than loyalty to the employer would have prevented the fiduciaries from acquiring and providing truthful investment information to the beneficiaries – the same information a prudent and disinterested fiduciary would have provided.

Finally, commonplace principles of trust law would justify (if not obligate) trustees to deviate from the

written terms of a trust in response to changed circumstances. For example, the Restatement (Third) of Trusts § 66(1) contemplates a "deviat[ion]" from the terms of a trust "if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust."[18] It would never be the case, then, that the terms of a trust would have the categorical effect of prohibiting conduct to protect the beneficiaries from the types of harms the Complaint describes. The central question always would be what a non-conflicted and prudent fiduciary would have done in response to the situation in which the Plan was placed. The facts alleged in the Complaint fall well within any reasonable reading of the existing rules for deviation. *See supra* pp. 6-8 (discussing relevant allegations in J.A. 57-59).

Petitioners argue that the Court must read ERISA to bar *all* deviations from the language of the Plan, lest the conventional duty of prudence conflict with the provision in ERISA § 404(a)(1)(D) obligating fiduciaries to follow the terms of the Plan. Petitioners' Br. 28-29.[19] But paragraph (D) itself eliminates any obligation to comply with terms that are not "consistent with" ERISA and our discussion above of ERISA § 410(a) shows that Congress intended fiduciary duties to prevail over inconsistent terms of ERISA plans. Together, those provisions obviate any need for a strained limitation of the duty of prudence. *See*

[18] *See also*, *e.g.*, Petitioners' Br. 30-34 (accepting this principle); IIA Austin W. Scott & William F. Fratcher, Scott on Trusts § 167, 287-88 (4th ed. 1987) (discussing deviation to prevent "substantial impairment" of trust).

[19] To be specific, petitioners argue that no deviations would be permitted except in "dire" circumstances; in that case, free deviations would be permitted.

supra pp. 17-18 (discussing the breadth of ERISA's exculpation provision, as compared to common-law principles).

If the text of the statute itself is not clear enough, the structure and operations of ERISA make clear how starkly a "no-deviation" rule would depart from a sensible construction of Congress' intentions. The common law always has permitted some deviation and has broadened considerably in recent decades. *See* Petitioners' Br. 32-33 & n.12 (acknowledging broadening).[20] But any debate over whether ERISA should be read as adopting the common law as it stood in the 1970's or current developing principles of trust law[21] seriously misapprehends the text, structure, and operations of ERISA. As we have pointed out repeatedly, the most prominent point on which ERISA departed from the common law was in Section 410, which suggests an intention to loosen the requirements for deviation, not tighten them.

More broadly, though, any rule that narrowly confines deviation would rest on a deep misapprehension of the difference between conventional trusts and

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[20] *See* John J. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 663-65 (1996) (explaining that the doctrine permits variation from any provision that "manifestly harms" the interests of the beneficiaries because of a presumed intention to benefit the beneficiaries); Peter J. Wiedenbeck, *Trust Variation and ERISA's Misbegotten "Presumption of Prudence*," forthcoming TAX NOTES (Mar. 2014) [hereinafter Wiedenbeck, *Trust Variation*] (manuscript at 12) (explaining that under current principles of trust law "material purposes that would obstruct change are not lightly to be inferred").

[21] *See* Petitioners' Br. 32-33 & n.12 (arguing that ERISA should be read as incorporating 1970's principles of trust law, frozen in time).

modern defined contribution plans. The doctrine of deviation in traditional trust law reflects the simple idea that the settlor of a trust, contributing the property, should have some ability to define the uses to which the property will be put. In a modern defined-contribution plan, by contrast, the concept of "settlor" is quite different, as contributions are made in part by employers, but largely by employees. In that context, it makes little sense strictly to constrain deviations out of some desire to further the interests of the employees who themselves contributed the funds.[22] Common-law doctrines establishing safety valves for the protection of beneficiaries provide no support for a rule that prohibits fiduciaries from taking loyal and prudent actions to further the interests of the employees whose retirement funds are at stake.

In the end, any conclusion that grants absolute (or near-absolute) priority to the terms of plans would be wholly perverse. In this context, for example, it would encourage employers to establish plans that absolutely forbid any shifting of investments, as opposed to plans (like this one) that give fiduciaries an explicit obligation to monitor the ongoing prudence of investments. Given the strength of ERISA's bar on exculpation it would be illogical to allow deviations even more rarely for ERISA plans than the common law allows for conventional trusts.

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[22] *See* Wiedenbeck, *Trust Variation*, *supra* (manuscript at 5-6) (discussing the difficulty of applying the "settlor" concept to the ERISA context).

III. The Concerns of Employers and Insiders Do Not Excuse Violations of Fiduciary Duties of Loyalty and Prudence.

Given the tenuous reading of the statute on which they rely, petitioners understandably emphasize extra-statutory concerns to justify the stark limitation on fiduciary duties that they propose. Two themes dominate their discussion: that application of normal standards of fiduciary liability places fiduciaries of funds that own employer stock in an untenably conflicted position; and that application of those same standards makes it unacceptably easy to bring class actions against companies that sponsor such plans or fiduciaries that operate them. Both concerns are spurious, largely because they elevate irrelevant employer interests over the beneficiary interests that ERISA brings to the fore.

A. The Concerns Fiduciaries Have For The Interests of Employers Do Not Excuse Disloyal and Imprudent Behavior.

The most persistent point petitioners make is that the prospect of litigation against fiduciaries of plans that own employer stock places those fiduciaries in an untenable position; they emphasize the harm that flows to the employer when fiduciaries take steps to protect the interests of the beneficiaries of the plan. Petitioners' Br. 40-44.[23] It should be obvious from the discussion above that this point all but admits a violation of the duty of loyalty the fiduciaries owe to the beneficiaries. If the fiduciaries were concerned

[23] *See also* Amicus Br. of Chamber of Commerce 15-16; Amicus Br. of ESOP Ass'n 15-19; Amicus Br. of Keycorp 18-19; Amicus Br. of Securities Industry and Financial Markets Ass'n 13-16, 26-28.

only about the interests of the employees and not at all about their own interests or the distinct interests of the employer, then the supposed tension would dissipate entirely. Examination of the actions that petitioners failed to take underscores this point.

1. First, and most obviously, fiduciaries loyal to the interests of the beneficiaries would have collected and disseminated truthful information about the continued prudence of employee investments in stock of Fifth Third. The dissemination of truthful information would have benefited the employees because it might have led more of them, more quickly, to move their investments from the Fifth Third Stock Fund to other options under the Plan.

To the extent the relevant information was public (and the information discussed in the Complaint appears to have been public in some sense, albeit unknown to the employees), it is difficult to discern any legitimate concern the fiduciaries might have. It is reasonable to assume that a wholly non-conflicted fiduciary as a matter of course would have evaluated the prudence of all of the investments, something professional investment managers would do as a matter of course for an asset in which a client had invested more than $100,000,000.[24] And if that information suggested the prudence of shifting the client's investments toward, or away from, that asset, presumably a loyal investment manager would have disseminated that information to the beneficiaries.

Perhaps it never occurred to the fiduciaries in this case (who were not professional investment managers) to consider the problem in that light. Or perhaps they

[24] *See* J.A. 36 (discussion of investment of Plan in stock of Fifth Third).

were concerned that dissemination of that information would have collateral consequences because of its distribution by officers of Fifth Third. But neither of those possibilities is the responsibility of the beneficiaries of the Plan, and neither of them would have constrained the activities of a wholly non-conflicted and prudent fiduciary motivated exclusively to protect the interests of its wards.

To be sure, discovery might bring to light material information that was not yet public at the time; disclosure of that information to the beneficiaries might have affected the price of the stock or affected other private interests of the individual petitioners or Fifth Third itself. But petitioners do not suggest any reason to think that disclosure of such information would have violated any applicable securities laws. So the nonpublic nature of the information seems irrelevant to any assessment of what a non-conflicted fiduciary would have done with the information.

Fifth Third and the individual petitioners might have had justifiable reasons for keeping the information private; the Complaint does not allege that the securities laws mandated disclosure of that information. But if they wished to put themselves in a position to keep material information confidential, then they should have structured their affairs to prevent such information from coming into the possession of individuals with a fiduciary obligation to disseminate it publicly. Thus, it is not the "company's decision to establish an ESOP [that has] far-reaching ripple effects on its corporate disclosures," Petitioners' Br. 44, it is the company's decision to put fiduciary control of that fund in the hands of corporate insiders.

That is the root of the matter – if the Plan were operated by independent fiduciaries, with no conflicting interests, none of these problems would have arisen. It is possible that independent fiduciaries would not have learned of the material nonpublic information. But we can never know what they might have learned, or done, because petitioners arranged the affairs of the Plan to deprive respondents of one of the principal protections that ERISA guarantees: the services of an exclusively loyal and non-conflicted fiduciary. What we do know is that the deeply conflicted fiduciaries that were in place did nothing with the information that they did have, public or nonpublic. There is nothing in the least bit problematic about holding them accountable for that.

We recognize that the status of some of the petitioners as officers and employees of Fifth Third is not, by itself, a violation of ERISA's duty of loyalty. *See* ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3). *See generally Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112-13 (2008) (discussing conflicts of interest where employer controls decision making under a plan). But that provision can no more readily provide insider fiduciaries a free pass than the provisions of ERISA § 404(a)(2) discussed above. Read in light of the obligation to act "solely in the interest" of the participants and beneficiaries and for the "exclusive purpose" of providing benefits to the participants and beneficiaries, it is plain that insider fiduciaries must comply with ERISA standards. *See also* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (obligating fiduciaries to comply with plan terms only "insofar as [they] are consistent" with ERISA); ERISA § 410(a), 29 U.S.C. § 1110(a) (invalidating plan provisions inconsistent with ERISA).

Wherever the boundary might be, insider fiduciaries cross the line when they take action (or choose not to take action) not because of a considered view that they are furthering the best interests of the employees, but rather because the action serves their own interests. *See Glenn*, *supra*, 554 U.S. at 127-28 (Scalia, J., dissenting) (explaining that a fiduciary violates the duty of loyalty when a "conflict *actually* and *improperly motivates*" the fiduciary's actions) (emphasis omitted). As Judge Friendly put it:

> Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. This, in turn, imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers and directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.

Donovan v. Bierwith, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J.) (citations omitted).

Again, we do not suggest that conflicted insider fiduciaries like petitioners are liable solely because of the dual loyalties to which they have subjected themselves. It is, however, surely relevant to the assessment of *their* actions. *See Glenn*, *supra*, 554 U.S. at 115-19; *Donovan*, *supra*, 680 F.2d at 275-76

(suggesting that conflicted fiduciaries should conduct an independent investigation before following a course of action that provides substantial benefits to the employer); *Leigh v. Engle*, 727 F.2d 113, 125-26 (7th Cir. 1984) (following *Donovan*).[25] Most importantly for present purposes, it crystallizes the proper analysis of the conflicted situation that petitioners emphasize: if the conflict interferes with the performance of their duties then it provides no substantial excuse, but rather demonstrates a plain breach of loyalty.

2. Given the information available to petitioners, it also is reasonable to expect (as the Complaint alleges) that a non-conflicted and prudent fiduciary would have gone beyond the mere collection and dissemination of information, to alter the routine practice of increasing investments in the stock of Fifth Third, or even to sell some of the stock of Fifth Third already owned by the Plan. Surely at a minimum a non-conflicted and prudent fiduciary would have investigated the prudence of altering the investment strategy of the Plan. *See* J.A. 735 (Trust Agreement § 3.3(a)).

Petitioners probably are correct to assert that such actions by the existing fiduciaries would have had adverse consequences for Fifth Third and for

[25] The parallel to the *Revlon* duties of directors under Delaware law is instructive. Following the decision in that case, directors that are corporate insiders considering a merger, sale, or similar transaction (where their interests are inherently conflicted) avoid liability for breach of the duty of loyalty only by appointment of a committee of independent directors to consider the decision in question. *See Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). *Compare* Petitioners' Br. 47 (comparing fiduciary duty of the individual petitioners to business judgment rule under Delaware law).

petitioners. Indeed, we agree that in some circumstances those actions might have violated the securities laws if they had not been preceded by the disclosure of any nonpublic information that motivated the shift in investment strategy. *See* Petitioners' Br. 42-44.

But that does not at all suggest (as petitioners and their amici argue) that fiduciaries cannot be held responsible for failing to take action. To the contrary, it simply underscores the point made above. Petitioners' decision to put fiduciary control of the Plan in the hands of individuals closely tied to Fifth Third and privy to confidential information about its affairs cannot reasonably absolve petitioners of their duties of loyalty and prudence to the beneficiaries of the Plan. If anything, the inherent conflict of the position into which Fifth Third placed the fiduciaries should subject them to *greater* scrutiny, not less. As between the employees and the corporate insiders who arranged the situation, why should the employees bear the loss occasioned by any difficulties the situation presented?[26]

No pressing legal constraint drove Fifth Third to place the Plan in the control of corporate insiders.[27]

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[26] In assessing the relative ability to bear those losses, it bears mentioning that low-wage workers are much more likely to have their plan assets concentrated in company stock than higher-wage workers. *See* GORDON P. GOODFELLOW & SYLVESTER J. SCHIEBER, *Investment of Assets in Self-Directed Retirement Plans*, in POSITIONING PENSIONS FOR THE TWENTY-FIRST CENTURY 67, 86 (Michael S. Gordon et al. eds., 1997).

[27] Indeed, it is now commonplace for large corporations to place employee pension plans in the control of independent fiduciaries. *See*, *e.g.*, *Honeywell Pension Move*, N.Y. Times, Dec. 31, 2002, *available at* http://www.nytimes.com/2002/12/31/business/honeywell-pension-move.html?pagewanted=print (last visited Feb. 24,

The decision not to employ professional and independent investment managers for an investment of that size might be permitted by ERISA, but it certainly is not required. In the early days of ERISA, when the majority of ERISA plans were defined benefit plans, employers had a strong business reason for controlling the plans, because employers retained the residual investment risk. With the rise of defined contribution plans like this one,[28] for which employees bear the residual investment risk, that concern has largely eroded. *See LaRue*, *supra*, 552 U.S. at 255-56 (discussing implications of shift from defined benefit to defined contribution plans); Fischel & Langbein, *supra*, 55 U. CHI. L. REV. at 1127.

It also bears noting that the plans that owned employer stock at the time ERISA was enacted for the most part were supplemental pension plans. A shift during the intervening decades so that the dominant usage of those plans is to provide the primary source

2014) (appointment of U.S. Trust by Honeywell); W.R. Grace & Co., *Grace Announces Sale of Shares by the Grace 401k Plan* (Apr. 12, 2004, *available at* http://www.grace.com/media/NewsItem.aspx?id=513545 (last visited Feb. 24, 2014) (appointment of State Street by W.R. Grace); Dealbook, *Ford Plans to Repay $4 Billion in Debt*, June 30, 2010, *available at* http://dealbook.nytimes.com/2010/06/30/ford-plans-to-repay-4-billion-in-debt/?_php=true&_type=blogs&_r=0 (last visited Feb. 24, 2014) (discussing "independent fiduciary and investment manager" for the Ford pension plan); Mary Williams Walsh, *Pension Shift at Northwest Raises Fears*, N.Y. Times, Apr. 5, 2003, *available at* http://www.nytimes.com/2003/04/05/business/pension-shift-at-northwest-raises-fears.html?pagewanted=all&src=pm (last visited Feb. 24, 2014) (discussing appointment of Aon Consulting as an independent fiduciary for Northwest Airlines plan).

[28] The point is particularly true for 401(k) plans, like this one, that offer a variety of investments.

of retirement income makes it even less tolerable to adopt a rule putting those plans largely outside the ERISA fiduciary regime.[29] Indeed, an intervening change in the applicable tax rules (which imposes a tax penalty on early withdrawals from such funds) has all but eliminated the use that was common when ERISA was enacted.[30]

The proponents of ERISA contemplated that the fiduciary duties it imposed might lead to changes in extant business practices. *See* ERISA Senate Report, *supra*, at 32. The possibility that enforcement of those standards might lead to more independent management of employee pension plans can hardly justify reading the statute to preserve business practices that dominated the landscape against which Congress felt the need to enact ERISA in the first instance.

B. The Ease or Difficulty of Bringing Litigation Against Employers and Insiders Is a Function of Legal Standards and Pleading Rules Within the Domain of Congress.

Petitioners and their amici also decry the undue ease with which opportunistic attorneys can initiate class actions against companies that sponsor ERISA plans investing in employer stock or the fiduciaries that manage them. In general, the claim is that these are mere "stock drop" actions, predicated on nothing more than a decline in the value of the employer's

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[29] *See* Wiedenbeck, *Trust Variation*, *supra* (manuscript at 16-18).

[30] *See* 26 U.S.C. § 72(t). *See generally* Wiedenbeck, *Trust Variation*, *supra* (manuscript at 19) (discussing the adoption of that rule in 1986 and its effect on the uses of ERISA plans owning employer stock).

stock.[31] Indeed, amici go so far as to claim that these ERISA "stock drop" actions should be condemned as an illegitimate end run around the constraints of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).[32] Petitioners similarly contend that application of normal fiduciary duties will have courts second-guessing reasonable decisions of fiduciaries. Petitioners' Br. 39-41.

To be sure, few class actions against the fiduciaries of ERISA plans challenge a rise in the value of investments. There is nothing remarkable about that, given the difficulty of proving damages in the management of an asset that has increased in value. But whatever might be true about the specificity of those complaints as a group, the criticism is wholly unfounded with regard to the Complaint at issue here (J.A. 15-282). As summarized above, the 287-paragraph Complaint details a longstanding course of misconduct, relying on prodigious documentation, detailing numerous specific actions of petitioners that precede and accompany the period during which the price of the stock fell. For allegations drafted before discovery has commenced, they are remarkably detailed.

But of course the important point is that the PSLRA does not apply here. The existence of the PSLRA shows Congress' ready attention to whatever stress putative "stock drop" actions might place on normal

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[31] Amicus Br. of Chamber of Commerce 19-21; Amicus Br. of ESOP Ass'n 7-10; Amicus Br. of Keycorp. 10-18; Amicus Br. of Securities Industry and Financial Markets Ass'n 30-35.

[32] Amicus Br. of Keycorp 9-10.

rules of pleading. There will be time enough for the Court to parse special pleading rules for ERISA class actions if Congress decides to enact them. For the present, though, the Court is left with only the stringent fiduciary standards of ERISA and the customary pleading standards articulated in FED. R. CIV. P. 8 as interpreted in *Iqbal* and *Twombly*.

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In the end, petitioners' central point is not that the Complaint fails to state a cause of action under the customary standards of loyalty and prudence. Rather, petitioners contend that the Court should use the interest in fostering employee stock ownership to create a rule that requires dismissal of any complaint that fails to establish that the employer is in dire financial straits. Although the lower courts following *Moench* have regarded this as a "presumption," petitioners are more forthright: they articulate a substantive rule calling for dismissal of a complaint that fails adequately to allege financial distress of the employer. *See* Petitioners' Br. 46 & n.19, 50-52.[33]

To be clear, if all complaints that do not establish financial distress are to be dismissed, this means that the fiduciaries of plans that own employer stock owe no enforceable duties of prudence and loyalty *except* to employees of financially distressed companies. We have demonstrated above that no sensible construction of Congress' intent can support that rule. Could Congress have intended to excuse the fiduciaries of a plan who sell their own stock (anticipating financial distress) but at the same time take no action to advise the employees either of those sales or of the

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[33] *See* Amicus Br. of Chamber of Commerce 18 (same).

information motivating those sales?[34] Or a fiduciary who purchases stock with the funds of employees, despite actual knowledge that the securities were overvalued (among the allegations of this Complaint)?

Surely a more sensible standard is the one Congress adopted: that fiduciaries are held to their traditional duties of loyalty and prudence, whether the fund owns employer stock or other assets. That standard presents a simple question, readily amenable to customary methods of proof and judicial review: how do the actions of the fiduciaries compare to the actions that wholly non-conflicted, loyal, and prudent fiduciaries would have taken? Under that standard, the Complaint describes conduct actionable under ERISA.

CONCLUSION

This is far from the first occasion on which this Court has examined the duties Congress imposed on the fiduciaries of ERISA plans. Our view is that the text provides such a clear answer in this case that nothing further is relevant. To the extent the Court feels a need to look further, we think the Court's own words adequately suggest the incongruity of the exemption petitioners discern in the narrow gaps of ERISA's "reticulated" framework (*Mertens*, 508 U.S. at 251 (citation and internal quotation marks omitted)):

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[34] The hypothetical is all too realistic. *E.g.*, Richard A. Oppel, Jr., *Employees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. Times, Nov. 22, 2001, at A2 (discussing the juxtaposition of sales of Enron stock by company executives with a steep decline in the retirement funds of Enron employees invested in Enron stock); *see also* Susan J. Stabile, *Enron, Global Crossing, and Beyond: Implications for Workers*, 76 St. John's L. Rev. 815, 824 (2004) (reporting that Enron employees lost 70%-90% of their retirement funds and discussing similar incident at Global Crossing).

> The statute itself says that it seeks "to protect the interests of participants and beneficiaries by establishing standards of conduct, responsibility, and obligation for fiduciaries and providing for appropriate remedies and ready access to the Federal courts." Section 404(a), in furtherance of this general objective, requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries." Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.

Varity Corp., *supra*, 516 U.S. at 513 (citations and ellipses omitted).

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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