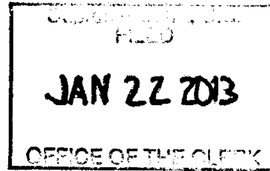

No. 12-751

IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, et al.,
Petitioners,

v.

JOHN DUDENHOEFFER, et al.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* KEYCORP IN SUPPORT OF PETITIONERS

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BRIEF OF THE *AMICUS CURIAE*

KeyCorp respectfully submits this brief under Supreme Court Rule 37.2(a) as *amicus curiae* in support of petitioner seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

KeyCorp is a bank holding company headquartered in Cleveland, Ohio. Approximately 30,000 employees and former employees of KeyCorp and its affiliate entities participate in the company's 401(k) retirement plan. Many of these individuals have chosen to invest a portion of their plan accounts in KeyCorp stock. Since 2008, several former employees have brought alleged class actions against KeyCorp and several of its senior officers based on ERISA claims very similar to those asserted against petitioner here. *See Taylor v. KeyCorp, et al.*, Case No. 08-cv-1927 (N.D. Ohio, Aug. 11, 2008) (consolidated); *Metyk v. KeyCorp, et al.*, Case No. 10-cv-2112 (N.D. Ohio, Sept. 22, 2010) (consolidated).

The first named plaintiff in *Taylor* received an unsolicited phone call to file the lawsuit. *Taylor v. KeyCorp*, 2010 WL 3702423, at *3 (N.D. Ohio Aug.

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[1] Consistent with Supreme Court Rule 37.2(a), counsel for petitioners and respondents both received timely notice and consented to the filing of this brief. Correspondence reflecting this consent is on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than KeyCorp made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

12, 2010). Discovery ultimately revealed she had made a profit investing her plan account in KeyCorp stock during the proposed class period. *Id.* A second named plaintiff never invested her plan account in KeyCorp stock, and subsequently refused to participate in the case. *Id.* at *1, n.1. Following dismissal of the *Taylor* action for lack of constitutional standing, plaintiffs' attorneys found two new plaintiffs to file an identical lawsuit. This new action, *Metyk*, remains pending.

The consequences of this manufactured litigation are real. KeyCorp files this *amicus* brief because the Sixth Circuit—in direct conflict with the several other courts of appeal that have addressed these same issues—has made it far too easy for plaintiffs to get a meritless claim under ERISA past the pleading stage. By unnecessarily exposing companies to the risk, disruption and expense of protracted litigation, the Sixth Circuit's decision thwarts Congress's clear intent to protect a company's ability to provide its employees with the opportunity to have an ownership stake in the company for which they work.

STATEMENT

Many 401(k) retirement plans contain an employee stock ownership plan ("ESOP") component through which the company's employees are able to invest their plan accounts in company stock. Congress codified ESOPs and "enacted a number of laws designed to encourage employers to set up such plans" because "[l]inking worker pay to company performance is thought to increase worker

productivity and company loyalty. . . ." *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 880 n.7 (9th Cir. 2010); *see also Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983) (ESOPs "expand[] the national capital base among employees—an effective merger of the roles of capitalist and worker"); *Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) ("[T]he concept of employee ownership constituted a goal in and of itself.").

Plaintiffs' class actions attorneys have recently inundated the federal courts with ERISA cases alleging companies and their plan fiduciaries breached their duties merely by providing plan participants with the option of investing in company stock. *See, e.g., In re Dell, Inc. ERISA Litig.*, 563 F. Supp. 2d 681, 687 (W.D. Tex. 2008) (noting "more than fifty [recent] court decisions in cases alleging breaches of fiduciary duties after an employer's stock significantly declined"). These cases are always filed after a decline in the company's stock price, and their universal theme is that the plan's fiduciaries should have foreseen the drop and protected the participants from losses associated with it. They are generically referred to as "ERISA stock-drop" cases.

These cases typically follow a uniform playbook. One count of the complaint is a "prudence" claim, alleging company stock was such a bad investment during the proposed class period that the plan's fiduciaries were required to forcibly liquidate participant holdings and bar any further purchases. A second count is typically a "misrepresentation" claim, alleging the company made misstatements in its securities filings, which are purportedly

"fiduciary communications" actionable under ERISA merely because these filings were incorporated by reference into plan documents.

The plaintiffs in these ERISA stock-drop cases, with the benefit of hindsight, broadly challenge the defendant's prior business practices that allegedly caused the stock-price decline at issue. Discovery is therefore wide-ranging and expensive. The potential liability can also be daunting. For large companies with thousands of 401(k) participants, company stock holdings often run into the hundreds of millions of dollars, if not more. If the company's stock price loses value, as happened to the majority of publicly-traded companies during the recent economic crisis, these companies become a ready target for substantial class action litigation.

Recognizing that Congress's intent was to encourage employee ownership, not punish it, the other courts of appeal had recently imposed two important limitations on such claims. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1280, 1284 (11th Cir. 2012); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140, 145 (2d Cir. 2011); *Quan*, 623 F.3d at 882; *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256-57 (5th Cir. 2007); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 348-49 (3d Cir. 2007).

First, applying the so-called "*Moench* presumption," *see id.*, 62 F.3d at 571, these courts have held that an ESOP fiduciary cannot be held liable for failing to take the drastic measure of liquidating company stock from the plan, unless the plaintiffs have pleaded facts demonstrating the

company was in truly dire circumstances. *See In re Citigroup*, 662 F.3d at 140-41; *Quan*, 623 F.3d at 882. These courts further held this presumption should be applied at the motion-to-dismiss stage, so as not to require defendants to endure sprawling and costly litigation where the plaintiff's claims have no chance of succeeding. *See Lanfear*, 679 F.3d at 1281; *Edgar*, 503 F.3d at 349.

Second, these courts refused to hold ESOP fiduciaries liable under ERISA for alleged misstatements contained in their company's securities filings, merely because these filings were incorporated by reference into plan documents, as required by the federal securities laws. *See In re Citigroup*, 662 F.3d at 145; *Kirschbaum*, 526 F.3d at 257; *see also Gearren v. The McGraw Hill Cos., Inc.*, 660 F.3d 605, 611 (2d Cir. 2011) (same).

The Sixth Circuit rejected both of these positions. As for the prudence claim, the court—in effect ignoring the fact ERISA exempts ESOP fiduciaries from the duty to diversify plan assets—held that ERISA "imposes identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." Pet. App. 13 (emphasis in original). Further magnifying this error was the court's refusal—contrary to every other circuit court to decide the issue—to apply the *Moench* presumption on the pleadings. *Id.* at 11-12.

The Sixth Circuit also allowed plaintiffs' misrepresentation claim to go forward, despite the fact that this claim was based solely on alleged misstatements in Fifth Third's securities filings.

Pet. App. 22. This holding—which creates a direct conflict with the Second, Fifth, and Eleventh Circuits—dramatically expands ERISA liability, and carves a gaping hole in the strict limitations Congress has placed on securities fraud claims.

This Court should review the Sixth Circuit's decision because it makes it too easy for plaintiffs in this circuit to surpass the important bulwark of a motion to dismiss, merely by alleging that ESOP fiduciaries should not have allowed plan participants even to have the choice of investing in company stock—a choice that Congress intended to protect and encourage. Fifth Third's petition presents an important opportunity for this Court to make it plain to companies, wherever they are located, that they can continue to allow their employees to invest in company stock without facing constant and undue risk of liability as the company's stock price inevitably rises and falls over time.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S DECISION THREATENS CONGRESS'S EMPLOYEE OWNERSHIP GOALS BY TREATING ESOPS LIKE CONVENTIONAL RETIREMENT PLANS.

A. Congress first passed legislation encouraging the formation of ESOPs forty years ago, as part of the Regional Rail Reorganization Act of 1973. *See* 45 U.S.C. § 716(e)(3) (requiring re-organization plan to set forth "the manner in which employee stock ownership plans may . . . be utilized for meeting the capitalization requirements of the Corporation"); *see*

also 45 U.S.C. § 702(7) (defining ESOP as "a technique of corporate finance . . . designed to build beneficial equity ownership of shares in the employer corporation into its employees").

Since that time, Congress has frequently enacted legislation reinforcing its policy of promoting employee investment in company stock. *See, e.g.*, Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (1975) (providing ESOPs with corporate tax credit); Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1590 (1976) (increasing allowable tax deductions for ESOP contributions); Economic Recovery Tax Act, Pub. L. No. 97-34, 95 Stat. 172 (1981) (making interest paid on loans from ESOP fully deductible); Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984) (providing tax incentives for lenders making loans to ESOPs and tax deductions for dividends passed through to ESOP participants); Small Business Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (permitting S corporation shareholders to participate in ESOPs); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (expanding provisions allowing deductions for dividends paid on reinvested ESOP stock); American Job Creations Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) (permitting S corporations to use distributions on stock held by plan to repay loans used to acquire stock).

ERISA remains the foundation for this legislative effort, because the statute expressly exempted ESOP fiduciaries from many of the restrictions that it otherwise applied to pension plan fiduciaries. For

example, the statute excludes ESOPs from the requirement that a pension plan may not hold more than 10 percent of its assets in employer securities. *See* 29 U.S.C. § 1107(b). Indeed, the statute *requires* ESOPs to be "primarily" invested in employer securities, *see id.* at § 1107(d)(6), and it expressly permits ESOPs to invest *all* their holdings in company stock. *Id.* at § 1107(b)(2)(iii).[2]

More importantly, ERISA exempts ESOP fiduciaries from any duty to diversify plan assets. ERISA generally requires a pension plan fiduciary to "discharge his duties . . . with the care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity . . . would use," 29 U.S.C. § 1104(a)(1)(B), including to "diversify[] the investments of the plan so as to minimize the risk of large losses." *Id.* at § 1104(a)(1)(C). But ERISA specifically exempts ESOP fiduciaries from this requirement. *See* 29 U.S.C. § 1104(a)(2) ("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 securities . . . .") (emphasis added); *see also* H.R. Conf. Rep. 93-1280, 1974 U.S.C.C.A.N. 5038, 5097 (1974) ("In recognition of the special purpose of [eligible] individual account plans . . . the

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[2] ERISA also exempts ESOPs from the statute's prohibited transaction provisions for purchases of company stock, so long as these purchases are made for "adequate consideration." 29 U.S.C. § 1108(e); *see also* 29 U.S.C. § 1002(18) (defining adequate consideration to mean "the price of the security prevailing on a national securities exchange").

diversification requirements of [ERISA] and any diversification principle that may develop in the application of the prudent man rule is not to restrict investments by eligible individual account plans in qualifying employer securities. . . .").[3]

B. The purpose of ERISA's diversification exemption is to insulate ESOP fiduciaries from liability for doing precisely what Congress intended them to do—permitting employees to invest their plan accounts in company stock. As the Ninth Circuit correctly recognized, "If there is no duty to diversify ESOP plan assets under the statute, it logically follows that there can be no claim for breach of fiduciary duty out of a failure to diversify, or in other words, arising out of allowing the plan to become too heavily weighted in company stock." *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) (quotation omitted); *see also Kirschbaum*, 526 F.3d at 249 (dismissing claim that plan became "too heavily weighted" in company stock); *Lanfear*, 679 F.3d at 1278 ("ESOP fiduciaries are exempt from the duty to diversify; indeed, they have a duty not to diversify.").

Thus, the relevant question for ERISA prudence claims like these is not whether the plan held too

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[3] An ESOP is a type of "eligible individual account plan" (EIAP), all of which are exempted from the duty to diversify. *See* 29 U.S.C. § 1107(d)(3)(A). For ease of reference, both EIAPs and ESOPs are referred to as "ESOPs" for purposes of this brief. *See, e.g., In re Citigroup ERISA Litig.*, 662 F.3d 128, 139 (2d Cir. 2011) (holding presumption of prudence applies equally to ESOPs and EIAPs); *Howell v. Motorola*, 633 F.3d 552, 568-70 (7th Cir. 2011) (same).

much company stock, but whether the fiduciaries breached their obligations by allowing plan participants to invest in "even one share" of it. *See Kirschbaum*, 526 F.3d at 249 (plaintiff alleged "it was imprudent for the Plan to hold even one share of REI stock"); *Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 638-39 (N.D. Ohio 2009) ("Plaintiffs admit that their prudence claim is not that Defendants breached their fiduciary duty by failing to diversify the Plan, but that they breached their fiduciary duty by permitting any participant to have the option of holding or investing in even one share of KeyCorp stock after December 31, 2006, when Key common stock was an excessively risky vehicle for retirement savings.") (quotation omitted).

Accordingly, to prevail on such a claim, plaintiffs have to prove an extreme proposition—that the company stock had become such an ill-advised investment that the plan fiduciaries were required to liquidate every single share then held by plan participants, and prohibit those participants from buying any additional shares going forward.

Recognizing the drastic nature of such a claim, the Second, Third, Fifth, Ninth, and Eleventh Circuits have all held ESOP fiduciaries cannot be held liable for continuing to invest plan assets in company stock except in the most dire of circumstances. *In re Citigroup*, 662 F.3d at 140 (holding that "only circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms"); *Quan*, 623 F.3d at 882 (plaintiff must make allegations that "clearly

implicate the company's viability as an ongoing concern or show a precipitous decline in the employer's stock combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement") (quotations omitted); *Kirschbaum*, 526 F.3d at 255 (rejecting alleged imprudence claim where there was "no indication that REI's viability as a going concern was ever threatened, nor that REI's stock was in danger of becoming essentially worthless"); *Edgar*, 503 F.3d at 348 (dismissing claim where plaintiff's allegations did not indicate the "type of dire situation which would require defendants to disobey the terms of the Plans by not offering the Avaya Stock Fund as an investment option"); *see also Lanfear*, 679 F.3d at 1280 (plaintiff must show "the ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate") (quotation omitted).

The Sixth Circuit, however, did not embrace this standard. Rather than require plaintiffs to meet a specific standard to prove ESOP fiduciaries acted imprudently by continuing to permit investment in company stock, the court offered only a vague, general formulation—that plaintiffs must "prove that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Pet. App. 12 (quotation omitted). Thus, the court continued, "if a 'prudent man acting in a like capacity and familiar with such matters' would not have undertaken that conduct at issue, then an ESOP or any other fiduciary may not do so regardless of whether a dire situation, pending

bankruptcy, or impending collapse exists." *Id.* at 13 (quoting 29 U.S.C. § 1104(a)(1)(B)). The Sixth Circuit held this "unembellished standard makes sense," because ERISA imposes "identical standards of prudence and loyalty on *all* fiduciaries, including ESOP fiduciaries." *Id.* at 12-13 (emphasis in original).

Finally, the Sixth Circuit gave ERISA stock-drop plaintiffs a free pass to expensive and disruptive discovery, by ruling that this "presumption of reasonableness" cannot be applied on a motion to dismiss. *Id.* at 13; *but cf. In re Citigroup*, 662 F.3d at 139 ("Where plaintiffs do not allege facts sufficient to establish an abuse of discretion, there is no reason not to grant a motion to dismiss.").

In making these holdings, the court ignored the fact ERISA specifically carves out the duty to diversify from an ESOP fiduciary's duty of prudence. The court also ignored the host of practical problems its "unembellished standard" creates, all of which generate powerful incentives to discontinue the use of ESOPs in this circuit—an outcome directly at odds with Congressional intent. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590 (1976) (urging courts not to make employee ownership goals unattainable through "rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.").

To begin with, the Sixth Circuit's decision puts ESOP fiduciaries "in the untenable position of having to predict the future of the company's stock performance." *Kirschbaum*, 526 F.3d at 256. Unlike the Sixth Circuit, the other courts of appeal have recognized that without a strong standard to protect ESOP fiduciaries from liability, these fiduciaries would have to "play" the stock market and liquidate massive amounts of company stock any time they feared the stock price might be headed for a fall. But as the Fifth and Ninth Circuits have correctly noted, "the long-term horizon of retirement investing requires protecting fiduciaries from pressure to divest when the company's stock drops." *Id.* at 254; *see also Quan*, 623 F.3d at 882 (same).

And that is only where the fiduciaries' dilemma starts. If fiduciaries forcibly liquidate an ESOP and the company's stock price then increases, they would "face liability for that caution." *See Edgar*, 340 F.3d at 349 (quotation omitted). Indeed, fiduciaries have been sued under ERISA for doing exactly that. *See Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 3 (1st Cir. 2009) (fiduciaries sued for divesting company stock at "imprudently low price"); *Tatum v. R.J. Reynolds Tobacco Co.*, 392 F.3d 636, 639 (4th Cir. 2004) (fiduciaries sued for liquidating employer stock fund from 401(k) plan).

Moreover, the drastic step of liquidating an ESOP would almost certainly do more harm than good. With the benefit of hindsight, plaintiffs in these cases allege their plan fiduciaries should have liquidated their ESOPs of what in many cases is hundreds of millions of dollars of company stock,

typically when it is trading at near-peak prices. *See Dudenhoeffer v. Fifth Third Bancorp, et al.*, Case No. 1:08-cv-538, Consol. Compl. (ECF # 54) ¶¶ 15, 45, 186, 243 (Fifth Third stock was trading at more than $40 per share when plaintiffs allege defendants should have forcibly liquidated the plan's assets). But even if plan fiduciaries had the clairvoyance to predict future stock performance, such a substantial amount of stock could not be dumped on the market without causing a significant drop in its price, thereby harming all the company's shareholders—including the plan participants on whose behalf these cases are purportedly brought.

As the Eight Circuit has stated, it would be "fanciful" to believe ESOP fiduciaries could flood the market in this way "without creating a much more severe impact on stock price than the alleged impact [the company's] actual response caused." *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010) (affirming grant of motion to dismiss stock-drop case); *Kirschbaum*, 526 F.3d at 256 ("[F]rom a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price."); *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009) (decision to eliminate company stock as investment option would be "clarion call to the investment world that the Committee lacked confidence in the value of its stock," which would have "catastrophic effect on [its] stock price."), *aff'd by Quan*, 623 F.3d 870.

The Sixth Circuit ignored these practical concerns. Departing from the thoughtful holdings of

the other courts of appeal, the Sixth Circuit adopted a vague, "unembellished" standard of review that treats ESOPs like conventional retirement plans. If allowed to stand, the Sixth Circuit's decision will raise the stakes for companies headquartered in this circuit that wish to provide their employees with the opportunity to invest in company stock—an outcome that is directly contrary to Congress's intent to encourage employee ownership.

II. THE SIXTH CIRCUIT'S DECISION IMPROPERLY SUBJECTS SECURITIES FILINGS TO FIDUCIARY STANDARDS.

A. As is true in most ERISA stock-drop cases, the plaintiffs here also assert a misrepresentation claim based exclusively on alleged misstatements contained in Fifth Third's securities filings. Pet. App. 18. The Sixth Circuit reversed the district court's dismissal of this claim and held—again contrary to every other circuit court to address the issue—that securities filings are subject to ERISA merely because they were incorporated by reference into plan documents, in this case, the plan's Summary Plan Description ("SPD"). *Id.* at 22. In so holding, the Sixth Circuit has created dangerous new precedent that allows plan participants to bring veiled securities fraud claims under the guise of ERISA, thereby eviscerating the important limitations Congress has placed on such claims.

The "threshold question" in every ERISA fiduciary duty case is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to

complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Thus, communications are actionable under ERISA only if made in a "fiduciary capacity." *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996).

Plaintiffs acknowledge their misrepresentation claim is based solely on Fifth Third's securities disclosures, which Fifth Third files pursuant to the federal securities laws.[4] Pet. App. 31, 50. The Sixth Circuit held these disclosures were actionable under ERISA because Fifth Third "chose" to incorporate by reference its securities filings into plan documents. Pet. App. 18, 22. But Fifth Third did not "choose" to incorporate these filings by reference into plan documents. Rather, the federal securities laws *require* every publicly traded company that offers its stock to employees through an employee benefit plan to incorporate these filings by reference into a prospectus given to plan participants. *See* 15 U.S.C. § 77e(a) (security must be registered with SEC to be lawfully sold); 17 C.F.R. § 239.16b (issuers may use Form S-8 to register securities "offered to its employees . . . under any employee benefit plan"); http://www.sec.gov/about/forms/forms-8.pdf (Form S-8); *see also id.* at 8-9 (Item 3. Incorporation of Documents by Reference) (requiring registrant to

[4] *See* 15 U.S.C. § 78m (requiring filing of periodic reports as required by the SEC); 15 U.S.C. § 78o-(d) (same); *see also* 17 C.F.R. § 240.13a-1 (implementing regulation requiring issuers to file annual reports); 17 C.F.R. § 240.13a-13 (same with respect to quarterly reports); 17 C.F.R. § 240.13a-11 (same with respect to current reports). These laws further mandate the form these filings must take, and the information they must contain. *See* 17 C.F.R. §§ 249.308a, 249.310.

incorporate periodic filings by reference into prospectus provided to plan participants).

Plaintiffs allege Fifth Third, like many other companies,[5] met this obligation by providing plan participants with a combined prospectus and SPD—a practice expressly permitted by the Securities and Exchange Commission. 17 C.F.R. § 230.428(1)(ii) (Documents constituting a section 10(a) for Form S-8 registration statement) (registrant "may designate an entire document or only portions of a document as constituting part of the section 10(a) prospectus"). The mere fact that Fifth Third sent the SEC-mandated prospectus in combined form with the ERISA-mandated SPD should not magically transform its securities filings into fiduciary communications. *See Fisher v. J.P. Morgan Chase & Co.*, 469 Fed. Appx. 57, at *2 (2d Cir. May 8, 2012) ("The only false or misleading statements identified by plaintiffs are in SEC filings that plaintiffs contend were incorporated into the Plan's Summary Plan Description. ERISA, however, holds fiduciaries liable solely to the extent that they were acting as a fiduciary . . . when taking the action subject to the complaint.") (quotation omitted).

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[5] *See In re Bausch & Lomb Inc. ERISA Litig.*, 2008 WL 5234281, at *8 (W.D.N.Y. Dec. 12, 2008) ("[T]he securities laws require that Plan Participants are offered access to SEC filings that are provided to potential purchasers or owners of the company stock. This requirement is usually fulfilled by incorporating by reference a company's SEC filings into the plan's prospectus/SPD.").

This is the same position the Department of Labor has taken in prior litigation: "The Secretary agrees that a company and its officers do not become ERISA fiduciaries by filing SEC forms, such as the Form 10K or Form 10Q, which all companies that issue stock to the public are required to file. . . . That is true even if the securities filings are distributed by others to plan participants or incorporated by reference into plan documents." *Kirschbaum v. Reliant Energy, Inc.*, No. 06-20157, Brief of Secretary of Labor, Elaine L. Chao, In Support of Plaintiffs-Appellants at pg. 4, n.2 (Aug. 17, 2006).

B. The Sixth Circuit's decision to create new potential ERISA liability based solely on a company's securities filings is misguided. If the defendants did in fact issue false or misleading filings, then plan participants, along with all other shareholders, already have the right to seek relief—under the securities laws. *See Fisher v. J.P. Morgan Chase & Co.*, 703 F. Supp. 2d 374, 388 (S.D.N.Y. 2010) ("[I]f JP Morgan Chase filed 'materially false and misleading' 8-Ks, 10-Qs, and 10-Ks with the knowledge that those filings were false, JP Morgan Chase may have run afoul of the federal securities laws, but it did not violate ERISA by doing so."), *see also Gearren v. The McGraw Hill Cos., Inc.*, 690 F. Supp. 2d 254, 273 (S.D.N.Y. 2010) (same).

Moreover, permitting this claim would undermine Congress's carefully crafted laws regarding when companies can be held liable for misstatements in their securities filings. Congress has recently addressed this issue on two separate occasions—the Private Securities Litigation Reform Act of 1995 and

the Securities Litigation Uniform Standards Act of 1998. *See Demings v. Nationwide Life Ins. Co.*, 593 F.3d 486, 490-91 (6th Cir. 2010) (O'Connor, J., Ret.) (discussing statutes). And on both occasions, Congress sought to *limit*, not expand, the circumstances under which companies may be held liable. *See Demings*, 593 F.3d at 490 ("In enacting PSLRA, Congress was primarily concerned with 'nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers of the clients whom they purportedly represent.'") (quotation omitted); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) ("Proponents of the Reform Act argued that [securities fraud class action] abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors.").

If the Sixth Circuit's decision is allowed to stand, plan participants holding company stock in this circuit will have the unique right to bring additional misrepresentation claims based solely on alleged misstatements contained in securities filings. By doing so, plaintiffs and their counsel can avoid the PSLRA's heightened pleading and proof requirements. *See, e.g.*, 15 U.S.C. § 78u-4(b)(1) (complaint must identify "each statement alleged to have been misleading," and "the reason or reasons why the statement is misleading"); *id.* at (b)(2)(a) (plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"); *id.* at (b)(3)(D) (staying discovery pending motion to dismiss).

Indeed, the Sixth Circuit was careful to note that fiduciaries in the circuit can face liability under ERISA "regardless of whether [their] statements or omissions were made negligently or intentionally." Pet. App. 16 (quotation omitted); *but cf. Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1796 (2010) ("In a § 10(b) action, scienter refers to a mental state embracing intent to deceive, manipulate, or defraud.") (quotation omitted); *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1324 (2011) (complaint adequately pleads scienter under PSLRA "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged") (quotation omitted).

Congress enacted the PSLRA to prevent "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only the faint hope that the discovery process might lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 104-369, 1995 U.S.C.C.A.N. 730, 731 (1995). The Court should not allow plaintiffs' attorneys to sidestep these limitations by challenging the same purported misconduct under ERISA. This is particularly so given that the Sixth Circuit premised this substantial new potential liability on such a thin reed—the mere fact Fifth Third provided its plan participants with a combined prospectus and SPD rather than burden them with two separate documents.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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