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

SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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Pursuant to Supreme Court Rule 15.8, petitioners submit this Supplemental Brief to address new points raised in the Brief for the United States as *Amicus Curiae.*

I. The Government Agrees That The First Question Presented Warrants Review

A. The government agrees with petitioners that the courts of appeals are split over the proper application of the presumption of reasonableness in cases alleging that an ESOP fiduciary has violated the duty of prudence. U.S. Br. 14-16, 19. The government also agrees that this case is an appropriate vehicle to resolve these important and recurring questions. *Id.* at 18-19. Accordingly, the government recommends that the Court grant review of the first question presented. *Id.* at 9.

In the short time since the Petition was filed, the Seventh Circuit has joined the Second, Third, Fifth, Sixth, Ninth and Eleventh Circuits in holding that the presumption of reasonableness applies to an ESOP fiduciary's decision to remain invested in employer stock. *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 988-91 (7th Cir. 2013); *see In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011); *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 253-56 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1279 (11th Cir. 2012). As the government recognizes, however, the courts of appeals "have diverged on two interrelated subsidiary questions: what a plaintiff must show to

rebut the presumption, and at what stage in the proceedings the plaintiff must make that showing." U.S. Br. 14.

Six circuits require a plaintiff to plausibly allege "the viability of the company was threatened or the employer's stock was in danger of becoming worthless" in order to overcome the presumption of reasonableness. *White*, 714 F.3d at 994; *Citigroup*, 662 F.3d at 140; *Edgar v. Avaya*, 503 F.3d 340, 348-49 (3d Cir. 2007); *Kirschbaum*, 526 F.3d at 254-256; *Quan*, 623 F.3d at 882; *Lanfear*, 679 F.3d at 1282. Five circuits have held that the presumption applies at the pleading stage. *Citigroup*, 662 F.3d at 139-40; *Edgar*, 503 F.3d at 349; *Kopp v. Klein*, 722 F.3d 327, 339 (5th Cir. 2003); *White*, 714 F.3d at 990-91; *Lanfear*, 679, F.3d at 1281. Only the Sixth Circuit "has departed from the other circuits in both respects." U.S. Br. 15. *See Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 592-93, 595 (6th Cir. 2012).

The government and petitioners agree the Court's review is warranted to "resolve this conflict of authority to ensure that lower courts and plan administrators understand the legal duties of ESOP fiduciaries." U.S. Br. 19.

B. While the government agrees that this Court should resolve the conflict among the courts of appeals regarding petitioners' first question presented, it asks the Court to consider an additional question as well: whether ESOP fiduciaries should *ever* be accorded a presumption of reasonableness. U.S. Br. 19. This question was not raised in the court below, and there is no circuit conflict on this issue – all seven circuits that have decided the question have held that ESOP fiduciaries

are entitled to a presumption of reasonableness. For these reasons, the additional question posed by the government does not warrant review.

The government asks the Court to rule that "courts should not apply a presumption that an ESOP fiduciary has acted prudently at any stage of the proceedings." U.S. Br. 19. Neither respondents nor the government raised this issue in the court of appeals. Instead, the government argued only that under the "flexible presumption" of reasonableness adopted by the Sixth Circuit in *Kuper*, "courts reasonably require plaintiffs to show that prudence dictated a different investment decision 'under the circumstances then prevailing.'" Sec. of Labor Br. 10-11, 16 (July 14, 2011) (quoting 29 U.S.C. §1104(a)(1)(B)). The government's request for review thus disregards the principle that this Court ordinarily does not decide questions that were neither raised nor decided in the court below. *See Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). It also departs from the Court's usual practice of refusing to decide questions raised only by an *amicus curiae*. *See, e.g., United States v. Dion*, 476 U.S. 734, 746 (1986).

Moreover, as the government admits, there is no conflict in the circuits on the additional question it asks this Court to decide. U.S. Br. 13-14. Granting review of this question would therefore require the Court to depart from its longstanding directive that review "will only be granted for compelling reasons," such as a conflict in the courts of appeals "on the same important matter." Sup. Ct. R. 10. Because the seven courts of appeals to have addressed the issue have uniformly held that the presumption of

reasonableness applies to an ESOP fiduciary's decision to remain invested in employer stock, the government's proposed additional question does not warrant the Court's review.

C. The uniform position of the courts of appeals is sound. Contrary to the government's assertion, the presumption of reasonableness does not rest "largely on policy considerations that extend beyond ERISA's text." U.S. Br. 11.

ERISA fiduciaries are required to discharge their duties "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*." 29 U.S.C. § 1104(a)(1)(A) (emphasis added). This statutory language clearly provides that the prudence of a fiduciary's conduct is determined not in the abstract, but in a context that includes the provisions of the plan. *See* 29 U.S.C. § 1104(a)(1)(D) (requiring fiduciaries to discharge their duties in accordance with plan documents insofar as such documents are consistent with ERISA).

By authorizing and encouraging the formation of ESOPS, Congress recognized that ESOP provisions are valid plan *characteristics* and *aims* that fiduciaries should take into account under 29 U.S.C. § 1104(a)(1)(A). "[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570, n.10 (1985). (citing S. Rep. No. 93-127,

p. 29 (1973) ("The fiduciary responsibility section, in essence, codifies and makes applicable to those fiduciaries certain principles developed in the evolution of the law of trusts"); H.R. Rep. No. 93-533, p. 11 (1973) (same)).

The seven courts of appeals that have adopted a presumption of reasonableness did so "by recognizing that when an ESOP is created, it becomes simply a trust under which the trustee is directed to invest the assets primarily in the stock of a single company." *Moench*, 62 F.3d at 571. They also recognized that "the trust serves a purpose explicitly approved and encouraged by Congress." *Id.* The presumption of reasonableness acknowledges that ESOP fiduciaries should not be subject to liability "for investing plan assets in the manner and for the purposes that Congress intended." *Id.*

If the Court were to adopt the government's position, which ignores both the statutory text of ERISA and the text and character of the plan, fiduciary responsibility with respect to employer stock plans would become a high-wire act. ERISA places ESOP fiduciaries on a "razor's edge" with its "simultaneous demands to comply with plan documents and to exercise prudence in choosing investment options for plan participants." *White*, 714 F.3d at 990. These dual requirements have led seven courts of appeals to agree that ESOP fiduciaries should be afforded "significant deference when their prudence is being challenged." *Id.* Without the presumption of reasonableness, "the duty of prudence would leave fiduciaries exposed to liability based on 20-20 hindsight for mere swings in the market or other foreseeable circumstances in which

reasonable fiduciaries and other investors could easily disagree about the better course of action." *Id.*

* * *

The Court's review of Petitioners' first question presented is warranted. Review of the government's proposed additional question is not warranted, but in any event the presumption of reasonableness is valid and supported by the text of ERISA.

II. The Second Question Presented Warrants This Court's Review

The government urges the Court to deny review of the second question presented, concerning respondents' disclosure claim, on the grounds that (a) there is no conflict of authority among the circuits and (b) the Sixth Circuit's ruling is correct. U.S. Br. 20. Petitioners disagree with the government on both grounds and urge the Court to review the second question.

A. The government's position is based on an erroneous description of respondents' claim. According to the government, respondents allege that petitioners violated their fiduciary duties "by *knowingly* providing misleading information to participants about Fifth Third's financial condition through plan documents." U.S. Br. 5 (emphasis added). Respondents' claim, however, is not so limited. Respondents allege more broadly that petitioners failed to provide complete and accurate financial information regarding Fifth Third's financial condition – not that they did so knowingly. *See, e.g.*, Complaint ¶¶5, 245. Respondents claim that petitioners are liable for breaches of their duties

of loyalty and prudence because they "knew or should have known" of the misleading statements made in SEC filings that were incorporated into plan documents. *See* Complaint ¶¶ 97, 187-193.

The court of appeals recognized that respondents were not claiming *only* that petitioners intentionally misled plan participants and held that respondents' "*knew or should have known*" allegations were sufficient to state an ERISA misrepresentation claim. *See* Pet. App. 5-6, 16 ("Significantly, a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements were made *negligently or intentionally*.") (emphasis added) (internal quotations omitted). The Ninth Circuit recently joined the Sixth Circuit on this issue. *Harris v. Amgen, Inc.*, No. 10-56014, 2013 U.S. App. LEXIS 21503, at *45 (9th Cir. Oct. 23, 2013) (finding sufficient plaintiffs' allegations that "the defendants knew or should have known that statements contained in these filings, incorporated by reference into the [summary plan descriptions ('SPDs')], were materially false and misleading.")

By contrast, the Second and Seventh Circuits have ruled that a fiduciary who prepared a SPD would be liable for statements in SEC filings incorporated into the SPD by reference *only if* the fiduciary *knew* that the statements were false. *Rhinehart v. Akers*, 722 F.3d 137, 153 (2d Cir. 2013); *In re GlaxoSmithKline ERISA Litig.*, No. 11-2289-cv, 2012 U.S. App. LEXIS 18552, at *9 (2d Cir. Sept. 4, 2012); *Gearren v. McGraw-Hill Cos.*, 660 F.3d 605, 611 (2d Cir. 2011); *Howell v. Motorola, Inc.*, 633 F.3d 552, 571 (7th Cir. 2011) ("[P]laintiffs do not point to any intentionally

misleading statement issued by [defendants]. To the extent that they argue that the defendants negligently misrepresented information [] in their SEC filings, that negligence would not be enough to show a violation of ERISA's disclosure duty.")

B. If the Court declines to review the second question presented, the fiduciaries of employee stock plans will be in an untenable position. Because ERISA provides for nationwide service of process, and an action can be brought in the district (a) where the plan is administered, (b) where the breach took place, or (c) where a defendant resides or may be found, (29 U.S.C. § 1132(e)(2)), fiduciaries of employee stock plans throughout the country will be subject to conflicting standards of liability, contrary to the text and objectives of ERISA. *See* 29 U.S.C. § 1144(a), (b)(2), (d) (ERISA preempts state law, but not any federal law or state securities laws); *Conkright v. Frommert*, 559 U.S. 506, 517 (2010); *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 11 (1987) (Congress sought to avoid "a patchwork scheme of regulation").

The circuit split described above, involving the Sixth, Ninth, Second, and Seventh Circuits, will account for only part of that confusion. In addition, the Fifth and Eleventh Circuits have taken a different point of view and have ruled that a plan fiduciary is not liable for material misstatements in SEC filings where the filings were incorporated into plan prospectuses, but not incorporated into SPDs, and distributed by the fiduciary to plan participants. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1273, 1284 (11th Cir. 2012). There is

no reason why fiduciary liability should turn on this distinction without a difference.

The Secretary of Labor has added to this confusion. In the regulation under section 29 U.S.C. § 1104(c), the Secretary emphasized that the regulation neither requires a fiduciary to disclose material nonpublic information to the general public nor requires disclosure of such information to plan participants if disclosure would violate the securities laws. *See* 29 C.F.R. § 2550.404c-1(c)(2)(ii); 57 Fed. Reg. 46,923 (Oct. 13, 1992). Although petitioners do not rely on § 1104(c) as a defense in this case, there is no reason to think that the § 1104(a) disclosure standards are more exacting than the § 1104(c) standards. *See Howell v. Motorola, Inc.*, 633 F.3d 552, 571 (7th Cir. 2011) ("[N]or, for that matter, do we see why the disclosure required of Plan fiduciaries under ERISA generally should be different than that required in order for fiduciaries to take advantage of section 404(c).")

In a brief as *amicus curiae* in *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), the Secretary argued that "a company and its officers do not become ERISA fiduciaries by filing SEC forms, such as the Form 10K or Form 10Q, which all companies that issue stock to the public are required to file. That is true even if the securities filings are distributed by others to plan participants *or incorporated by reference into plan documents.*" *See* Sec. of Labor Br. 4 n.2 (Aug. 16, 2006) (emphasis added) (internal citation omitted). More recently, in *Kopp v. Klein*, No. 12-10416, 2013 U.S. App. LEXIS 13879 (5th Cir. July 9, 2013), the Secretary took a conflicting position: that a fiduciary can be liable

regardless of whether the SEC filings are incorporated into the plan's SPDs. *See* Sec. of Labor Br., Part II (Aug. 15, 2012).

Review by this Court is necessary to prevent fiduciaries from being subjected to conflicting standards of liability.

C. Contrary to the government's assertion, the Sixth Circuit's ruling is erroneous. ERISA imposes comprehensive disclosure obligations regarding employee benefit plans; it does not impose disclosure obligations regarding corporate securities. *See* 29 U.S.C. Part 1 of Title 1 ("Reporting and Disclosure").

Public companies are subject to carefully delineated corporate disclosure laws. Congress, perceiving the need to protect companies against "strike suits," has amended the securities laws to (i) revise the requirements that plaintiffs must meet in order to be able to bring securities class action litigation alleging misrepresentation, and (ii) require such class action suits to be brought under the federal securities laws. ERISA should not be used as a vehicle for an end-run around such requirements. *See Baker v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004) ("[I]f we were to create a new fiduciary duty, as plaintiffs request, we run the risk of disturbing the carefully delineated corporate disclosure laws. We decline to do so here where there is no well-pleaded allegation of intent to deceive the plan participants."); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003) (SLUSA enacted to prevent end-run around PSLRA); *Lander v. Hartford Life & Annuity Co.*, 251 F.3d 101, 107 (2001) (PSLRA intended to prevent "strike suits").

When Congress imposed disclosure obligations in other parts of ERISA, including 29 U.S.C. Part 4 of Title 1 (governing fiduciary responsibility), it did so explicitly. Congress did not authorize the courts to create disclosure requirements under ERISA that it did not include in the text of ERISA, and that could overlap and conflict with the carefully delineated disclosure requirements imposed by the securities laws, including the securities law prohibitions on selective disclosure and insider trading. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995); *Bd. of Trs. of CWA/ITU Negotiated Pension Plan v. Weinstein,* 107 F.3d 139, 146-47 (2d Cir. 1997); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 808 (7th Cir. 2007).

Petitioners were not acting as fiduciaries in preparing the SEC filings and incorporating them into SPDs. The SEC filing requirements are not imposed by ERISA on fiduciaries; they are imposed by the securities laws on issuers. *See* 15 U.S.C. § 77e; 17 C.F.R. § 239.16B; 17 C.F.R. § 230.428(a)(1). The securities laws impose comprehensive disclosure obligations on the issuers of publicly traded securities, including employer stock that participants may elect to purchase through their employers' employee benefit plans.

The Secretary of Labor's ERISA regulations exclude the preparation of employee communications and government-required reports from the scope of fiduciary conduct. *See* 29 C.F.R. § 2509.75-8(D-2). By treating SEC filings as fiduciary communications, merely through incorporation, the Sixth Circuit's ruling requires public companies to adopt a wholly impractical regime under which plan fiduciaries are

obligated to review and second-guess the judgment of the company's securities experts. *Cf. In re Citigroup, Inc.*, 662 F.3d 128, 145 (2d Cir. 2011) ("We are also mindful that requiring Plan fiduciaries to perform an independent investigation of SEC filings would increase the already-substantial burden borne by ERISA fiduciaries and would arguably contravene Congress's intent 'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'") (quoting *Conkright*, 559 U.S. at 517). This is not what Congress intended.

By transforming SEC filings into fiduciary communications, through mere incorporation into plan documents, the Sixth Circuit has subjected statements made in SEC filings to ERISA regulation as well. The second question presented also warrants this Court's review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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