No. 12-751

IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, *et al.*,

Petitioners,

v.

JOHN DUDENHOEFFER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, THE PLAN SPONSOR COUNCIL OF AMERICA, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF AMICI CURIAE. 1

SUMMARY OF THE ARGUMENT. 3

ARGUMENT. 5

I. Congressional Policy Strongly Favors The Offering Of Employer Stock Funds, Which Provide Many Public and Private Benefits 5

II. The Unique Nature And Favored Status Of Employer Stock Funds Warrant A Presumption That Fiduciaries Act Prudently By Offering Them 9

A. ERISA Defines "Prudence" By Reference To The Aims Of An Employer Stock Fund. 10

B. Ordinary Measures Of Prudence Are Inapplicable In The Context Of Employer Stock Funds 13

C. The Presumption Of Prudence Applies At The Motion-To-Dismiss Stage 17

Table of Contents

Page

III. Sponsors Will Be Discouraged From Offering Employer Stock Funds Absent A Strong Presumption Of Prudence That Applies At The Pleading Stage 18

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

Cases

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 17, 19

Bunch v. W.R. Grace & Co.,
555 F.3d 1 (1st Cir. 2009). .15, 20

CIFPT v. Loomis Sayles & Co.,
No. 96-cv-4036, 1999 WL 1457226 (C.D. Cal. Mar. 26, 1999), *aff'd in part, vacated in part*, 259 F.3d 1036 (9th Cir. 2001). .14

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp.,
472 U.S. 559 (1985). 10

DiFelice v. U.S. Airways, Inc.,
497 F.3d 410 (4th Cir. 2007). .20

Dudenhoeffer v. Fifth Third Bancorp,
692 F.3d 410 (6th Cir. 2012), *cert. granted*, 134 S. Ct. 822 (2013). 13, 17, 18

Dupree v. Prudential Ins. Co. of Am.,
No. 99-cv-8337, 2007 WL 2263892 (S.D. Fla. Aug. 7, 2007) 14

Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007) 12, 18

Page

Gray v. Citigroup, Inc. (In re Citigroup ERISA Litig.), 662 F.3d 128 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 475 (2012) 11, 18

In re Suntrust Bank, Inc. ERISA Litig., No. 1:08-cv-3384, 2013 WL 5418130 (N.D. Ga. Sept. 26, 2013) 19

In re Wachovia Corp. ERISA Litig., No. 3:09-cv-262, 2010 WL 3081359 (W.D.N.C. Aug. 6, 2010) 19

Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008) 11

Kopp v. Klein, 722 F.3d 327 (5th Cir.), *petition for cert. filed*, No. 13-578 (Nov. 7, 2013) 18

Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995) 6

Lanfear v. Home Depot, Inc., 679 F.3d 1267 (11th Cir. 2012) 11, 16, 17, 18

Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995) 13, 15

Page

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671 F.3d 585 (6th Cir.), *cert. denied*,
133 S. Ct. 756 (2012). 17-18

Quan v. Computer Scis. Corp.,
623 F.3d 870 (9th Cir. 2010). 11, 16

Summers v. State St. Bank & Trust Co.,
453 F.3d 404 (7th Cir. 2006) .16

Taveras v. UBS AG,
107 F.3d 436 (2d Cir. 2013) 16

Varity Corp. v. Howe,
516 U.S. 489 (1996) 12

White v. Marshall & Ilsley Corp.,
714 F.3d 980 (7th Cir. 2013). 11, 17, 18

Statutes and Other Authorities

26 U.S.C. § 72(t)(2)(A)(vi) 8

26 U.S.C. § 402(e)(4) 8

26 U.S.C. § 404(a)(9) 8

26 U.S.C. § 404(k) 8

26 U.S.C. § 1042. 8

Page

29 U.S.C. § 1104(a)(1)(B) 10

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29 U.S.C. § 1107(b)(1) 7

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Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 . . . . 9, 20

93 Cong. Rec. S40,754 (daily ed. Dec. 11, 1973) 6

H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639. 11

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Sup. Ct. R. 37.6 1

A Statistical Profile of Employee Ownership, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/articles/statistical-profile-employee-ownership 7

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Page

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans that provide benefits to millions of active workers, retired persons, and their families nationwide. ERIC frequently participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit design or administration under the Employee Retirement Income Security Act of 1974 ("ERISA").

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1. Counsel for each party consented to the filing of this brief. Correspondence reflecting this consent is on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici or their members made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

The American Benefits Council (the "Council") is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 350 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Plan Sponsor Council of America ("PSCA") is a nonprofit association that provides services, best-practice information, and advocacy to defined contribution plan sponsors. Membership includes 1,200 companies ranging in size from Fortune 100 firms to small, entrepreneurial businesses.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM is a leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber, ERIC, the Council, PSCA, and NAM (collectively, "Amici") frequently participate as amici curiae in cases with the potential to significantly affect the

design and administration of employee benefit plans under ERISA. Many of Amici's members offer their employees the opportunity to invest in stock funds similar to the one at issue here. Both the companies that design those plans and the fiduciaries who administer them have significant interests in the standard by which their actions are reviewed. If the decision to offer a stock fund and invest its assets in company stock is not subject to a presumption of prudence that can be applied at the motion-to-dismiss stage—as has been the law in every other circuit that has addressed the question for more than two decades—then plan sponsors are likely to discontinue that option, as their risk of ERISA liability, or the costs of defending claims, would be too great in the event of an ordinary downturn in the stock market. Accordingly, Amici file this brief to aid the Court in its understanding of the fiduciary duties at issue and the deleterious impact that affirming the Sixth Circuit's judgment could have on retirement plans that feature employer stock.

SUMMARY OF THE ARGUMENT

Seven circuits have held that fiduciaries who offer employer stock funds like Fifth Third's are entitled to a "presumption of prudence." Nearly every circuit to address the question has ruled that this presumption—which, in substance, is a standard for adjudicating a fiduciary's liability—can be rebutted only upon a showing of dire financial circumstances that would undermine the congressional purpose in encouraging employee stock ownership.

The Sixth Circuit below diverged from the "dire circumstances" test, holding that the presumption of

prudence can be overcome whenever a plaintiff proves that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." The Sixth Circuit also held that the presumption of prudence is an evidentiary, rather than a substantive, standard and therefore refused to apply it on a motion to dismiss.

The Sixth Circuit was wrong on both fronts. Unlike other investment funds—whose sole purpose is to increase an employee's retirement savings—one of the essential purposes of an employer stock fund is to permit an employee to share in the ownership and long-term success of the company for which she works. Congress specifically endorsed that goal in explicit statements of legislative purpose. It also encouraged such funds by providing tax incentives to companies that offer them and exempting the funds from various rules that would ordinarily prohibit them, including ERISA's prohibited transaction rules. Consequently, a prudent fiduciary evaluating whether to offer an employer stock fund would focus not only on the expected financial return but also on the importance of promoting employee ownership. That goal is achieved unless the employer's viability as a going concern is in doubt.

Absent a strong presumption of prudence, plan fiduciaries and corporate plan sponsors could be deterred from offering employer stock funds as an investment option for fear of the costs and risks of litigation. The typical tools ordinarily employed by fiduciaries to evaluate investment options are unavailable when an employer stock fund is at issue. Fiduciaries will therefore be ill-equipped to defend themselves from what will likely be an onslaught of lawsuits challenging their decisions to maintain stock

funds whenever the price of the stock drops (even if it subsequently rebounds). Similar adverse consequences will result if the presumption of prudence is not applied at the motion-to-dismiss stage because expensive and time-consuming discovery inexorably follows the failure to dismiss an unmeritorious claim, which pressures plan fiduciaries to settle regardless of the suit's lack of merit.

ARGUMENT

I. Congressional Policy Strongly Favors The Offering Of Employer Stock Funds, Which Provide Many Public and Private Benefits.

Employer stock funds are fundamentally different from other types of investment funds offered in conjunction with 401(k) and other employee retirement plans.[2] By definition, employer stock funds invest primarily in a single stock, whereas the typical investment fund is diversified and tailored to a particular risk profile. Consistent with their structure and composition, employer stock funds also serve different purposes. Whereas typical investment funds are offered and maintained solely to increase or preserve a participant's retirement savings, employer

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2. Congress often refers to employee stock ownership plans ("ESOPs"), which are employee benefit plans that invest primarily in employer stock. Eligible individual account plans ("EIAPs") include both ESOPs and 401(k) plans, the latter of which may offer ESOP or non-ESOP stock funds as investment options. *See* 29 U.S.C. § 1107(d)(3)(A)(ii) (defining EIAPs). Fifth Third's 401(k) plan offers employees the option to invest in one or more of a variety of funds, including an ESOP fund composed primarily of company stock. We refer herein to this type of fund, as well as non-ESOP stock funds, as "employer stock funds."

stock funds are also designed to provide employees with the opportunity to participate in the ownership of their employers. *See Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995) ("Congress envisioned that an ESOP would function both as an employee retirement benefit plan and a technique of corporate finance that would encourage employee ownership." (citation and internal quotations omitted)). Participation is usually voluntary. In 401(k) plans, where the employer stock fund is one of several investment alternatives, participants may choose to invest any portion of their plan accounts in that fund, while leaving the remainder for more conventional retirement saving.

Since their introduction in the 1970s, employer stock funds have become widely available on the menu of retirement plan options offered by American corporations. Employers like these funds because they provide an affordable means of raising capital. *See* 93 Cong. Rec. S40,754 (daily ed. Dec. 11, 1973) (statement of Sen. Russell Long, Chair of Senate Finance Committee when ERISA was enacted) (employee ownership plans "provide low-cost capital for the employer"). Moreover, businesses tend to experience increases in productivity, sales, and hiring following the offering of a stock fund or similar plan that encourages employee ownership. *See* Corey M. Rosen, *Employee Ownership and Corporate Performance*, *in* 1 Employee Stock Ownership Plans at 2-1 to 2-3 (Robert W. Smiley, Jr. et al. eds., 2006).

At the same time, employer stock funds offer multiple benefits to workers. Employees who own company stock report feeling more committed to their employer, and many studies have shown that they are more satisfied

with their work. *Enron and Beyond: Enhancing Worker Retirement Security: Hearing Before the H. Subcomm. on Employer-Employee Relations*, 107th Cong. 97-98 (Feb. 13, 2002) (statement of Douglas Kruse, Professor, Rutgers University). And, of course, stock funds offer employees the opportunity to share financially in the success of their employer.

For all of these reasons, employer stock funds have proven to be extremely popular among both employers and employees. It is estimated that more than 12,000 U.S. companies offer some form of an employer stock fund, with more than 14 million workers choosing to participate. *See A Statistical Profile of Employee Ownership*, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/articles/statistical-profile-employee-ownership (last visited Feb. 1, 2014).

Congress has repeatedly encouraged sponsorship of employer stock funds. To begin with, it exempted employer stock funds from ERISA's diversification requirements—which would normally limit the percentage of a plan's assets that a fiduciary could invest in any single security—as well as from prohibited transaction rules that would similarly limit plan ownership of employer stock. *See* 29 U.S.C. § 1104(a)(2) (stating that in the case of an EIAP, the diversification requirement and the prudence requirement (insofar as it requires diversification) are not violated by the acquisition or holding of employer stock); *id.* § 1107(b)(1) (exempting EIAPs from the rule that employer stock cannot compose more than 10% of an ERISA plan's total value). Congress thereby facilitated the inclusion of ESOPs and other employer stock funds in 401(k) plans.

Congress has also enacted dozens of other laws to encourage employers to offer their employees the opportunity to invest in company stock. *See* Robert W. Smiley, *ESOP Legislative History Summary*, *in* 2 Employee Stock Ownership Plans, *supra* p. 6, at A20-2 to A20-3. For example, Congress provides significant tax advantages to companies that offer stock funds to their employees. A company may deduct certain contributions that it makes to a stock fund, *see* 26 U.S.C. § 404(a)(9), as well as certain dividends paid to fund participants, *see id.* § 404(k). Moreover, owners of closely held corporations can defer taxation on capital gains from certain stock sold to an employer stock fund. *See id.* § 1042. Congress also created incentives for employees to participate in employer stock funds. For instance, the Internal Revenue Code provides special benefits to employees, such as deferred tax on "net unrealized appreciation," *id.* § 402(e)(4), and an exception from the penalty for early distributions for employer stock dividends, *see id.* § 72(t)(2)(A)(vi).

Indeed, Congress expressly found that employer stock funds and other investment vehicles that foster employee ownership offer numerous public and private benefits that should be promoted and encouraged:

> Intent of Congress Concerning Employee Stock Ownership Plans—The Congress, in a series of laws . . . has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520. Conversely, it has warned against "regulations and rulings which treat employee stock ownership plans as conventional retirement plans," lest they be regulated out of existence. *Id.*

II. The Unique Nature And Favored Status Of Employer Stock Funds Warrant A Presumption That Fiduciaries Act Prudently By Offering Them.[3]

By its terms, ERISA requires a prudent fiduciary, when faced with the decision of whether to allow employees the option to invest in a particular fund, to consider the purpose of that fund. Employer stock funds are unique investment vehicles in that they have the additional purpose of facilitating employee ownership in their employer. As such, these funds serve different goals from other investment funds, which exist purely to maximize or preserve retirement dollars.

It is therefore prudent to give employees the option to invest in a stock fund so long as the fund provides investing employees with a viable share of their employer. Only when the employer is no longer viable as a going concern would it be imprudent to allow such an investment because, in those circumstances, investing in the fund would not provide employees with a meaningful ownership interest.

3. Although the Court granted certiorari on the question of whether the facts alleged by Respondents are sufficient to rebut the "presumption of prudence," that issue is necessarily bound up with the reasons that the presumption exists in the first instance. We accordingly address that issue here.

Six of the seven circuits to address the issue are in accord that fiduciaries act prudently when they offer employer stock funds as long as the employer's viability as a going concern is not in doubt. As discussed below, this "dire circumstances" test not only comports with ERISA's explicit definition of prudence, but it also fulfills Congress's legislative goal—embodied in ERISA and other statutes—to encourage employee ownership.

A. ERISA Defines "Prudence" By Reference To The Aims Of An Employer Stock Fund.

ERISA requires that a fiduciary act with "prudence" when discharging his duties with respect to an employee retirement plan. 29 U.S.C. § 1104(a)(1)(B). The prudence of a particular decision, in turn, is defined by reference to the standard of care that a prudent man would use "in the conduct of an enterprise *of a like character and with like aims*." *Id.* (emphasis added). Accordingly, the measure of prudence must take into account the specific purposes of the plan option under consideration. *See* 29 C.F.R. § 2550.404a-1 (fiduciary satisfies prudence standard by giving appropriate consideration to "facts and circumstances" that are "relevant to the particular investment," including the "role" the investment plays in the plan's portfolio). In that respect, ERISA's definition of prudence corresponds to the concept of prudence found in the common law of trusts, which also looks to the goals of the trust itself. *See* Restatement (Third) of Trusts § 77(1) (2007) ("The trustee has a duty to administer the trust as a prudent person would, in light of the *purposes, terms, and other circumstances* of the trust." (emphasis added)); *see also Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp.*, 472 U.S. 559, 570 (1985) (noting

that ERISA's prudence element derives from the common law); *accord* H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

The courts of appeals that have addressed the issue have all recognized that the decision to create and maintain an employer stock fund, when the plan provides for one, must be presumptively prudent given the distinct, additional purposes that such funds serve. All but the Sixth Circuit have developed a bright-line standard governing prudence in the context of these funds: Fiduciaries are presumed to act prudently when they offer employees the option to invest in an employer stock fund unless the employer's viability as a going concern is in doubt or other dire circumstances are present.[4] In that case, the policy

4. Although they have used different formulas to describe precisely what constitutes sufficiently dire circumstances to rebut the presumption, the standard is functionally the same in all six circuits. *See*, *e.g.*, *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 994 (7th Cir. 2013) (claim failed to "show extreme risks imposed upon participants by fiduciaries that outweigh the flexibility of a plan that allows employees to select from among a variety of investment options"); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1282 (11th Cir. 2012) ("short-term events and fluctuations in the market" insufficient to rebut presumption); *Gray v. Citigroup, Inc. (In re Citigroup ERISA Litig.)*, 662 F.3d 128, 140 (2d Cir. 2011) ("circumstances placing the employer in a 'dire situation'"), *cert. denied*,133 S. Ct. 475 (2012); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (claims failed to implicate the employer's viability "as an ongoing concern" or show "a precipitous decline in the employer's stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement" (citation omitted)); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 255 (5th Cir. 2008) ("no indication that [employer's] viability as a going concern was ever threatened");

goals that animated Congress to encourage such stock funds—and the reasons that motivate employees to invest in them—can no longer be served. The "presumption" is more aptly described as a heightened standard of proof: Fiduciaries who offer these congressionally favored plans may not be held liable under ERISA unless a plaintiff can demonstrate that the purposes behind investing in employer stock funds cannot be satisfied.

Under this test, short-term stock price fluctuations should not compel a fiduciary to jettison an employer stock fund and all of its attendant advantages. Regardless of whether the stock loses money in the short run, the stock fund's purpose of fostering employees' ability to share in the ownership of their employer would still be fulfilled.

Where, however, the company faces dire circumstances, such as an inevitable bankruptcy, offering the fund no longer advances the goal of facilitating employee ownership. Increasing employee ownership of what a fiduciary knows is a failing company is not beneficial to anyone, and a fiduciary should not be presumed prudent for continuing to offer company stock that will soon be worthless.

The "dire circumstances" test not only comports with ERISA's plain terms, but it also honors the congressional policy of encouraging employee ownership. When interpreting the prudence requirement of ERISA, "courts may have to take account of competing congressional purposes," *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)—

Edgar v. Avaya, Inc., 503 F.3d 340, 348-49 (3d Cir. 2007) ("dire situation").

here, the congressional aims to protect retirement assets while also encouraging employee ownership of employer stock. Because an undiversified stock fund is potentially volatile, ERISA's prudence requirement could, if strictly construed, preclude a fiduciary from offering an employer stock fund. *See Moench v. Robertson*, 62 F.3d 553, 570 (3d Cir. 1995) (expressing concern that absent a presumption of prudence, ERISA's goal of protecting retirement savings would "override" the goal of encouraging employee ownership). The "dire circumstances" standard honors both policy aims by protecting a fiduciary who offers employer stock funds from liability so long as those funds serve their congressionally designed purpose.

B. Ordinary Measures Of Prudence Are Inapplicable In The Context Of Employer Stock Funds.

The Sixth Circuit rejected the "dire circumstances" test, holding instead that whether a fiduciary acts prudently by offering an employer stock fund turns on whether a "prudent fiduciary acting under similar circumstances would have made a different investment decision." *Dudenhoeffer v. Fifth Third Bancorp*, 692 F.3d 410, 418-19 (6th Cir. 2012), *cert. granted*, 134 S. Ct. 822 (2013). The Sixth Circuit thus adopted the traditional test for prudence but in so doing failed to take into account the unique attributes and objectives of employer stock funds and ignored the impossibility of a fiduciary being able to satisfy its proposed test.

The duty of prudence should be applied and evaluated differently with respect to an employer stock fund. With a typical investment fund—where the sole aim is

to increase and preserve retirement savings—a plan fiduciary demonstrates his prudence by analyzing the fund's performance against various objective benchmarks, such as the risk-return ratio, the performance of the fund relative to similar "peer" funds, and the qualities and costs of the fund manager. *See*, *e.g.*, *Dupree v. Prudential Ins. Co. of Am.*, No. 99-cv-8337, 2007 WL 2263892, at *12, *37 (S.D. Fla. Aug. 7, 2007); *CIFPT v. Loomis Sayles & Co.*, No. 96-cv-4036, 1999 WL 1457226, at *10 (C.D. Cal. Mar. 26, 1999), *aff'd in part, vacated in part*, 259 F.3d 1036 (9th Cir. 2001); *Evaluating Performance*, FINRA, http://www.finra.org/Investors/ SmartInvesting/ AdvancedInvesting/EvaluatingPerformance (last visited Feb. 1, 2014) (explaining standard protocol for evaluating investment portfolio). A fiduciary who considers and acts upon these objective measures would be insulated from claims of imprudence even if the fund's value subsequently declined.

These traditional objective benchmarks are either inapt or inapplicable when analyzing the prudence of offering an employer stock fund. Objective indicia like risk-return ratios are unhelpful in evaluating employer stock funds because funds holding a single asset are inherently more volatile and, therefore, are considered risky. Moreover, it is pointless for a fiduciary to compare the performance of the employer's stock with "peer" investments—such as competitors' stock—because the purpose of these funds is to provide employees with the opportunity to invest in *their* employer even if the employer's stock is not among the best performing investments. Nor can the cost or quality of fund managers be considered as part of the prudence analysis because

employer stock funds require no traditional management. Indeed, Congress effectively decided that the ordinary standards for evaluating the prudence of an investment fund do not apply in the context of an employer stock fund by declaring that it is not imprudent to offer such funds even though they are undiversified and permit employees to place all of their retirement eggs in a single basket. *See* 29 U.S.C. § 1104(a)(2).

As a practical matter, then, a fiduciary trying to demonstrate the prudence of offering an employer stock fund would not have at his disposal any of the ordinary measures of prudence. And the decision below provides no further guidance as to how a court would evaluate the fiduciary's prudence in this context. If the Sixth Circuit's holding carries the day, fiduciaries will find themselves with little idea of how to measure the propriety of offering an employer stock fund and few means of defending themselves if they are sued following a stock-price drop. Thus, fiduciaries would have stronger incentives to abandon employer stock funds altogether to reduce their litigation costs (and risk). Of course, abandoning an employer stock fund for fear of being sued on a prudence theory might also expose a fiduciary to other claims if the employer's stock price subsequently rises. *See, e.g.*, *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 5-6 (1st Cir. 2009) (fiduciary sued for causing plan to divest of employer stock that subsequently rose in value); *see also Moench*, 62 F.3d at 571-72 ("[I]f the fiduciary, in what it regards as an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution, particularly if the employer's securities thrive."). The Sixth Circuit's rule thus leaves fiduciaries caught

"between the devil and the deep blue sea." *Lanfear v. Home Depot, Inc.*, 679 F. 3d 1267, 1282 (11th Cir. 2012).[5]

In the Solicitor General's amicus brief at the petition stage, the Government proposed another standard for prudence: Offering an employer stock fund is imprudent whenever a fiduciary "reasonably should have known" that the stock was "significantly overvalued." *See* Brief for the United States as Amicus Curiae ("U.S. Brief") at 9-10. That standard is fatally flawed.

The Government's proposed approach is tantamount to demanding that the plan fiduciaries have clairvoyance regarding the future movement of stock prices. A fiduciary faced with the same universe of public information as the rest of the market cannot be expected to divine when the employer's stock price is inflated such that further investment would be unwise. *See, e.g.*, *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010) ("Fiduciaries are not expected to predict the future of the company stock's performance."); *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 408 (7th Cir. 2006) (Posner, J.) ("A trustee is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him.").

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5. For similar reasons, a standard proposed by some circuits wherein the strength of the presumption depends on the particular language of the plan is also unworkable. *See, e.g., Taveras v. UBS AG*, 107 F.3d 436, 443-46 (2d Cir. 2013). Whether the plan requires or merely allows the creation or maintenance of an employer stock fund, a presumption of prudence is always warranted regardless of the specific wording of the plan language so long as offering the fund facilitates employee ownership of employer stock.

There may be situations in which a fiduciary is a company insider who has access to non-public information that would put him in a better position to evaluate the value of an employer's stock price than the market as a whole. But employees "have no right to insist that fiduciaries who are corporate insiders use inside information to the advantage of the participants." *Lanfear*, 679 F.3d at 1282; *see also White v. Marshall & Isley Corp.*, 714 F.3d 980, 982 (7th Cir. 2013) (stating that a fiduciary who uses "insider information for the benefit of employees . . . would violate federal securities laws"). The Court should not craft additional obligations or rules through an interpretation of ERISA's prudence requirement in a manner that would conflict with other laws, such as the federal securities laws.

C. The Presumption Of Prudence Applies At The Motion-To-Dismiss Stage.

It is now well established that a plaintiff must plead facts that, if proven, would raise a right to relief beyond a speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In the ruling below, however, the Sixth Circuit became the only circuit to refuse to apply the presumption of prudence on a motion to dismiss. In explaining its rationale, the court noted that it has not adopted the other circuits' "dire circumstances" test for rebutting the presumption. *See Dudenhoeffer*, 692 F.3d at 418-19. Instead, the Sixth Circuit has adopted a standard pursuant to which a plaintiff could rebut the presumption merely by showing that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585, 591 (6th Cir.) (citation omitted), *cert. denied*, 133 S. Ct. 756 (2012). The court below noted

that this standard would be difficult to apply on a motion to dismiss because by its nature it concerns "questions of fact." *See Dudenhoeffer*, 692 F.3d at 419 n.1.

This is incorrect. A plaintiff's complaint must articulate plausible facts that, if proven, would support a theory sufficient to overcome the presumption of prudence. Indeed, a straightforward application of *Twombly* leads to the inexorable conclusion that if a plaintiff does not plead facts that, if proven, would be sufficient to overcome the presumption of prudence, then the complaint must be dismissed. The other courts of appeals correctly recognize that the presumption of prudence is in substance a standard of review for a claim that a plan fiduciary has breached his duty of prudence in offering an employer stock fund. *See, e.g.*, *Gray v. Citigroup (In re Citigroup ERISA Litig.)*, 662 F.3d 128, 139 (2d Cir. 2011). To prevail upon that claim, a plaintiff therefore must establish facts that overcome the presumption. *See Kopp v. Klein*, 722 F.3d 327, 339 (5th Cir. 2013), *petition for cert. filed*, No. 13-578 (Nov. 7, 2013); *White*, 714 F.3d at 990-91; *Lanfear*, 679 F.3d at 1281; *Citigroup*, 662 F.3d at 139; *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007). This Court should reject the Sixth Circuit's vague formulation of the standard for overcoming the presumption of prudence and its refusal to apply the presumption at the pleading stage.

III. Sponsors Will Be Discouraged From Offering Employer Stock Funds Absent A Strong Presumption Of Prudence That Applies At The Pleading Stage.

If the presumption of prudence as applied by the majority of circuits is weakened or eliminated, or if it is held not to apply at the pleading stage, sponsors will be

less likely to offer employer stock funds as an investment option. In recent years, ERISA fiduciaries have confronted an explosion of so-called "stock-drop" lawsuits. *See* Robert P. Davis et al., *The Outlook for ERISA "Stock-Drop" Litigation*, N.Y.L.J., Feb. 17, 2009, at S3. The bulk of those suits have been dismissed on the pleadings because the plaintiff failed to allege facts that could overcome the presumption of prudence. *See, e.g.*, *In re Suntrust Bank, Inc. ERISA Litig.*, No. 1:08-cv-3384, 2013 WL 5418130 (N.D. Ga. Sept. 26, 2013); *In re Wachovia Corp. ERISA Litig.*, No. 3:09-cv-262, 2010 WL 3081359 (W.D.N.C. Aug. 6, 2010).[6]

If the standard for overcoming the presumption is weakened or rendered inapplicable at the pleading phase, the costs of offering employer stock funds would increase dramatically. The plaintiffs' bar will surely rush to file nuisance suits every time a company's stock price drops. Because prudence claims are fact-intensive, discovery is costly and burdensome. Consequently, when such claims do survive a motion to dismiss, fiduciaries are often pressured into settling claims for large sums of money. *See Twombly*, 550 U.S. at 558 (recognizing that the expense and inconvenience of discovery often compel a defendant to settle even an unmeritorious suit); *cf. ERISA Class Action Settlements & Attorney Fees (2010)*, Fiduciary Counselors, Inc., http://www.erisasettlements.com/press/ERISA-Chart.pdf (last visited Feb. 1, 2014) (noting that ERISA class actions involving employer stock often settle for tens of millions of dollars).

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6. To date, not a single plaintiff has won a full trial on the merits in a breach-of-duty stock-drop suit involving a publicly traded company.

Even if plan fiduciaries ultimately prevail in defending the prudence of their actions, the sheer cost of defending stock-drop claims in the absence of a strong presumption of prudence could deter plan sponsors from maintaining employer stock funds. The Government attempts to downplay concerns about weakening or eliminating the presumption of prudence by observing that the fiduciary can simply prove prudence at trial. *See* U.S. Brief 12-13. But even in cases like *DiFelice v. U.S. Airways, Inc.*, a case where the fiduciary prevailed *following a full trial*, 497 F.3d 410, 413-14 (4th Cir. 2007), the defendant undoubtedly incurs millions of dollars in litigation fees and costs to defend the ultimately meritless suit. *See also Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 2 (1st Cir. 2009), *cited in* U.S. Brief 13 (defendant fiduciary prevailed upon summary judgment only after incurring the expense and inconvenience of discovery). If fiduciaries cannot obtain dismissal of baseless stock-drop suits at an early stage of the litigation, they will be less likely to offer employer stock funds in the first instance for fear of incurring significant legal fees to defend the prudence of their decisions.

That result would be precisely what Congress warned against when it first crafted the special standards governing employer stock funds. "Congress is deeply concerned that the objectives sought" by its laws encouraging employee stock ownership "will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans" and "which reduce the freedom of . . . employers to take the necessary steps to implement the plans, and which otherwise block the establishments and success of these plans." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520.

To ensure the continued success of employer stock funds, the Court should hold that a plaintiff claiming that it was imprudent for a plan fiduciary to offer an employer stock fund must plead plausible facts to establish that the employer was not viable as a going concern.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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