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

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Although the government persuasively explains why the *Moench* presumption is inconsistent with the text and purposes of ERISA, the government pays insufficient attention to a crucial difference between this case and the other allegedly conflicting cases. The question on which the courts of appeals are divided concerns the duty of prudence applicable to fiduciaries of an ERISA plan *who are required by the terms of the plan to invest in company stock*. By contrast, this case concerns the duty of prudence applicable to fiduciaries of an ERISA plan *where the terms of the plan "do[] not mandate"* investment in the company stock and "*do[] not limit*" their ability to "remove … or divest" company stock. Pet. App. 4 (emphasis added).

There are only a relatively small number of cases involving such unconstrained fiduciaries. Moreover, there is no real conflict regarding their duty of prudence. If the Court were to grant certiorari, it would likely reach the same conclusion with regard to the duty of unconstrained fiduciaries as did the court below and as have all other courts that have faced the question. More important, the Court would likely fail to reach the question of the duty of prudence owed by constrained fiduciaries on which the circuits are divided, and its resolution of this case would thus likely provide little guidance for most future cases in this area. The petition for certiorari should be denied.

I. OTHER COURTS APPLY A SIMILAR STANDARD TO UNCONSTRAINED FIDUCIAIRIES

The government does not dispute that most of the cases discussing the duty of ERISA fiduciaries investing in company stock have involved plans that required or at least significantly constrained fiduciaries to invest in company stock. *See* BIO 15-18. Nor does the government dispute that at least the Second, Third, Fifth, and Ninth Circuits expressly agree that "[a] guiding principle … is that the burden to rebut the presumption [of prudence] varies directly with the strength of a plan's requirement that fiduciaries invest in employer stock." *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 883 (9th Cir. 2010). *See* BIO 19 (citing cases).[1] Where, as here, the

[1] The Third Circuit itself, where the *Moench* presumption originated, has made clear that the presumption is "inapposite" where the fiduciaries were "'simply permitted to make … investments' in 'employer securities.'" *In re Schering-Plough*

plan "does not limit" the fiduciary's discretion to divest or cease investing in company stock, Pet. App. 4, these courts would all permit a complaint like the one here to go forward.[2] They would all agree that the so-called *Moench* presumption, if it applies at all in this situation, would have little or no weight.

Although the government apparently agrees that most of the decisions have held that the fiduciary's duty turns in part on the obligations the plan imposes on him, the government does argue that "*not all* of the precedents from other circuits relied on mandatory plan terms to apply the presumption of prudence." Gov't Br. 17 (emphasis added). But *Kopp v. Klein*, 722 F.3d 327, 336 (5th Cir. 2013), pet. for cert. filed, Nov. 7, 2013 (No. 13-1578),[3] is the *only* decision that has suggested that the standards applicable to fiduciaries in this situation have nothing to do with whether the fiduciary is constrained to invest in employer stock. In *Kopp*, the district court had found that "the Plan *mandated* the [fiduciaries] invest in [company] stock." *Id*. at 335 (emphasis added). If the district court were correct, *Kopp* is thus just another mandated-fiduciary case.

It is true that there was a challenge to the district court's conclusion on appeal, and the court of appeals declined to resolve that challenge, stating that it

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Corp. ERISA Litig., 420 F.3d 231, 238 n.5 (3d Cir. 2005) (quoting *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995)).

[2] The court of appeals held that "the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates." Pet. App. 4.

[3] One of the attorneys representing respondents in this case is also representing petitioners in *Kopp*.

would apply the *Moench* presumption "regardless of whether the [fiduciaries] had discretion to cease permitting new Fund investments in [company] stock or liquidate Fund investments in [company] stock." *Klein*, 722 F.3d at 336. But if taken at face value, that statement creates a clear intra-circuit split with the Fifth Circuit's prior conclusion that "a greater degree of deference, and hence a lesser degree of judicial scrutiny, would be appropriate to" plans that "afford[] no discretion to enter into other investments." *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 255 & n.9 (5th Cir. 2008). Especially in light of the fact that *Kopp* gave no explanation whatever for its statement and made no effort to reconcile it with *Kirschbaum*, that statement alone cannot be taken as a firm indication that the Fifth Circuit would disagree with the Sixth Circuit's result in this case.

It is also true, as the government states, that other cases have examined plans that provide the fiduciary with "*some* discretion" in divesting or ceasing to invest in company stock. Gov't Br. 17 (quoting *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1277, 1282 (11th Cir. 2012)) (emphasis added). The terms of plans differ, and the Second and Ninth Circuits' cases cited by the government (at Br. 17) offered the fiduciaries only *some* discretion to divest or cease to invest in company stock. None of the cases cited by the government, however, involved a plan that "does not limit" the fiduciary's discretion to cease investing or to divest the employer stock. Pet. App. 4. The cases that did involve such unconstrained fiduciaries in the Second and Ninth Circuits have uniformly agreed with the court of appeals here and have permitted similar cases to proceed. *See Harris v. Amgen, Inc.*, 2013 WL 5737307, at *10 (9th Cir. Oct. 23, 2013); *Taveras v. UBS AG*, 708 F.3d 436, 444 (2d Cir. 2013).

Taveras is illustrative. In that case, which involved two plans, the court allowed complaints against *un*constrained fiduciaries of one plan to go forward, 708 F.3d at 444, while it affirmed dismissal of the complaint against the constrained fiduciaries of another plan. 708 F.3d at 446. The government notes (Br. 18) that in *Taveras*, the court stated that the constrained fiduciaries in the second plan had "the ability to remove the company's fund from those funds available to plan investors." 708 F.3d at 444. But, contrary to the government's contention, that did not put those fiduciaries in the same position as respondents here. The Second Circuit in *Taveras* did *not* conclude, as the Sixth Circuit did here, that the second plan in *Taveras* "does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates." Pet. App. 4.

Insofar as there is a conflict in the circuits on the fiduciary duties owed by constrained fiduciaries, this is the wrong case to resolve it. The fiduciaries here were governed both by ERISA's mandate to exercise prudence, as discussed by the government (Br. 9-13), and by the precisely parallel plan mandate to act "as prudence dictates" in deciding whether to cease investing in or divest company stock. Pet. App. 4. Because both mandates require exactly the same conduct, the courts of appeals would agree on the disposition of this case, which does not at all turn on the proper disposition of a case in which it is arguable that the plan's terms attempt to require conduct *different* from that required by ERISA's prudence standard. This Court would likely agree that the ERISA prudence standard is directly applicable in this situation, without having the opportunity to consider the question—on which there is significant

disagreement—whether *constrained* fiduciaries may act less prudently than the ordinary prudence standard of 29 U.S.C. 1104(a)(1)(B) allows.

II. THE TERMS OF THE PLAN HERE SUPPORT THE SIXTH CIRCUIT'S CONCLUSION

The government (Br. 18) states that "the plain terms of the Plan [in this case] mirror the terms of plans that other courts of appeals have determined … 'provide only limited discretion'" to fiduciaries. Here, however, the court of appeals was quite clear that the plan terms "do[] not limit" the fiduciary's discretion to cease investing in or divest employer stock. Pet. App. 4a. Nor did the district court here come to any contrary conclusion. *See* BIO 14-15. Nor did petitioners argue either to the court of appeals or in the petition itself that the plan limited the fidiciaries' discretion in this regard. Petitioners did belatedly assert in their Reply Brief (at 4) that "there is no basis to distinguish" the terms of the plan here from the terms of plans in conflicting cases. But it is too late in the day to re-examine the particular terms of the plan here to determine whether the court of appeals correctly construed them, and doing so would surely not be a sound use of this Court's resources. In any event, the court of appeals' conclusion was correct.

1. The government and petitioners both cite provisions of the plan that state that company stock "shall be an investment option" and that the fiduciaries "shall direct [the company] to make available at least three investment funds in addition to the Fifth Third Fund." Gov't Br. 18; Reply Br. 5. It is not surprising that snippets of plan documents in one case, taken out of context, may appear similar to snippets of plan documents in another case. Any such

similarity has little to do with the meaning or interpretation of the documents as a whole, which must take into account *other* provisions, which neither petitioners nor the government bother to quote.

In particular, if review of the court of appeals' conclusion about the particular plan provisions at issue in this case were thought to be of sufficient importance to warrant this Court's attention, the plan here includes several provisions that establish the correctness of the court of appeals' result. Plans in other cases, such as the *Taveras* constrained-fiduciaries plan on which petitioners rely (at Reply Br. 7-8), provide that the fiduciaries "shall invest and reinvest all amounts in each Participant's Accounts … from among the Investment Funds made available by the Investment Committee … one of which *shall* be the [company] Common Stock Fund." 708 F.3d at 443-44. The plan here provides that "the Fifth Third Stock Fund … shall be an investment option," Reply Br. App. 45, but it immediately follows that with the admonition:

> 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*.

Reply Br. App. 45 (emphasis added). Thus, although company stock had to be an initial offering of the plan here as in other cases, the fiduciaries here were under a mandate that they "shall" terminate that or any other investment if and when prudence dictates.

Furthermore, the plan in *Taveras* provided that its "purpose" is to "attract and retain qualified

individuals by providing them with an opportunity to accumulate assets for their retirement *and to acquire [company] stock*." 708 F.3d at 443 (emphasis added). The plan here has no such provision. To the contrary, the plan here was "established for the purpose of holding the Plan Assets and for the *exclusive benefit* of Participants and their beneficiaries." Reply Br. App. 2, 37; *see also id*. at 2, 37 ("It shall be impossible, by any means, … 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."). A fiduciary of a plan whose purpose is to hold company stock may believe that he may not cease investing in or divest the company stock (although ERISA itself nonetheless requires him to act prudently). But a fiduciary of a plan for whom it is "impossible, by any means" to use plan assets for purposes other than the "exclusive benefit" of the plan participants is under no such arguable constraint.

This Court should not grant review in this case, premised upon the proposition that the court of appeals misinterpreted the particular terms of the plan here, based on arguments that petitioners could and should have made before that court and, if they believed it warranted, in their petition for certiorari. In the cases cited by the government and petitioners, the courts below made clear findings that the fiduciaries were constrained. If further review of the issue of the duties of constrained fiduciaries is warranted, the Court should undertake such review in a case in which the Court can rely on findings that the fiduciaries were constrained and then consider the legal significance of such findings, if any, for the duty of prudence under ERISA Section 1104(a)(1)(B). The Court should not do so in a case, like this one, in which the court below found, the record establishes, and

petitioners did not contest until their reply brief in this Court, that the fiduciaries were unconstrained.

2. The government suggests that, if the Court grants further review here, it should reformulate the question presented, so as to focus attention on the core issue of the meaning and application of the prudence requirement for ESOP fiduciaries investing in company stock. Gov't Br. 19. Unfortunately, the corresponding question presented in the petition merely asks whether the complaint had to plausibly allege that the plan fiduciaries "abused their discretion by remaining invested in employer stock." Pet. i. But there is no controversy about whether an abuse of discretion standard governs plan fiduciaries. As the government notes, the issue on which controversy has arisen (though not with respect to *un*constrained fiduciaries, as noted above) is how much discretion fiduciaries have under ERSIA Section 1104(a)(1)(B).

On November 7, 2013, a petition for certiorari was filed in *Kopp v. Klein*, *supra*. The questions presented in that case are:

> 1. Does the so-called *Moench v. Robertson*, 62 F.3d 553 (1995), *cert. denied*, 516 U.S. 1115 (1996) "presumption of prudence," invented by the Third Circuit, which is not found in the text of the Employee Retirement Income Security Act of 1974 ("ERISA"), have any place in the judicial review of the actions and inactions of ERISA fiduciaries who must conduct themselves according to the prudent fiduciary standard which is found in the text of ERISA?
>
> 2. If the "presumption of prudence" does exist and should be applied to the actions and inactions of

> ERISA fiduciaries, should the scope of judicial review be dependent upon the amount of discretion given to the fiduciaries under the plan document such that fiduciaries like the Idearc fiduciaries, who had actual discretion to change the retirement plan investments, be accorded no judicial deference as they were not constrained from acting to protect their wards?

13-578 Pet. i. Unlike here, those questions presented *do* squarely raise the issues the government believes merit this Court's review. If further review were warranted, the Court should grant certiorari in a case like *Kopp*, in which petitioners clearly raised the core issues, rather than a case like this one, in which they did not.

III. THE ISSUES HERE WOULD BE BETTER CONSIDERED ON A FULL FACTUAL RECORD

In reformulating the questions presented in this case (Br. 19), the government correctly puts emphasis on the question whether there is a presumption of prudence and what it takes to rebut it. Contrary to the government's contention (Br. 18), those questions would be much more fruitfully addressed on a more complete factual record. In particular, insofar as a presumption of prudence is recognized, there are a large variety of terms that courts have employed to describe what must be shown to rebut it. *See*, *e.g.*, *Kirschbaum*, 526 F.3d at 255-256 (rebuttal must show company's "viability as a going concern was . . . threatened," but not necessarily that it was "about to collapse."); *In re Citigroup ERISA Litig*., 662 F.3d 128, 140-141 (2d Cir. 2011), cert. denied, 133 S. Ct. 475 (2012) ("dire situation"); *White v. Marshall & Ilsley Corp*., 714 F.3d 980, 994 (7th Cir. 2013) ("extreme

risks … that outweigh the flexibility of a plan that allows employees to select from among a variety of investment options"). When considering the issue in the abstract (and under a statute that gives no guidance on how great a departure from the duty of prudence is warranted), it is difficult to formulate a clear or coherent standard.

If review were warranted on the question of fiduciary duty with respect to employer stock in an ESOP, the Court would be in a much better position to consider it in a case presenting actual facts regarding the situation the fiduciaries found themselves in; the analysis, if any, they undertook of alternative investment options; and the steps, if any, they took to serve the interests of participants and beneficiaries. Such a factual setting could crystallize the inquiry and enable the Court to adopt an appropriate standard to interpret the duty of prudence in Section 1104(a)(1)(B).

IV. FURTHER REVIEW IS NOT WARRANTED ON THE SECOND QUESTION PRESENTED

We agree with the government that further review is unwarranted on the second question presented. *See* BIO 27-33, Gov't Br. 20-23. As the government points out, the Second and Ninth Circuits have recently joined the unanimous view of the courts of appeals that individuals "act[] as ERISA fiduciaries when they incorporate[] [the employer's] SEC filings into the SPD distributed to plan-participants." Gov't Br. 23 (quoting *Rinehart v. Akers*, 722 F.3d 137, 152 (2d Cir. 2013)) and citing *Harris*, 2013 WL 5737307, at *16-17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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