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

PETITIONERS' REPLY BRIEF

James E. Burke
Counsel of Record
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Pursuant to Supreme Court Rule 15.6, Petitioners Fifth Third Bancorp, Kevin T. Kabat, and the members of the Fifth Third Bank Pension, Profit Sharing and Medical Plan Committee, who include Paul L. Reynolds, Nancy Phillips, Greg D. Carmichael, Robert Sullivan, and Mary Tuuk, file this Reply to address new points raised in Respondents' Brief in Opposition ("Opposition").

INTRODUCTION

Respondents' arguments in their Opposition do not undermine any of the compelling reasons Petitioners put forth for granting their Petition for a Writ of Certiorari ("Petition"). Rather, the Opposition reinforces that this case is an appropriate vehicle for the Court to address the important and recurring questions of ERISA law regarding (1) the proper standard of review to be applied at the pleading stage to an ESOP fiduciary's decision to remain invested in employer stock, and (2) whether the mere incorporation of allegedly false or misleading SEC filings into plan documents is a sufficient basis for an ERISA breach of fiduciary duty claim.

For more than a decade, federal district courts have conflicted over whether a presumption of reasonableness, overcome only by an abuse of discretion, should be applied to an ESOP fiduciary's investment decisions at the pleading stage. This conflict has now been answered by the circuit courts and the Second, Third and Eleventh Circuits have answered in the affirmative. The Sixth Circuit, however, disregarded this precedent and answered this question in the negative, thus creating a clear and

unwarranted split among the circuits. This conflict is problematic because circuit courts are now deciding very similar cases differently. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012). If the Sixth Circuit's decision is allowed to stand, it will encourage forum shopping among the district courts in these respective circuits and create unfairness for litigants whose identical conduct is being judged by different standards of review in different courts.

Respondents attempt to distract the Court from the seriousness of this split in authority by incorrectly arguing that no conflict exists because this case differs from *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011), *Edgar v. Avaya*, 503 F.3d 340 (3d Cir. 2007), and *Lanfear, Inc.*, 679 F.3d 1267. Respondents contend that because the Plan at issue in this case allegedly does not require that the Fifth Third Stock Fund be an investment option under the Plan, the Sixth Circuit's decision does not conflict with the application of the presumption of reasonableness at the pleading stage in *Citigroup*, *Edgar* and *Lanfear*. Opp. at 12-20. Respondents are wrong.

The Fifth Third Plan, like the plans in *Citigroup, Edgar* and *Lanfear,* expressly requires that an employer stock fund *shall* be an investment option under the Plan. In fact, the Plan language at issue in this case is essentially identical to the plan language analyzed in *Citigroup*, *Edgar* and *Lanfear*. Therefore, all four circuit court cases confronted essentially identical factual circumstances, making the split in authority all the more glaring. Identical plan language cannot justify conflicting opinions as to

whether the presumption of reasonableness applies at the pleading stage.

With regard to the issue of whether incorporation of allegedly false and misleading SEC filings into plan documents states a valid ERISA claim, Respondents unsuccessfully attempt to distinguish the Second Circuit decision of *Gearren v. The McGraw Hill Cos., Inc.*, 660 F.3d 605 (2d Cir. 2011). *Gearren* also addressed the issue of incorporating allegedly misleading SEC statements into a plan-mandated Summary Plan Description ("SPD") and held that this was insufficient to state a valid ERISA breach of fiduciary duty claim. According to Respondents, because the holding in *Gearren* was based on a pleading deficiency that allegedly does not exist in the instant case, there is no split with the Sixth Circuit. Opp. at 32-33. A simple read of Respondents' complaint, however, demonstrates that, like the complaint in *Gearren*, both contain only conclusory allegations that ERISA fiduciaries "knew or should have known" that statements in securities filings were false or misleading without any allegations of "how" these fiduciaries had such knowledge. Thus, both complaints are essentially identical.

Due to the irreconcilable decisions by the circuit courts relating to both of these issues, this Court needs to intervene to restore uniformity with respect to these important and recurring questions of ERISA law.

ARGUMENT

I. This Case is Not Distinguishable from *Citigroup*, *Edgar* or *Lanfear* to Warrant a Different Analysis or Holding

The principal argument in Respondents' Opposition is based upon a demonstrably incorrect premise. Respondents argue that, because the Fifth Third Plan does not require investment in an employer stock fund like the plans in *Citigroup, Edgar* and *Lanfear*, the Sixth Circuit's decision not to apply the presumption of reasonableness at the pleading stage does not conflict with the decisions of the Second, Third and Eleventh Circuits. Opp. at 12-20. Respondents' argument is wrong.

A comparison of the express language from each of the ERISA plans completely rebuts Respondents' argument and makes clear that there is no basis to distinguish the conflicting holdings of these courts:

- ***Citigroup* Plan:** "Trustee *shall* maintain, within the Trust, the Citigroup Common Stock Fund and other Investment Funds." *Citigroup*, 662 F.3d at 133-34 (citing § 7.01 of the Citigroup Plan) (emphasis added).

- **Fifth Third Plan:** "[I]n all events, the Fifth Third Stock Fund, as described in Section

3.4(a)(1) below, *shall* be an investment option." Reply App. 45 (emphasis added).[1]

- ***Citigroup* Plan:** Trustee must "maintain at least 3 investment Funds in addition to the Citigroup Common Stock Fund." *Citigroup*, 662 F.3d at 133-34 (citing § 15.06(b) of the Citigroup Plan).

- **Fifth Third Plan:** "In all events, the Administrator *shall* direct the Trustee to make available at least three investment funds in addition to the Fifth Third Stock Fund." Reply App. 26-27 (emphasis added).

- ***Edgar* Plans:** "Plans provide that the investment options '*shall* include the Avaya Stock Fund, which *shall* be invested primarily in shares of Avaya common stock, with a small portion in cash and other liquid investments.'" *Edgar*, 503 F.3d at 343 (emphasis added).

- **Fifth Third Plan:** "The Trustee *shall* segregate a portion of the Plan Assets into a separate fund known as the 'Fifth Third Stock Fund.' The Fifth Third Stock Fund *shall* be invested primarily in shares of common stock of Fifth Third Bancorp." Reply App. 27 (emphasis added).

---

[1] Because the Fifth Third Plan documents were attached by Respondents to their complaint and are central to their claims, they were properly considered by the district court below, *see, e.g., Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88-89 (6th Cir. 1997), and therefore can be analyzed by this Court on review.

- ***Lanfear* Plan:** "The language of the Plan requires that one of the available investment funds be a 'Company Stock Fund.' The 'Company Stock Fund' is 'the Investment Fund invested primarily in shares of [Home Depot] stock.'" *Lanfear*, 679 F.3d at 1271-72.

- **Fifth Third Plan:** "The Administrator shall have the discretionary authority and fiduciary duty to determine the investment funds to be made available, from time to time, for this purpose. However, in all events, the Fifth Third Stock Fund, as described in Section 3.4(a)(1) below, *shall* be an investment option." Reply App. 45 (emphasis added).

Respondents' assertion that the Fifth Third Plan did not require Petitioners to offer the Fifth Third Stock Fund as an investment option is therefore refuted by the language of the Plan itself.

Respondents also contend that because the Fifth Third Plan allowed Petitioners to "remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates," this distinguishes the decisions of the other circuits. Opp. at 10-11, 13, 15-17, 19-20. This is irrelevant. *See Gearren,* 660 F.3d at 610; *Taveras v. UBS AG*, No. 12-1662, 2013 U.S. App. LEXIS 4061, at *18-19 (2d Cir. Feb. 27, 2013). Just last month, the Second Circuit, in *Taveras*, re-affirmed its previous assertion in *Gearren* that the presumption of reasonableness applies to ERISA plans that contain language requiring investment in an employer stock fund even if those plans also contain a provision permitting fiduciaries to

terminate that same fund. *Taveras*, 2013 U.S. App. LEXIS, at *17-19 (*citing Gearren*, 660 F.3d at 610). In *Taveras*, two plans were at issue – the Plus Plan which contained language that mirrors the language in the Fifth Third Plan stating that an employer stock fund "shall" be an investment option under the plan, and a SIP Plan where the plan document contained "no language mandating that the UBS Stock Fund 'shall' be offered as an option to investors in the plan." *Id.* at *17-25. The court held that the fiduciaries of the Plus Plan were entitled to the presumption of reasonableness at the pleading stage, but the fiduciaries of the SIP Plan were not. *Id.* at *19, 25. In reaching this holding, the Second Circuit found it irrelevant that the Plus Plan contained language permitting the fiduciaries to terminate the stock fund as an investment option at its discretion:

> The Plan Document does provide the Plus Plan Investment Committee a means by which to terminate the company's fund as an investment option if it so chooses. But the ability to remove the company's fund from those funds available to plan investors existed also in *Gearren*, where we applied the presumption of prudence. *See Gearren II*, 660 F.3d at 610. As the District Court held, "[b]ecause the Plus Plan [Plan Document] clearly and explicitly limits the trustee's discretion by requiring that the UBS Stock Fund be offered as an investment option, the Plus Plan fiduciaries are entitled to a presumption of prudence." (citations omitted). We agree that the Plus Plan Document required the plan's fiduciaries to offer the UBS Stock Fund and, therefore, affirm the District Court's

> holding that the fiduciaries of the Plus Plan are entitled to the presumption of prudence in reviewing their decision to offer the UBS Stock Fund as an investment option. *Id.* at *18-19.

Virtually identical plan language is at issue here. Accordingly, there is no justification for the Sixth Circuit's refusal to apply the presumption of reasonableness at the pleading stage to Petitioners' continued investment in employer stock, while the Second, Third and Eleventh Circuits did the opposite under identical factual circumstances. This is a clear, obvious circuit split which subjects fiduciaries to different standards of review in different courts for identical conduct pursuant to identical plan language. This is a genuine conflict ripe for resolution by this Court now.[2]

II. The Second Circuit's *Gearren* Holding is Not Distinguishable on the Issue of Incorporation of SEC Filings

In response to Petitioners' citation to *Gearren*, Respondents argue that the Second Circuit's holding was premised on the plaintiffs' failure to allege that the defendants knew the SEC statements incorporated into the SPD were false and misleading, and that this

---

[2] Respondents make the plea for this Court to delay review of this issue until more of a factual record has been developed in this case. *See* Opp. at 12. However, whether or not Petitioners are entitled to application of the presumption of reasonableness at the pleading stage is clearly a legal question that is currently being addressed by the circuit courts – at the pleading stage – so no additional facts are necessary to its resolution.

pleading deficiency is not present in this case. Opp. at 32-33. This is a misstatement of the *Gearren* opinion.

In *Gearren*, as well as a subsequent Second Circuit opinion on this exact issue, *In re Glaxosmithkline ERISA Litig*., No. 11-2289, 2012 U.S. App. LEXIS 18552, at *10 (2d Cir. Sept. 4, 2012), the court clearly stated that its dismissal of the plaintiffs' breach of fiduciary duty claims based on incorporation of SEC statements into plan-mandated SPDs was not because the plaintiffs failed to make the conclusory allegation that the defendants knew or should have known the SEC statements were false and misleading, but rather because they failed to allege "how" the defendants obtained this knowledge. *Gearren*, 660 F.3d at 611.

Respondents here made barely a conclusory allegation of knowledge (*see* Complaint ¶¶ 49, 59), and completely fail to identify a single allegation in their complaint of "how" Petitioners, as purported ERISA fiduciaries, would have had knowledge of misleading SEC statements. As explicitly stated by the Second Circuit, "we decline to hold that the Plan fiduciaries were required to perform an independent investigation of SEC filings before incorporating them into the SPDs." *Glaxosmithkline*, 2012 U.S. App. LEXIS 18552, at *9 (*quoting Citigroup*, 662 F.3d at 145). In fairness to plan fiduciaries in the Sixth Circuit, the same rule must apply.

The Sixth Circuit's holding that the mere incorporation of allegedly false and misleading SEC filings into a plan-mandated SPD is sufficient to state an ERISA breach of fiduciary duty claim directly conflicts with the Second Circuit holdings in *Gearren*

and *Glaxosmithkline*.[3] Accordingly, the Court should grant certiorari and summarily reverse the Sixth Circuit's decision, or alternatively, accept this case for plenary review.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, a writ of certiorari should be granted.

---

[3] Respondents' attempt to distinguish *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008), and *Lanfear*, 679 F.3d at 1284, on the ground that those cases involved the incorporation of SEC filings into a prospectus, not a plan-mandated SPD, also fails. Opp. at 31-32. The only allegations of incorporation that exist in Respondents' complaint relate to the incorporation of SEC filings into the Plan Prospectus – *not* a plan-mandated SPD. Complaint ¶ 49. The Sixth Circuit's analysis and conflicting ruling based solely on incorporation into a plan-mandated SPD, therefore, is not supported by the allegations of Respondents' own complaint. Thus, *Kirschbaum* and *Lanfear* are directly on point and not distinguishable from the facts of this case.

Respectfully submitted,

James E. Burke
Counsel of Record
Joseph M. Callow, Jr.
Danielle M. D'Addesa
David T. Bules
KEATING MUETHING &
KLEKAMP PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
(513) 579-6400
jburke@kmklaw.com

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX 1

THE FIFTH THIRD BANCORP MASTER PROFIT SHARING PLAN as amended and restated effective as of December 31, 2000

Table of Contents
Articles

ARTICLE 1

INTRODUCTION AND PURPOSE

1.1 Amendment and Restatement. Fifth Third Bank hereby amends and restates The Fifth Third Bancorp Master Profit Sharing Plan in its entirety, effective as of December 31, 2000; provided however, such other effective dates as are specified in the Plan for particular provisions shall be applicable.

1.2 Purposes of the Plan. The purposes of the Plan are to provide retirement and other benefits for Participants and their respective beneficiaries. Except as otherwise provided by Sections 4.8 and 5.2, the assets of the Plan shall be held for the exclusive purpose of providing benefits to Participants and their beneficiaries and defraying reasonable expenses of administering the Plan, and it shall be impossible for any part of the assets or income of the Plan to be used for, or diverted to, purposes other than such exclusive purposes. In accordance with section 401(a)(27) of the Code, the Plan is hereby designated as a profit sharing plan except with respect to the following portions of the Plan which shall constitute a stock bonus plan and an employee stock ownership plan as defined in section 4975(e)(7) of the Code, designed to invest primarily in qualifying employer securities:

(a) the portion of the Plan attributable to Employer matching contributions under Section 4.4 (credited to the Employer Matching Accounts);

(b) the Enterprise ESOP Accounts referred to in Append XV;

(c) the Ottawa ESOP Participant Accounts referred to in Appendix XVII;

(d) the CISP Matching Contribution Account referred to in Appendix XVI; and

(e) effective December 31, 2001, the Fifth Third Stock Fund (as described in Section 7.4) and the Fifth Third Stock Investment Option (as described in paragraph 2(d) of Appendix XVIII).

1.3 Plan Merger. In the event another plan merged into the Plan or the Old Plan after the effective date of any "GUST" provision and before having been amended for such GUST provision, then provisions in this Plan affecting qualification under section 401 of the Code with effective dates on or before the merger date shall be treated as amendments to such other plan, as it existed prior to the merger, effective as of the same effective dates. For this purpose, "GUST" refers to the Uruguay Round Agreements Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1997 and the Internal Revenue Service Restructuring and Reform Act of 1998.

ARTICLE 2

DEFINITIONS

As used in the Plan, the following terms, when capitalized, shall have the following meanings, except when otherwise indicated by the context:

2.1 "Account" means, with respect to a Participant, his allocable share of the Plan Assets. A Participant's Account under the Plan may include one or more of the following subaccounts:

(a) After-Tax Account;

(b) Employer Matching Account;

(c) Frozen Cash Election Account;

(d) Frozen Vesting Account;

(e) Profit Sharing Account;

(f) Rollover Account; and

(g) Section 401(k) Salary Deferral Account.

A Participant's Account also may include applicable subaccounts as specified under an Appendix to the Plan. A Participant's account, if any, under a Predecessor Plan which merges into, or makes transfers to, this Plan, shall be allocated to the appropriate subaccounts as determined by the Administrator. The establishment and maintenance of separate Accounts under the Plan is for accounting

purposes and a segregation and separate investment of each Account shall not be required.

2.2 "Accounting Date" means the last day of each June, September, December and March; provided, however, if such last day falls on a Saturday, Sunday, or holiday, then the preceding business day shall be the Accounting Date.

2.3 (a) "Actual Contribution Percentage" for purposes of determining the limit under Section 4.5 on voluntary after-tax Participant contributions means, for a group of Participants for a Plan Year, the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the amount of the Employee's voluntary after-tax Participant contributions actually contributed under Section 4.5 during the Plan Year, to

(2) the Employee's Annual Compensation for such Plan Year.

(b) "Actual Contribution Percentage" for purposes of determining the limit under Section 4.4 on Employer matching contributions means, for a group of Participants for a Plan Year the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the amount of the Employer match contributed to the Plan for such Plan Year under Section 4.4 on behalf of each such Employee, to

(2) the Employee's Annual Compensation for such Plan Year.

(c) In determining the Actual Contribution Percentage for purposes of determining the limits under Section 4.5 on voluntary after-tax Participant contributions, Employer matching contributions under Section 4.4 shall not be taken into account. In determining the Actual Contribution Percentage for purposes of determining the limits under Section 4.4 on Employer matching contributions, voluntary after-tax Participant contributions under Section 4.5 shall not be taken into account. For purposes of computing the separate ratio under (a) above for any Highly Compensated Employee, all plans described in section 401(a) of the Code or arrangements described in section 401(k) of the Code of the Employer (and other employers taken into account under section 414 of the Code) in which such Highly Compensated Employee is a participant, shall be treated as one such plan or arrangement; provided, however, the Employer matching contributions under Section 4.4 shall not be treated as part of the same arrangement as the other parts of the Plan.

(d) If the Plan satisfies the requirements of section 401(m), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy such requirements only if aggregated with this Plan, then such other plans shall be aggregated with this Plan for purposes of computing the Actual Contribution Percentages and for determining whether the nondiscrimination rules of Section 4.5(b) or 4.4, as the case may be, are satisfied.

(e) Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.4 (a) "Actual Deferral Percentage" for a group of Participants for a Plan Year is the average of the ratios, calculated separately for each such Employee in such group, of:

(1) the compensation reduction contributions on behalf of each such Employee for such Plan Year under Section 4.1(a), plus any amounts contributed on behalf of each such Employee for the Plan Year under Section 4.3(b), to

(2) the Employee's Annual Compensation for such Plan Year.

(b) For purposes of computing the separate ratio under (a) above for any Highly Compensated Employee, all cash or deferred arrangements under section 401(k) of the Code of the Employer (and other employers taken into account under section 414 of the Code) in which such Highly Compensated Employee is a participant, shall be treated as one cash or deferred arrangement under section 401(k) of the Code; provided however, the Employer matching contributions under Section 4.4 shall not be treated as part of the same arrangement as the other portions of the Plan.

(c) If the Plan satisfies the requirements of section 401(k), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy such requirements only if

aggregated with this Plan, then such other plans shall be aggregated with this Plan for purposes of computing the Actual Deferral Percentages and for determining whether the nondiscrimination rules of Section 4.3(c) are satisfied.

(d) Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.5 "Administrator" or "Plan Administrator" means the Fifth Third Bank Pension and Profit Sharing Committee. Members of said Committee shall be appointed by, and serve at the pleasure of, the President and Chief Executive Officer of Fifth Third Bank. A reference to the Plan Administrator includes, where applicable, its delegate.

2.6 "Affiliate" means each of the following for such period of time as is applicable under section 414 of the Code:

(a) a corporation which, together with the Employer, is a member of a controlled group of corporations within the meaning of section 414(b) of the Code (as modified by section, 415(h) thereof for the purposes of Article 5) and the applicable regulations thereunder;

(b) a trade or business (whether or not incorporated) with which the Employer is under common control within the meaning of section 414(c) of the Code (as modified by section 415(h) thereof for the purposes of Article 5) and the applicable regulations thereunder;

(c) an organization which, together with the Employer, is a member of an affiliated service group (as defined in section 414(m) of the Code); and

(d) any other entity required to be aggregated with the Employer under section 414(o) of the Code.

2.7 "After-Tax Account" means the separate portion of each Participant's Account which reflects the Participant's nondeductible voluntary contributions, as adjusted in accordance with Article 7.

2.8 "Annual Compensation" means the remuneration (before reduction for withheld amounts) an Employee receives, or would have received but for compensation reduction pursuant to Section 4.1, pursuant to The Fifth Third Bank 125 Plan or pursuant to a Code section 132(f)(4) qualified transportation arrangement, from an Employer during a Plan Year, from and after becoming a Participant, in the form of base wages or salary, overtime, variable compensation, and similar compensation, but excluding payments made pursuant to product-focused incentive plans, Jeanie maintenance payments, tuition refund reimbursements, Profit Sharing Flex Dollars (whether or not received in cash), and similar payments and benefits. Performance-based additional cash compensation incentives (other than variable compensation) shall be excluded from Annual Compensation unless an applicable incentive program by its terms provides that such compensation shall be taken into account under the Plan for either all Employees or all Non-Highly Compensated Employees covered by such incentive program; provided, however, in all events an Employee eligible under a

performance-based additional cash compensation incentive program (other than variable compensation) shall have his Annual Compensation limited to $125,000 for the Plan Year. For purposes of allocating profit sharing contributions under Section 4.2, "Annual Compensation" prior to a Participant's completion of one Eligibility Year shall be disregarded.

Solely for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage, the Administrator, in its discretion, may use the definition of "Annual Compensation" set forth in the above paragraph, or the following definition. If the Administrator so determines, "Annual Compensation" for purposes of determining the Actual Deferral Percentage and the Actual Contribution Percentage shall mean the total wages as defined in section 3401 of the Code and all other payments of compensation by the Employer (in the course of its trade or business) for which the Employer is required to furnish the Employee a written statement under sections 6041(d), 6051(a)(3) and 6052 of the Code determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2) of the Code) which is paid by the Employer to an Employee during a Plan Year including amounts that otherwise would have been included within this definition but for section 402(a)(8) of the Code (relating to a salary reduction election under section 401(k) of the Code), section 125 of the Code (relating to the cafeteria or flexible benefit plans), section 132(f)(4) (effective for Plan Years beginning after December 30, 2000), section 402(h) of the Code (relating to SEPs),

section 403(b) of the Code (relating to certain tax deferred annuities), section 457(b) of the Code (relating to deferred compensation plans of state and local governments and tax-exempt organizations), section 414(h)(2) of the Code (relating to certain picked-up employee contributions). For purposes of determining the Actual Contribution Percentage applicable to Employer matching contributions, the Administrator may either exclude, or include, such Annual Compensation paid to an Employee prior to the time he completes one Eligibility Year.

For any Plan Year, only the first $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted by the Secretary of Treasury in accordance with section 401(a)(17) of the Code) of a Participant's Annual Compensation shall be taken into account. Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply.

2.9 "Beneficiary" means the person or persons entitled to receive the distributions, if any, payable under the Plan upon or after a Participant's death, as such Participant's Beneficiary. Each Participant may designate a Beneficiary by filing the proper form with the Administrator. A Participant may designate one or more contingent Beneficiaries to receive any distributions after the death of a prior Beneficiary. A designation shall be effective upon said filing, provided that it is so filed during such Participant's lifetime, and may be changed from time to time by the Participant; provided however, if a Participant has at least one Hour of Service or at least one hour of paid leave from the Employer (or any other employer for whom service

is treated as service for the Employer) on or after August 23, 1984 and is survived by a Surviving Spouse, then such spouse shall be his Beneficiary unless the designation of another Beneficiary is consented to by such spouse in a written consent which acknowledges the effect of such designation, acknowledges the specific Beneficiary or Beneficiaries, and is witnessed by a Plan representative or a notary public.

If there is no designated Beneficiary to receive any amount that becomes payable to a Beneficiary, then such amount shall be paid to the person or persons in the first surviving class of the following classes of successive preference beneficiaries, and the members thereof shall receive equal shares of any distribution payable:

Class 1. the Participant's Surviving Spouse;

Class 2. the Participant's surviving children or issue of deceased children, per stirpes;

Class 3. the Participant's surviving parents;

Class 4. the Participant's surviving brothers and sisters; and

Class 5. the Participant's executor or administrator.

2.10 "Break in Service" means:

(a) before January 1, 1985, a Severance of at least 12 consecutive months; and

(b) after December 31, 1984, a Severance of at least 72 consecutive months; provided however, if as December 31, 1984, service was not required to be taken into account under the provisions of section 410(a) or 411(a) of the Code, then this Subsection (b) shall not cause such service to be taken into account.

2.11 "Code" means the Internal Revenue Code of 1986, as amended at the particular time applicable. A reference to a section of the Code shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

2.12 "Deferrable Compensation" means Annual Compensation other than variable compensation; plus performance based additional cash compensation incentives (other than variable compensation) an Employee receives, or would have received but for compensation reduction pursuant to Section 4.1, pursuant to The Fifth Third Bank 125 Plan or pursuant to a Code section 132(f)(4) qualified transportation arrangement, from an Employer from and after becoming a Participant whether or not such amounts are considered "Annual Compensation"; plus Profit Sharing Flex Dollars allocable to periods after becoming a Participant (without regard to how the Participant elects to utilize such Profit Sharing Flex Dollars). Prior to December 31, 2001, overtime and shift differential shall also be excluded.

For any Plan Year, only the first $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted by the Secretary of Treasury in accordance

with section 401(a)(17) of the Code) of a Participant's Deferrable Compensation shall be taken into account. Effective for Plan Years beginning after December 31, 1996, the family aggregation rules previously in effect for this purpose no longer apply. This $170,000 ($200,000 for Plan Years beginning after December 31, 2001) (as adjusted) limit may be applied proportionately to each pay period or in any other reasonable manner determined by the Administrator or its delegate.

2.13 "Disability" means an incapacity caused by bodily injury or disease which prevents an Employee from performing his regular duties, based upon medical evidence satisfactory to the Administrator.

2.14 "Early Retirement Age" means age 55 and at least 5 Vesting Years.

2.15 "Effective Date" means December 31, 2000.

2.16 "Eligible Participant" means a Participant, described in Section 4.2(c), who is qualified to receive an allocation of the Employer contribution under Section 4.2 for a Plan Year. As provided in an applicable Appendix, certain individuals may be excluded from the term "Eligible Participant."

2.17 (a) "Eligibility Service" means, subject to (b) below, an individual's Service.

(b) A reemployed person's prior Service shall be disregarded and he shall be treated as a new employee for purposes of determining Eligibility Service if he has incurred a Break in Service and if he

did not have any nonforfeitable right to any part of his Account attributable to employer contributions and if such Break in Service equals or exceeds his Eligibility Service before such Break in Service, provided that such Eligibility Service before such Break in Service shall be deemed not to include any of such individual's Eligibility Service not taken into account by reason of any prior Breaks in Service incurred by him.

2.18 "Eligibility Year" means 365 days of Eligibility Service (whether or not continuous).

2.19 "Employee" means an individual who is employed by an Employer and who is considered by the Employer in its sole and absolute discretion to be an Employee for purposes of the Plan. An individual who performs services for the Employer as an independent contractor, leased employee, employee of a temporary agency or in any other capacity other than as an employee of an Employer shall not be considered an Employee for purposes of the Plan. A determination that an individual is an employee of the Employer for other purposes such as employment tax purposes, shall have no bearing whatsoever on the determination of whether the individual is an Employee under the Plan if the Employer does not consider the individual to be its Employee for purposes of the Plan. As provided in an applicable Appendix, certain individuals may be excluded from the term "Employee."

2.20 "Employer" means Fifth Third Bank and each other subsidiary (direct or indirect) of Fifth Third Bancorp except for any such subsidiary excluded under the terms of the Plan (including an Appendix). An entity shall not be considered an Employer either

before or after the time it is a subsidiary (direct or indirect) of Fifth Third Bancorp.

2.21 "Employer Matching Account" means the separate portion of each Participant's Account which reflects the Employer's contributions under Section 4.4 as adjusted in accordance with Article 7.

2.22 "Employment Commencement Date" means, with respect to an individual, the date on which he first performs an Hour of Service.

2.23 "ERISA" means the Employee Retirement Income Security Act of 1974, as amended, at the particular time applicable. A reference to a section of ERISA shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

2.24 "Five-Percent Owner" means any person who owns (or is considered as owning within the meaning of sections 318 and 416 of the Code) more than 5 percent of the outstanding stock of the Employer or stock possessing more than 5 percent of the total combined voting power of all stock of the Employer.

2.25 "Frozen Cash Election Account" means the separate portion of each Participant's Account which reflects contributions of the "Elective Percentage" of his "Profit Sharing Allocation" (as those terms were defined in the Old Plan) for Plan Years before 1997, as adjusted in accordance with Article 7.

2.26 "Frozen Vesting Account" means the separate portion of each Participant's Account which reflects the

Employer's contributions for Plan Years before 1997 of that portion of each Participant's "Profit Sharing Allocation" which exceeds his "Elective Percentage" (as those terms were defined in the Old Plan) and forfeitures allocated thereto as adjusted in accordance with Article 7.

2.27 (a) "Highly Compensated Employee" with respect to a Plan Year beginning after December 31, 1996, means, as determined under section 414(q) of the Code and the Treasury Regulations thereunder, an individual who, at any time during the Plan Year is an Employee, and who:

(1) during the Plan Year or the preceding twelve month period, was at any time a Five-Percent Owner; or

(2) received Section 415 Compensation from the Employer in excess of $80,000 (as adjusted pursuant to section 414(q)(1) of the Code) during the twelve month period preceding the Plan Year, and, if the Employer so elects, was in the group consisting of the top 20 percent of Employees when ranked on the basis of Section 415 Compensation paid during such preceding twelve month period.

(b) The determination of Highly Compensated Employees shall be made in accordance with the following:

(1) For purposes of determining the number of Employees under (a)(2), the Employees described in section 414(q)(5) of the Code shall be disregarded.

(2) The Employer shall be treated as including any other entities required to be aggregated under section 414 of the Code.

2.28 "Hour of Service" means an hour for which an individual is paid, or entitled to payment, for work for the Employer or an Affiliate.

2.29 "Military Service" means, with respect to a person employed immediately prior thereto by the Employer, the period of time that he spends in the Armed Forces of the United States, or its equivalent recognized pursuant to federal law, provided he returns to the service of the Employer within such period, if any, as is then provided by law for the protection of his reemployment rights, and provided he has not been employed elsewhere before returning to work for the Employer.

2.30 "Non-highly Compensated Employee" means an individual who is not a Highly Compensated Employee and who, at any time during the Plan Year, is an Employee.

2.31 "Normal Retirement Age" means the date on which a Participant has both reached age 65 and completed 5 Vesting Years; provided, however, a Participant's Normal Retirement Age shall in no event be later than the later of the time a Participant attains age 65 or the 5th anniversary of the time the Participant commenced participation in the Plan (or any Predecessor Plan).

2.32 "Old Plan" means The Fifth Third Bancorp Master profit Sharing Plan as it existed prior to the Effective Date.

2.33 "Participant" means an Employee who satisfies the eligibility requirements of Article 3 and also means a former Employee who has an Account under the Plan. To the extent provided in an applicable Appendix, the term also includes an individual with an Account under the Plan by reason of a plan merger or transfer identified in such Appendix. As provided in an applicable Appendix, certain individuals may be excluded from the term "Participant."

2.34 "Plan" means The Fifth Third Bancorp Master Profit Sharing Plan as set forth in this document, including all Appendices, and, if amended at any time, then as so amended.

2.35 "Plan Assets" means the assets of the Plan at the particular time applicable.

2.36 "Plan Year" means:

(a) For Plan Years beginning prior to January 1, 1999, the calendar year;

(b) For the Plan Year beginning on January 1, 1999, the period commencing on January 1, 1999, and ending on December 30, 1999; and

(c) For Plan Years beginning after December 30, 1999, the 12-month period commencing on December 31 and ending on December 30.

2.37 "Predecessor Plan" means a plan identified as such in an Appendix to this Plan.

2.38 "Profit Sharing Account" means the separate portion of each Participant's Account which reflects the Employer's contributions for Plan Years after 1996 under Section 4.2(d) and forfeitures allocated thereto as adjusted in accordance with Article 7.

2.39 "Profit Sharing Allocation" has the meaning determined under Section 4.2(d).

2.40 "Reemployment Commencement Date" means the first day, after a Severance, on which an individual performs an Hour of Service.

2.41 "Rollover Account" means the separate portion of each Participant's Account which reflects his rollover contributions, if any, as adjusted in accordance with Article 7.

2.42 "Section 401(k) Salary Deferral Account" means the separate portion of each Participant's Account which reflects contributions on behalf of each Participant under Sections 4.1 and 4.3(b), as adjusted in accordance with Article 7.

2.43 (a) "Service" means the sum of the following periods (whether or not continuous), provided that no period of time shall be counted more than once:

(1) each period beginning on an individual's Employment Commencement Date or Reemployment Commencement Date and ending with his next Severance;

(2) any separation from the service of the Employer of 12 months or less;

(3) Military Service;

(4) service taken into account for a particular Participant under a Predecessor Plan. Except as otherwise provided in an Appendix, the following transition rules shall apply with respect to any Participant who has been covered under a Predecessor Plan under which service has been computed on the basis of hours of service during 12-month computation periods. Such an individual shall receive credit for a period of service consisting of:

(A) the number of years of service credited to him before the computation period (determined under the Predecessor Plan) in which the Plan is adopted, plus

(B) the greater of

(i) the period of service that would be credited to him under the elapsed time method under (a) above for his service during the entire computation period in which the adoption occurs or

(ii) service taken into account under the computation periods method as of the date of the adoption.

In addition, the individual shall receive credit for service subsequent to the adoption commencing on the

day after the last day of the vesting computation period in which the adoption occurs.

(5) as provided in an applicable Appendix, service (not otherwise taken into account under a Predecessor Plan) for a predecessor employer named in such Appendix, taken into account as provided in such Appendix.

(b) Anything in the Plan to the contrary notwithstanding, in determining an Employee's Service, he shall be entitled to such credit, if any, as is required by federal law.

2.44 "Severance" means, an absence from the employment of the Employer and all Affiliates, beginning on the earliest of death, quit, discharge, retirement or the first anniversary of any other absence (with or without pay).

2.45 "Surviving Spouse" means a Participant's surviving spouse except to the extent that a former spouse is treated as such, for purposes of the Plan, under a qualified domestic relations order as described in section 414(p) of the Code.

2.46 "Trustee" means Fifth Third Bank and its successors and assigns in trust.

2.47 (a) "Vesting Service" means, subject to (b) below, an individual's Service.

(b) To the extent included in (a) above, the following periods shall be disregarded for purposes of determining Vesting Service:

(1) each period, with respect to Fifth Third Bank, prior to January 1, 1982 or, with respect to any other Employer, prior to such Employer's adoption of the Plan, if such service would have been disregarded under the rules of The Fifth Third Bank Profit Sharing Plan or of such other Employer's Predecessor Plan, as the case may be, relating to breaks in service or failure to complete a required period of service within a specified period of time, as such rules were in effect on the applicable date; and

(2) each period prior to a Break in Service if, at the time of incurring such Break in Service, the individual did not have any nonforfeitable right to any part of his Account attributable to employer contributions and if the Break in Service equals or exceeds his Vesting Service before such Break in Service, provided that such Vesting Service before such Break in Service shall be deemed not to include any of such individual's Vesting Service not taken into account hereunder by reason of any prior Breaks in Service.

2.48 "Vesting Years" mean the number of whole years of a Participant's Vesting Service, whether or not such Vesting Service was completed continuously. Nonsuccessive periods of Vesting Service (whether or not consecutive) shall be aggregated on the basis that 365 days of Vesting Service equal a whole Vesting Year.

* * *

ARTICLE 7

INVESTMENT OF ACCOUNTS

7.1 Funding Policy and Method.

(a) Establishment. The Administrator shall establish, for the Plan, a funding policy and method, which shall be consistent with the objectives of the Plan, ERISA and any other applicable legal requirements and which shall identify the Plan's short-run and long-run financial needs with respect to liquidity and investment growth, as the same may change from time to time. Such funding policy shall be communicated as soon as practicable to those who are responsible for investment of the Plan Assets.

(b) Funding Entity. The Plan Assets shall be held under and the benefits under the Plan shall be funded through The Fifth Third Profit Sharing Trust as it may be amended from time to time. The trust so established and maintained is and shall be a part of the Plan. In addition, Plan Assets may be held under and the benefits under the Plan may be funded through such other trusts as the Employer, in its discretion, may establish or cause to be established or entered into for the purposes of carrying out the Plan. The Employer shall determine the form and terms of any such trust, from time to time, consistent with the objectives of the Plan, ERISA and any other applicable legal requirements, and may remove any trustee and select a successor trustee or trustees or may terminate any such trust. Any such trust so established and maintained is and shall be a part of the Plan.

(c) Investment Elections.

(1) Prior to January 1, 2001. Prior to January 1, 2001, each Participant shall elect the manner in which his Section 401(k) Salary Deferral Account, After-Tax Account and Rollover Account and any future contributions thereto are to be invested from among such investment funds as are made available under the Plan. Prior to January 1, 2001, the investment funds available under the Plan shall be the general trust fund (in which Plan Assets over which the Participant has no investment discretion are segregated), the Fifth Third Stock Fund (as defined below) and such other investment funds as the Administrator directs the Trustee to make available.

(2) On and After January 1, 2001. After December 31, 2000, each Participant shall elect the manner in which his Account, excluding his Employer Matching Account, and any future contributions thereto are to be invested from among such investment funds as are made available under the Plan. Effective January 1, 2001, the Administrator shall direct the Trustee as to the investment funds to be made available, including the Fifth Third Stock Fund (as defined below).

(3) Procedural. An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules including rules which limit the frequency of changes to elections, prescribe times for making elections, regulate the amount or increment a Participant may allocate to a particular fund, require or allow an election (or election change) to relate only to future allocations,

require an election to apply consistently to all subaccounts and provide for the investment of an Account of a Participant who fails to make an investment election.

(d) Employer Matching Account. Subject to Section 7.3, the Plan Assets attributable to the Employer Matching Accounts shall be invested in the Fifth Third Stock Fund (as defined below).

7.2 Investment Adjustment. The Administrator shall account for the investments and investment transactions attributable to each Account separately. Earnings or losses on Plan Assets attributable to a particular Account shall be allocated solely to that Account. All determinations of the investment adjustments under this Section and under Sections 7.3 and 7.4 below and any Appendix shall be made by the Trustee, and such determinations when so made by the Trustee shall be conclusive and shall be binding upon all persons.

7.3 Diversification Election. Each Participant who has attained age 55 and completed 10 Vesting Years (if earlier, 10 years of participation) may elect the manner in which his Employer Matching Account and any future contributions thereto are to be invested from among such investment funds as the Administrator directs the Trustee to make available for this purpose. The first such investment election for a Participant must be implemented no later than 90 days following the Plan Year which follows the Plan Year in which the Participant both attained age 55 and completed 10 Vesting Years (if earlier, 10 years of participation). In all events, the Administrator shall direct the Trustee

to make available at least three investment funds in addition to the Fifth Third Stock Fund (as defined below).

An investment election shall be made in such manner as the Administrator shall direct. The Administrator may prescribe rules consistent with the requirements of section 401(a)(28) of the Code including rules which limit the frequency of changes to elections, prescribe times for making elections, regulate the amount or increment a Participant may allocate to a particular fund, require or allow an election (or election change) to relate only to future allocations, and provide for the investment of an Employer Matching Account of a Participant who fails to make an investment election.

7.4 Fifth Third Stock Fund.

(a) General. The Trustee shall segregate a portion of the Plan Assets into a separate fund to be known as the "Fifth Third Stock Fund." The Fifth Third Stock Fund shall be invested primarily in shares of common stock of Fifth Third Bancorp. The Fund may also be invested in short-term liquid investments to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run liquidity needs of the Plan or Fund. The Trustee shall have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs. In the event of a merger or other corporate transaction, the Fund may hold whatever assets that may be received.

(b) Investment Adjustment. The Plan Assets comprising the Fifth Third Stock Fund shall be valued daily at fair market value and the Participants, Accounts (and appropriate subaccounts) shall be adjusted daily to reflect the change in value of the Fifth Third Stock Fund.

(c) Voting of Employer Securities. To the extent a Participant's Account (or any subaccount) is invested in the Fifth Third Stock Fund, the Participant (or in the event of his death, his Beneficiary) shall have the right to instruct the Trustee in writing as to the manner in which the shares represented by his interest in such Fund are to be voted at each annual or special meeting of the shareholders of Fifth Third Bancorp and as to the manner in which any other right relating to such stock is to be exercised. In the event that any Participant (or Beneficiary) shall fail to instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(d) ESOP Dividend Pass-Through Election. Effective December 31, 2001, commencing with the dividends payable on the common stock of Fifth Third Bancorp to shareholders of record on December 31, 2001, a Participant with an Account (including any subaccount) invested in the Fifth Third Stock Fund (or in the event of his death, his Beneficiary), shall have the right to elect, in accordance with instructions or procedures of the Administrator, or its delegate to either (1) leave such dividends in the Plan for reinvestment in common stock of Fifth Third Bancorp under the Fifth Third Stock Fund or otherwise; or (2) take the dividends in cash. This election shall also

be available with respect to the Enterprise ESOP Accounts (described in Appendix XV), the Ottawa ESOP Participant Accounts (described in Appendix XVII) and the Fifth Third Stock Investment Option (described in Appendix XVIII including the comparable investment choice under the Old Kent Thrift Plan effective as of December 31, 2001, as it existed on such date immediately prior to the merger into this Plan).

7.5 Life Insurance. No life insurance shall be purchased under the Plan.

7.6 Loans.

(a) Eligibility. Upon filing the proper application form with the Administrator by a Participant, the Administrator may authorize and direct the Trustee on behalf of the Plan, to grant a loan to such Participant from the Plan Assets, subject to the conditions set forth below.

(b) Conditions. Loans under (a) above shall meet all of the following requirements:

(1) Loans shall be made available to all Participants on a reasonably equivalent basis; provided that loans shall not be available to Participants who are not Employees (other than former Employees who are parties in interest within the meaning of section 3(14) of ERISA).

(2) Loans shall be made available only in the following circumstances:

(A) in the event of a hardship (as defined in Section 8.1(b)) of the Participant;

(B) if the Participant will use the loan proceeds for any educational needs of the Participant or family members of the Participant (including the repayment of any prior student loan);

(C) if the Participant will use the loan proceeds for the care of one or more family members of the Participant; or

(D) if the Participant will use the proceeds to purchase (through the exercise of stock options or otherwise) for investment purposes shares of common stock of Fifth Third Bancorp (including the repayment of any loan incurred by the Participant prior to November 1, 1996, if the proceeds of such prior loan were used for such purpose).

(3) Prior to borrowing from the Plan, a Participant must withdraw all of his After-Tax Account (if any) and any other amounts in a subaccount referred to in an Appendix attributable to after-tax employee contributions.

(4) A Participant may borrow solely from his Section 401(k) Salary Deferral Account, Frozen Cash Election Account, Rollover Account and other subaccounts referred to in an Appendix to the extent attributable to elective deferrals described in section 402(g)(3) of the Code or rollover contributions.

(5) A Participant may have only one loan outstanding at any time.

(6) A Participant loan must be in an amount equal to at least $1,000.

(7) Loans shall not be made available to Highly Compensated Employees in an amount greater than the amount made available to other Participants.

(8) Loans shall bear a reasonable rate of interest equal to the rate that the Fifth Third Bank, in its lending business, would charge on a similar loan.

(9) Loans shall be adequately secured, which security shall, notwithstanding Section 14.2, consist of an assignment of up to 50 percent of a borrowing Participant's nonforfeitable Account under the Plan. The Administrator may allow such an assignment to consist solely of amounts not attributable to elective deferrals described in section 402(g)(3) of the Code if such amounts would constitute adequate security.

(10) Loans shall be repaid only by payroll withholding properly authorized by the Participant; provided that the Administrator may allow complete prepayment through other means; and provided further, a Participant who is on a leave of absence may pay installments by personal check or other means to the extent his pay (if any) is insufficient to meet the repayment schedule.

(11) No Participant loan shall exceed the limitations under (c) below.

(12) In the event of default, foreclosure on the Participant's accrued nonforfeitable benefit, to the

extent used as security for the loan, will occur after a distributable event occurs under the Plan. Events constituting default shall be specified in the promissory note or security agreement to be executed by the Participant.

(c) Limitation on Amount. A loan under the Plan (when added to any other loans outstanding under the Plan and any other plans taken into account under section 72(p)(2)(D) of the Code) to a Participant shall not exceed the lesser of:

(1) $50,000 reduced by the excess (if any) of -

(A) the highest outstanding balance of loans from the Plan (and other plans taken into account) during the one-year period ending on the day before the date on which such loan was made, over

(B) the outstanding balance of loans from the Plan (and other plans taken into account) on the date such loan was made, or

(2) one-half of the nonforfeitable portion of the Participant's Account.

(d) Distributable Event. Solely for purposes of foreclosure on the Participant's nonforfeitable Account, to the extent used as security for the loan, default on a Participant's note shall be deemed to be a distributable event for such a Participant (in addition to the other distributable events under the Plan); provided however, with respect to a Participant's Section 401(k) Salary Deferral Account, Frozen Cash

Election Account and any other amounts subject to the distribution limitations of section 401(k)(2), to the extent used as security for the loan, such a default shall be deemed a distributable event if, and only if, the Participant has attained age 59-1/2.

(e) Repayment Period. Each loan, by its terms, shall be required to be repaid within 5 years. In addition, loans shall be due and payable in full upon a Participant's termination of employment (except in the case of parties in interest within the meaning of section 3(14) ERISA) and such repayment need not be through payroll withholding.

(f) Level Amortization. Each loan shall be subject to substantially level amortization, with payments of principal and interest not less frequently than quarterly, over the term of the loan.

(g) Earmarking. If a loan is made to a Participant pursuant to (a) above, then his interest in other Plan Assets shall be reduced by the amount of the loan, the loan shall be an investment of his Account, and interest and other amounts allocable to such loan shall be allocated only to his Account.

(h) Effect of Default on Benefits. Upon a Participant's death, if less than 100 percent of his Account is payable to his Surviving Spouse, then, in determining the amount payable to the Surviving Spouse, the amount treated as payment in satisfaction of any loan (including accrued interest) shall first be treated as reducing the Account.

(i) Administration. The Administrator is authorized to administer the loan program. Loans will be approved if the proper forms and documentation are completed and delivered to the Administrator, the amount of the loan requested does not exceed the limits specified in this Section, adequate security authorized in this Section is delivered to the Trustee, and the other provisions of this Section are satisfied. The Administrator is authorized to impose on a Participant a reasonable administrative fee for his loan.

* * *

APPENDIX 2

THE FIFTH THIRD
PROFIT SHARING - TRUST AGREEMENT
(as amended and restated)

TABLE OF CONTENTS

ARTICLES

THE FIFTH THIRD
PROFIT SHARING
TRUST AGREEMENT
(as amended and restated)

This amended and restated Trust Agreement and Declaration of Trust executed this 28 day of December, 2001, by and between Fifth Third Bank, an Ohio banking corporation in its individual corporate capacity (the "Employer"), and Fifth Third Bank, an Ohio banking corporation acting in its fiduciary capacity as trustee (the "Trustee").

WITNESSETH:

WHEREAS, the Employer has adopted and maintains the Fifth Third Bancorp Master Profit Sharing Plan (the "Plan"), and

WHEREAS, The Fifth Third Profit Sharing Trust (the "Trust") serves as the funding vehicle for the Plan,

WHEREAS, the Trust was established and is presently maintained pursuant to an amended and restated Trust Agreement and Declaration of Trust executed December 29, 1982, effective as of January 1, 1982, as subsequently amended by the First through Fifth Amendments,

WHEREAS, under Section 7.1 of the amended and restated Trust Agreement and Declaration of Trust, the Employer and the Trustee have the right to amend at any time,

WHEREAS, the Employer and the Trustee have determined to amend and restate the Trust Agreement and Declaration of Trust in its entirety as The Fifth Third Profit Sharing Trust (as amended and restated), as herein stated, and

WHEREAS, this Trust Agreement and Declaration of Trust is intended to qualify under the provisions of sections 401(a) and 501(a) of the Internal Revenue Code of 1986, as amended.

NOW, THEREFORE, the Employer and the Trustee do hereby agree each with the other as follows.

ARTICLE 1

TITLE, PURPOSE AND DEFINITIONS

1.1 Title. The Trust established pursuant hereto shall be known as The Fifth Third Profit Sharing Trust (hereinafter referred to as the "Trust").

1.2 Purpose. The Trust is established for the purpose of holding the Plan Assets and for the exclusive benefit of Participants and their beneficiaries. Subject to the provisions of the Plan that are consistent with ERISA, it shall be impossible, by any means, and at any time before the satisfaction of all liabilities to Participants or their beneficiaries, for any part of the Plan Assets to be used for, or diverted to, purposes other than for the exclusive benefit of the Participants and their beneficiaries.

1.3 Definitions. As used in this Trust Agreement, the following terms shall have the following meanings and provisions applicable thereto.

(a) "Administrator" means the individual, group of individuals, or entity appointed to administer the Plan; provided that if none is so appointed, then it means the Employer.

(b) "Code" means the Internal Revenue Code of 1986, as amended at the particular time applicable. A reference to a section of the Code shall include said section and any comparable section or sections of any future legislation that amends, supplements or supersedes said section.

(c) "ERISA" means the Employee Retirement Income Security Act of 1974, as amended, at the particular time applicable.

(d) "Participant" means a person who is a participant in the Plan.

(e) "Plan" means the Fifth Third Bancorp Master Profit Sharing Plan and if amended at any time, then as so amended.

(f) "Plan Assets" means the assets of the Plan at the particular time applicable.

ARTICLE 2

CONTRIBUTIONS AND PAYMENTS

2.1 Receipt of Contributions. The Trustee shall receive any contributions paid to it in cash or in the form of such other property as it may from time to time deem acceptable and which shall have been delivered to it. The Trustee shall also receive a transfer of Plan Assets from any other funding vehicle of the Plan or predecessor plan in connection with a plan merger or plan-to-plan transfer. All contributions and transfers so received, together with the income therefrom and any other increment thereon, shall be held, invested, reinvested and administered by the Trustee pursuant to the terms of this Trust Agreement. The Trustee shall not be responsible for the calculation or collection of any contribution or transfer under or required by the Plan, or for the determination of whether any contributions or transfers received by it are correct or are otherwise in compliance with the provisions of the

Plan, but shall be responsible only as provided in this Trust Agreement for property received by it.

2.2 Payments from the Plan Assets.

(a) From time to time, upon the Trustee's receipt of written directions from the Administrator that payments from the Plan are due, the Trustee shall make such payments from the Plan Assets to such persons in such form, in such amounts and at such time as the Administrator shall have directed; provided however, the Trustee shall not be required to make any payment from the Plan Assets until it receives copies of such government filings and/or approvals as the Trustee may reasonably request; and provided further, contributions to the Plan shall be returned to the Employer only under those circumstances set forth in the Plan and consistent with ERISA.

(b) Upon the distribution of Plan Assets in accordance with (a) above, to the extent permitted by law; the Trustee shall be released and discharged from all further accountability or liability respecting such Plan Assets, shall be fully protected in making payments out of the Plan Assets in accordance with such written directions, shall have no responsibility to see to the application of such payments or to ascertain whether such directions comply with the provisions of the Plan, and shall have no responsibility for any payments made by it in good faith without actual notice or knowledge of the changed condition or status of any person receiving such payments.

(c) If any payment directed to be paid from the Plan Assets is not claimed, then the Trustee,

shall notify the Administrator of that fact promptly. The Trustee and the Administrator shall work together to search for or ascertain the whereabouts of any payee under the Plan.

(d) If any dispute arises as to the persons to whom payment of any funds or delivery of any other Plan Assets should be made by the Trustee, then the Trustee may withhold such payment or delivery until such dispute shall have been determined by a court of competent jurisdiction or shall have been settled by the parties concerned.

(e) Plan Assets held hereunder shall be available to pay benefits under any and all parts of the Plan.

ARTICLE 3

INVESTMENT DUTIES AND POWERS OF THE TRUSTEE

3.1 Investment Duties. Subject to the funding policy for the Plan as set forth in Section 3.3 below, the Trustee shall, except to the extent it deems it expedient (pending investment of Plan Assets or pending payment of current expenses or benefits of the Plan) to keep Plan Assets temporarily uninvested and in cash, invest and reinvest the principal and income of the Plan Assets and keep the Plan Assets invested, without being restricted to securities or property of the character authorized for investments by trustees under the laws of any state, district or territory, in such securities and/or in such property, real or personal, tangible or intangible, or part interest therein,

wherever situate, whether or not productive of income, or consisting of wasting assets, as the Trustee shall deem advisable.

3.2 Investment Powers. Subject to the funding policy for the Plan as set forth in Section 3.3 below, the Trustee is authorized and empowered, in addition to powers granted under any applicable statutes, regulations or rules which, to the extent of their granting of powers applicable to trusts of a similar nature to the Trust, are incorporated herein by reference:

(a) to invest in any collective, common or pooled trust fund operated or maintained by any bank or trust company, including the Trustee or an affiliate of the Trustee, exclusively for the commingling and collective investment of monies or other assets held under or as a part of a plan which is established in conformity with and qualifies under section 401(a) of the Code; and, anything herein to the contrary notwithstanding, to the extent monies or other assets are transferred to such collective trust in exchange for an interest in such collective trust, the terms and conditions of such collective trust, as amended from time to time, shall govern the investment duties, responsibilities and powers of the trustee of such collective trust and, to the extent required by law, such terms, responsibilities and powers shall be incorporated herein by reference and shall be a part of this Trust Agreement; and, for purposes of valuation, the value of the interest maintained by the Plan Assets in such collective trust shall be the fair market value of

the collective fund units held by the Trustee determined in accordance with generally recognized valuation procedures;

(b) to purchase and subscribe for any securities or other property and to retain such securities or other property in trust;

(c) to sell at public or private sale, for cash, or upon credit, or otherwise dispose of any property, real or personal, and no person dealing with the Trustee shall be bound to see to the application or to inquire into the validity, expediency or propriety of any such sale or other disposition;

(d) to exercise any conversion privilege, subscription right or other option pertaining to or in connection with securities or other property held by it;

(e) to exercise itself, or by general or limited power of attorney, any right, including the right to vote, incident to any securities or other property held by it;

(f) to join in, dissent from or oppose the reorganization, recapitalization, consolidation, sale or merger of corporations or properties of which it may hold stocks, bonds or other securities or in which it may be interested, to pay any expenses, assessments or subscriptions in connection therewith, and to accept and to hold any other securities issued in connection therewith;

(g) to register any investment held in the Plan Assets in its own name or in the name of a nominee or to hold any investment in bearer form;

(h) to employ suitable agents, accountants and counsel and to pay their reasonable expenses and compensation;

(i) to hold any part or all of the Plan Assets uninvested;

(j) to invest in savings accounts, certificates of deposit and other deposits which bear a reasonable rate of interest, with any financial institution or quasi financial institution, either domestic or foreign, including any such financial institution operated or maintained by any Trustee (or an affiliate) in its corporate capacity;

(k) to form corporations and partnerships and to create trusts to hold title to any securities or other property, all upon such terms and conditions as it may deem advisable;

(l) to invest in open-end investment companies (mutual funds) and closed end investment companies, investment trusts, and in any partnership, limited or unlimited, joint venture or other form of joint enterprise created for any lawful purpose;

(m) to adjust, settle, contest, compromise and arbitrate any claims, debts, or damages due or owing to or from the Plan Assets, and to sue, commence or defend any legal proceedings in reference thereto;

(n) to borrow money upon such terms and conditions as may be deemed advisable to carry out the purposes of the Trust and to pledge securities or other property in repayment of any such loan; provided, however, that loans or advances may be made by the Trustee by way of overdrafts or otherwise on a temporary basis on which no interest is payable;

(o) to enter into any type of contract with any insurance company or companies, either for the purposes of investment or otherwise, and, to the extent the Plan so provides, to purchase any life insurance policy or annuity contract;

(p) to buy, sell, and deal in options as writer of call options against securities, stocks, convertible preferred stocks, convertible bonds and warrants, which are owned by the Trust, to repurchase written call options in a closing transaction, to deliver the securities for cash if the option is exercised, to buy put options for securities, stock, convertible preferred stock, convertible bonds and warrants, which are owned by the Trust, to resell put options, in a closing transaction and to deliver the securities for cash if the option is exercised;

(q) to appoint an investment manager, as defined in section 3(38) of ERISA, to manage (including the power to acquire and dispose of) any of the Plan Assets;

(r) to make, execute and deliver as Trustee any and all deeds, leases, mortgages, advances, contracts, waivers, releases or other instruments in

writing necessary or proper in the employment of any of the foregoing powers; and

(s) to exercise, generally, any of the powers which an individual owner might exercise in connection with property either real, personal or mixed held in the Plan Assets, and to do all other acts that the Trustee may deem necessary or proper to carry out any of the powers set forth in this Article 3 or otherwise in the best interests of the Trust.

3.3 Power of Participants to Direct Investments.

(a) Selection of Investment Funds. Under the Plan's funding policy, each Participant (and where applicable, Beneficiary and alternate payee) may elect the manner in which his Account (excluding his Employer Matching Account) and any future contributions thereto are to be invested from among such investment funds as the Administrator directs the Trustee to make available for this purpose. The Administrator shall have the discretionary authority and fiduciary duty to determine the investment funds to be made available, from time to time, for this purpose. However, in all events, the Fifth Third Stock Fund, as described in Section 3.4(a)(1) below, shall be an investment option. The Administrator shall have the duty of monitoring such investment funds to determine the continued prudence of offering such funds; and the Administrator shall change the investment funds available if and when it deems it prudent to do so.

(b) Segregated Investment Funds. In addition to such investment vehicles as mutual funds and

collective or common trust funds, the Administrator may prescribe as an investment option a fund the Trustee creates by segregating a portion of the Plan Assets. The Trustee shall have full discretionary authority and responsibility to manage any such fund in accordance with the general nature and objective of the fund as directed by the Administrator (such as a "balanced" fund).

(c) Procedures. The Administrator and the Trustee shall be responsible for implementing the Participant (and, where applicable, Beneficiary and alternate payee) investment elections under such rules and procedures as may be prescribed under the Plan. Neither the Trustee, the Employer nor the Administrator shall be under any duty or obligation to review the selection of investment funds by Participants (and, where applicable, Beneficiaries and alternate payees). Neither the Trustee, the Employer nor the Administrator shall have any fiduciary responsibility whatsoever in connection with the selection of investment funds by a Participant (and, where applicable, Beneficiaries and alternate payees). Neither the Trustee, the Employer nor the Administrator shall have any liability or responsibility for action taken pursuant to the direction of the Participants (and, where applicable, Beneficiaries and alternate payees).

3.4 Fifth Third Bancorp Stock.

(a) Investments. The Trustee is expressly permitted to invest Plan Assets in common stock of Fifth Third Bancorp without limit, subject to the following:

(1) The Trustee shall segregate a portion of the Plan Assets into a separate fund to be known as the "Fifth Third Stock Fund." The Fifth Third Stock Fund shall be invested primarily in shares of common stock of Fifth Third Bancorp. The Fund may also be invested in short-term liquid investments to the extent the Administrator or Trustee determines desirable to accommodate the expected short-run liquidity needs of the Plan or Fund. The Trustee shall have no discretionary authority to sell Fifth Third Bancorp shares or to refrain from acquiring additional Fifth Third Bancorp shares with funds not held for short-run liquidity needs. In the event of a merger or other corporate transaction, the Fund may hold whatever assets that may be received.

(2) The Trustee is expressly permitted, in its discretion, to invest Plan Assets in addition to those segregated in the Fifth Third Stock Fund, in common stock of Fifth Third Bancorp.

(b) Employer Matching Account. Subject to the diversification rights and other relevant provisions of the Plan, the Employer Matching Accounts under the Plan shall be invested in the Fifth Third Stock Fund.

(c) Voting of Shares.

(1) Anything in this Trust Agreement to the contrary notwithstanding, in the case of Fifth Third Bancorp common stock held in the Fifth Third Stock Fund, the Trustee shall exercise voting and other rights pertaining to any shares of Fifth Third Bancorp so held accordance with any instructions received from

the Participant (or beneficiaries) for whose account such shares are held. In the event that any Participant (or beneficiary) shall fail to so instruct the Trustee, then the Trustee shall have the same power to act (or refrain from acting) with respect to any such vote or right as it has with any other Plan Asset.

(2) In the case of Fifth Third Bancorp common stock held outside of the Fifth Third Stock Fund, the Trustee shall have the same power to act (or refrain from acting) with respect to any voting or other right as it has with any other Plan Asset.

ARTICLE 4

COMPENSATION, EXPENSES, AND ACCOUNTS

4.1 Compensation. The Trustee shall be entitled to such compensation for services rendered by it as may be agreed upon in writing from time to time between the Employer and the Trustee.

4.2 Trust Expenses. The expenses incurred by the Trustee in the performance of its duties, including fees for legal services, and such compensation to the Trustee as may be provided for pursuant to Section 4.1, and all other proper charges and disbursements of the Trustee, shall be paid by the Employer; provided however, the Employer may direct the payment of any or all such expenses from the Plan Assets.

4.3 Tax Assessments. The Trustee shall notify the Employer with regard to any tax assessments which it receives on any income or property maintained

in the Plan Assets and, unless notified to the contrary by the Employer at least ten (10) days before the tax is due, shall pay any such assessments from the Plan Assets. If the Employer notifies the Trustee within said period that in its opinion or in the opinion of counsel such assessments are invalid or that they should be contested, then the Trustee shall take whatever action is indicated in the notice received from the Employer or counsel, including contesting the assessment or litigating any claims.

4.4 Accounts, Records, Reports and Valuations.

(a) The Trustee shall keep accurate and detailed accounts of all investments, receipts, disbursements and other transactions under the Trust and all such accounts and other records relating thereto shall be open to inspection and audit at all reasonable times by any person designated by the Employer. Within thirty (30) days following the close of the fiscal year of the Trust, the Trustee shall make a valuation of the Plan Assets (other than any insurance contracts) at fair market value as of the last day of such fiscal year and shall file with the Employer a written copy of such valuation and a written account setting forth all investments, receipts, disbursements and other transactions effected by it under the Trust during such fiscal year. To the extent permitted by law, but subject to any express provision of applicable law as may be in effect from time to time to the contrary, no person other than the Employer may require an accounting or bring any action against the Trustee with respect to the Plan Assets or its actions as Trustee.

(b) All accounts and records maintained by the Trustee with respect to the Plan Assets shall be preserved for such period as may be required under any applicable law. Upon the expiration of any such required retention period, the Trustee shall have the right to destroy such records and accounts after first notifying the Employer of its intention and transferring to the Employer any such accounts. and records requested by it. The Trustee shall have the right to preserve all accounts and records in original form, or on microfilm, magnetic tape, or any other similar process.

(c) The Trustee shall make such periodic reports to the Employer as the Trustee shall deem necessary and proper and such other reports as the Employer may reasonably request, including a valuation of the Plan Assets at fair market value as of any date requested by the Employer.

ARTICLE 5

ACTIONS OF THE TRUSTEE

5.1 General Fiduciary Duties of the Trustee. The Trustee acknowledges that it assumes the fiduciary duties established by this Trust Agreement and imposed by law. Subject to the provisions of the Plan which are consistent with ERISA and which permit Plan Assets to be returned to the Employer, the Trustee shall discharge its duties with respect to the Plan solely in the interest of the Participants and beneficiaries and for the exclusive purpose of providing benefits to such Participants and their beneficiaries and defraying reasonable expenses of administering

the Plan, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and 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, all in accordance with the provisions of this Trust Agreement insofar as they are consistent with the provisions of ERISA, as this Trust Agreement and ERISA may be from time to time amended.

5.2 Extent of Responsibilities. The Trustee shall have only such responsibilities as are stated in this Trust Agreement; provided however, to the extent that the Trustee is the payor of benefits under the Plan, the plan administrator (as defined in section 414(g) of the Code) of the Plan may, subject to providing the Trustee with such information as the Secretary of the Treasury may require, direct the Trustee to withhold applicable federal income taxes under and in accordance with section 3405 of the Code; and provided further, in addition to such responsibilities as stated herein, the Employer and the Trustee may agree that the Trustee shall have the ministerial function of maintaining Participants' accounts in accordance with information, interpretations, and directions from the Administrator. The Trustee shall have no discretionary responsibility for the administration of the provisions of the Plan.

5.3 Court Approval. At no time during the administration of this Trust shall the Trustee be required to obtain any court approval of any act required of it in connection with the performance of its

duties or in the performance of any act required of it, in the administration of its duties as Trustee. The Trustee shall have full authority to exercise its judgment in all matters and at all times without court approval of such decisions; provided, however, that if any application to or proceeding or action in the courts is made, only the Employer and the Trustee shall be necessary parties, and no Participant in the Plan or other person having an interest in the Plan shall be entitled to any notice or service of process. Any judgment entered in such proceeding or action shall be conclusive upon all persons claiming an interest under the Plan.

5.4 Rights of Reliance by the Trustee.

(a) Counsel. The Trustee may consult with legal counsel (who may be of counsel to the Employer) concerning any question which may arise with reference to its duties under this Trust Agreement.

(b) Directions, Statements, and Certificates. The Employer shall furnish the Trustee from time to time with a written list of those persons authorized to give directions, statements, or certificates to the Trustee, and the Trustee shall be entitled to rely upon such list and shall not be charged with notice of any change with respect thereto until the Employer shall have furnished the Trustee with a new written list evidencing such change. The Trustee shall be entitled to rely upon any direction, statement, certificate, or other communication believed by it to be genuine and to be from the Employer or any such person to the full extent permitted by law.

(c) Plan Qualification. The Employer shall furnish the Trustee with copies of all determination letters from the Internal Revenue Service relating to the qualification of the Plan under section 401 of the Code, and the Trustee may rely upon such letters.

5.5 Bond. The Trustee shall not be required to give any bond or any other security for the faithful performance of its duties under this Trust Agreement, except such as may be required by a law which prohibits the waiver thereof.

ARTICLE 6

RESIGNATION, REMOVAL AND SUCCESSION OF THE TRUSTEE

6.1 Resignation and Removal. A Trustee may be removed by the Employer at any time by notice in writing to the Trustee. The Trustee may resign at any time upon sixty (60) days' notice in writing to the Employer. Within thirty (30) days after such removal or resignation, the Trustee shall file with the Employer a written report setting forth all investments, receipts and disbursements and other transactions effected by the Trustee since the end of the preceding Trust Year. Such report shall contain an exact description of all securities and property purchased and sold, the cost or net proceeds of sale (excluding accrued interest paid or received) and shall further indicate such assets held to such date of removal or resignation, together with the cost of each item thereof, as carried on the books of the Trustee.

6.2 Successor. Upon removal or resignation of the Trustee, but in no event more than sixty (60) days thereafter, the Employer shall designate and procure acceptance by, a successor trustee to act hereunder with the same powers and duties as those conferred upon the removed or resigning Trustee. Upon such designation, and upon the written acceptance of such successor, the resigning or removed Trustee shall assign, transfer and pay over to such successor the assets then constituting the Plan Assets; provided, however, that the resigning or removed Trustee is authorized to reserve such sum of money (and for that purpose to liquidate such property as may be necessary to produce such sum) as may seem advisable for payment of all proper charges against the Plan Assets including proper and reasonable expenses in connection with such resignation or removal, and any balance of such reserve remaining after the payment of such charges shall be paid over to the successor. Upon the payment and delivery to any successor of all the Plan Assets, and after full settlement of accounts, the responsibilities of the resigning or removed Trustee shall terminate.

ARTICLE 7

AMENDMENT AND TERMINATION

7.1 Amendment.

(a) This Trust Agreement may be amended by the Employer and the Trustee in accordance with the amendment procedures set forth in (b) below. Any amendment may be made effective retroactively if necessary to bring the Trust into conformity with

governmental regulations which must be complied with in order to make the Plan or Trust eligible for tax benefits. No amendment shall operate to deprive any Participant or beneficiary of any vested rights or benefits accrued to him prior to such amendment, nor shall any amendment or modification cause or authorize any part of the Plan Assets to revert to or be refunded to the Employer, except as otherwise provided in the Plan and consistent with ERISA.

(b) Any amendment of this Trust Agreement on behalf of the Employer shall be by action of the Fifth Third Bank Pension and Profit Sharing Committee or by the Director of Legal/Human Resources of the Bank. If an amendment is being made by the Committee, it must be approved by a majority of the members of the Committee as constituted at the time of adoption of the amendment. Any amendment approved in accordance with this paragraph may be given retroactive effect as determined by said Committee or the Director of Legal/Human Resources, as the case may be. An amendment must be in writing, duly executed and acknowledged by the Director of Legal/Human Resources or an individual with authority from said Committee to execute the amendment on behalf of the Employer and by a trust officer on behalf of the Trustee.

7.2 Termination.

(a) This Trust Agreement and the Trust created hereby may be terminated at any time by the Employer and upon such termination, the Plan Assets shall be paid out by the Trustee as and when directed by the Administrator pursuant to Section 2.2.

(b) Upon such termination of the Trust in whole or in part, the Trustee shall have a right to have its accounts settled.

(c) When the Plan Assets shall have been applied or distributed as provided herein, then the Trustee shall be released and discharged from all further accountability or liability respecting the Plan Assets (or that part of the Plan Assets so applied or distributed if the Trust is terminated only in part) or any part thereof so applied or distributed and shall not be responsible in any way or to any person for the further disposition of the Plan Assets (or that part of the Plan Assets so applied or distributed, if the Trust is terminated only in part) or any part thereof so applied or distributed.

ARTICLE 8

MISCELLANEOUS

8.1 Headings. The headings are for reference only. In the event of a conflict between a heading and the content of a Section, the content of the Section shall control.

8.2 Gender and Number. Except when otherwise indicated by the context, the genders of pronouns and the singular and plural numbers of terms shall be interchangeable.

8.3 Governing Law. This Trust shall be deemed to be an Ohio trust and shall in all respects be construed and regulated by the laws of the State of

Ohio, except where such laws are preempted by the Code or by ERISA.

8.4 Successors. This Trust Agreement shall be binding upon, and the powers herein granted to the Employer and the Trustee, respectively, shall be exercisable by the respective successors and assigns of the Employer and the Trustee. Any corporation which shall, by merger, consolidation, purchase or otherwise, succeed to substantially all the trust business of the Trustee, upon such succession and without any appointment or other action by any person, shall be and become successor trustee hereunder.

8.5 Participant's Interest. Except as otherwise provided in the Plan or this Trust Agreement, no Participant or beneficiary under the Plan shall have any interest in or right to the Plan Assets and, to the full extent of all applicable laws, the assets of this Trust shall not be subject to any form of attachment, garnishment, sequestration, or other actions afforded creditors of any Participant or beneficiary.

8.6 Severability. In case any provision of this Trust Agreement shall be held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining provisions of this Trust Agreement, and this Trust Agreement shall be construed and interpreted as if such illegal or invalid provision had never been a part of it.

IN WITNESS WHEREOF, the parties have caused this Trust Agreement to be executed by their duly authorized officers as of the day and year first above written.

FIFTH THIRD BANK (In its fiduciary capacity to act as Trustee) as the Trustee
/s/ _____

FIFTH THIRD BANK (In its individual corporate capacity) as the Employer
/s/ _____