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 FOR SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION ADDRESSED BY *AMICUS CURIAE*

Whether retirement plan fiduciaries and service providers are entitled to a strong presumption of prudence in allowing participants in a defined contribution plan to invest in the stock of their employer company and, if so, at what stage of the proceedings such a presumption attaches.

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BRIEF FOR SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association representing the interests of hundreds of securities firms, banks, and financial asset managers across the United States. SIFMA's mission is to support a strong financial sector, while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets. SIFMA has offices in New York and Washington, D.C. and is the United States regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise issues of vital concern to participants in the securities industry.

The majority of public companies that offer a participant-directed retirement plan, including many of SIFMA's publicly traded members, include an option for participants to invest in the stock of the employer company. In addition, SIFMA members regularly provide administrative, investment advisory, and other services to plan sponsors and fiduciaries in connection with retirement plans, including company stock investment options. Indeed, most retirement

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this *amicus* brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, counsel for SIFMA states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than SIFMA made a monetary contribution intended to fund the preparation or submission of this brief.

plans are not self-administered and require service providers, including many of SIFMA's financial services members, to assist fiduciaries in the plan's daily operations, usually pursuant to written agreements.

The rise in the use of defined contribution plans, in which employees make their own investment decisions within a range of options afforded by the plan, has spawned a rise in lawsuits like this one, in which participants allege after the fact that the plan fiduciaries or plan service providers breached their respective duties to participants by permitting them to invest in employer stock. Everyone involved in the structure and operation of defined contribution plans therefore benefits from clarity regarding their respective obligations, duties, and liabilities. Uncertainty in these areas would only reduce the number of investment options, in violation of congressional directives and basic principles of diversification. Increased uncertainty as to employer stock in particular may cause plan sponsors to refrain from offering employer stock investment options, thereby undermining the congressional judgment favoring such investments within ERISA-qualified plans, decreasing employee participation in such plans, and ultimately diminishing the value of overall retirement assets that are essential to the many Americans who are planning and saving for their golden years.

The so-called presumption of prudence standard, as articulated by the majority of the courts of appeals to have considered similar issues, provides needed certainty in this area, primarily to plan fiduciaries, but ultimately to all involved in the retirement system, including plan sponsors and service providers. By clarifying the duty of prudence in the employer stock context, this prevailing standard provides a more stable basis on which to build a defined-contribution investment platform and ensures the continued availability and operation of employer stock investment options in plans.

SUMMARY OF ARGUMENT

Stock in a single company generally exhibits greater price volatility than other, more diversified investment options available to retirement plan participants, such as funds that invest in multiple securities to track industry or market indices. This volatility can arise due to conditions in the general economy, factors relevant to the particular sector in which the company operates, matters unique to the company, or some combination of all three. Although single equities are, for these and other reasons, generally disfavored as investment options for retirement planning, Congress favors and has repeatedly encouraged employee ownership of employer stock, including through retirement plans regulated pursuant to the Employee Income Retirement Security Act (ERISA). As a result, most public companies that sponsor a retirement plan offer their employees the opportunity to invest in company stock through a plan qualified under Section 401(k) of the Internal Revenue Code, an employer stock ownership plan (ESOP), or some other form of defined contribution plan.

I. ERISA plan fiduciaries are subject to myriad statutory obligations, including a duty to comply with the terms of the plan they administer and a duty to prudently select the funds in which plan participants may invest.[2] Where an ERISA plan mandates that the fiduciary make company stock an investment option available to plan participants, fluctuations in the price of the sponsoring company's securities may produce an apparent tension between the fiduciary's duty to follow the plan's direction to continue to make company stock available to employees and the potential duty to protect the interests of plan participants against extraordinary declines in investment value. Specifically, if the trading price of company stock declines dramatically, the fiduciary may be forced to decide whether to ride the stock through a possible rebound in price, by allowing continued investment in company stock pursuant to the terms of the plan, or eliminate the stock as an investment option, either through divestiture or depriving plan participants of the option to invest additional amounts in company stock. As Petitioners observe, ERISA provides fiduciaries with flexibility in making these decisions by characterizing the duty of prudence as one that requires acting "with the care, skill, prudence, and diligence . . . that a prudent man . . . would use in the conduct of an enterprise of a like character and with like aims." *See* Pet. Br. 25-30 (referring to 29 U.S.C. § 1104(a)(1)(B)). ERISA also mandates that these decisions be viewed *ex ante*, from the perspective of a reasonably prudent person in similar circumstances, and not with the benefit of hindsight.

A. The "presumption of prudence" is a standard of primary conduct which presumes that fiduciaries for a plan that directs the offering of a company stock

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2 Service providers, including many of SIFMA's members, often participate by contract in administering some of these functions.

investment option act prudently when they continue to permit plan participants to invest in company stock in accordance with the terms of the plan. A participant who exercises that investment option but later claims a fiduciary breach may overcome the presumption only if he or she can allege facts to demonstrate that the fiduciary abused its discretion by adhering to the plan terms despite a serious question about the company's viability as an ongoing entity. By presuming prudence when the fiduciary complies with the plan terms, this standard provides critical protection for plan fiduciaries, and those who contract with them, from liability for not being prescient as to movements in the stock market. It also confirms that fiduciaries need not use or disclose material non public information to protect plan participants, in violation of the securities laws. And it provides certainty and spares fiduciaries from a paralyzing choice between violating plan terms by divesting from or eliminating company stock investment options, or violating ERISA by not divesting from or eliminating such options and harming plan participants. For these reasons, the presumption of prudence standard has been adopted by every circuit court to have considered similar issues.

B. The presumption of prudence standard is consistent with and, indeed, mandated by ERISA's statutory scheme, which directs fiduciaries to comply with plan terms and exempts fiduciaries for plans that direct the offering of company stock investment options from the duty to diversify. It is also consistent with the common law of trusts, this Court's directive to "develop a federal common law of rights and obligations under ERISA-regulated plans" (*Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989) (internal quotation marks omitted)), and Congress's dual interests in protecting plan participants and promoting employee ownership of employer stock.

By affirming the primacy of settlor directives and investor autonomy, protecting ERISA fiduciaries from unreasonable theories of liability, and holding fiduciaries accountable under ERISA only when a participant can prove an abuse of discretion, the presumption of prudence standard facilitates the continued availability and operation of company stock investment options. A decision that declines to provide this essential protection to fiduciaries required to offer company stock as an investment option will almost certainly reduce the availability of such options, in violation of Congress's clear preference for employee ownership of company stock.

II. Because the presumption of prudence is a substantive standard of liability under ERISA, it must be applied at the pleading stage. The Sixth Circuit's contrary conclusion not only flouts this Court's precedents but imperils the continued availability of company stock investment options. A defined contribution plan participant cannot plausibly assert a fiduciary breach without alleging facts that demonstrate that the fiduciary abused its discretion by continuing to follow the plan's direction to invest in company stock despite serious questions about the company's ongoing viability. The Sixth Circuit's refusal to apply the presumption of prudence standard at the pleading stage increases uncertainty by exposing plan fiduciaries and service providers, including many of SIFMA's members, to costly, and often meritless, litigation. It also provides plaintiffs with an end-run around the heightened pleading requirements in securities cases, which often overlap with the claims advanced in ERISA stock-drop suits.

The Sixth Circuit's decision should be reversed, and the district court's judgment dismissing this action should be reinstated.

ARGUMENT

There are generally two types of retirement plans: defined benefit plans, which are traditional pension plans wherein the plan sponsor promises participants a specified benefit upon retirement; and defined contribution plans, in which the plan participants contribute money (often with a "matching" component from the employer), and the retirement benefit is determined by the amount contributed and the performance of the investment options to which the contributions have been allocated. *See* 29 U.S.C. § 1002(34), (35). When ERISA was enacted in 1974, defined benefit plans were the norm, whereas "[d]efined contribution plans," like those authorized by section 401(k) of the Internal Revenue Code, "dominate the retirement plan scene today." *LaRue* v. *DeWolff, Boberg & Assoc., Inc.*, 552 U.S. 248, 255 (2008). Indeed, the overwhelming majority of defined contribution plans operating today are 401(k) plans, and most such plans sponsored by public companies offer company stock as an investment option—in other words, participants are permitted to invest their retirement savings in the stock of their employer—pursuant to an express directive in the plan itself.

This case is one of about 250 "ERISA stock-drop cases" in which defined contribution plan participants have sued a plan fiduciary or service-provider for continuing to offer company stock as an investment option (or for not requiring divestiture of prior investments in company stock) under a defined contribution plan. The great majority of ERISA stock-drop cases involve 401(k) plans that allow participants to allocate their accounts among a number of investment options, including company stock investment if the participant so chooses. Many 401(k) plans that offer company stock as an investment option designate the company stock fund maintained by the plan as an ESOP. This brief will focus on the presumption of prudence in cases where the terms of a 401(k) plan require company stock to be offered as an investment option. The principal difference between a 401(k) ESOP and a non-401(k) ESOP is that non-401(k) ESOPs invest exclusively in company stock (plus a small amount of cash to meet the plan's liquidity needs). Both 401(k) ESOPs and non-401(k) ESOPs qualify as eligible individual account plans (EIAPs), which are exempt from the duty of diversification imposed by ERISA on most plan fiduciaries. 29 U.S.C. §§ 1104(a)(1)(D), 1107(d)(3).

The Sixth Circuit's decision in this case, in sharp contrast with the decisions of every other circuit to have considered company stock investment through a defined contribution plan, would permit ERISA stock-drop cases to survive a motion to dismiss based solely on allegations that the employer's stock price substantially declined. This approach, if accepted by this Court, would put those charged with administering employer-sponsored defined contribution plans—usually the plan fiduciaries, but potentially service providers as well—in an untenable position by exposing them to costly litigation both for continuing to permit investment in or the holding of company stock when the stock price decreases, and for violating the plan terms and divesting company stock from the plan if the stock price later rebounds.

To avoid this quandary, five circuits have applied a "presumption of prudence" standard at the pleading stage in actions against ERISA plan fiduciaries, presuming that the fiduciary acted prudently by following the plan terms where the plan sponsor directed that company stock be offered as an investment option (a settlor decision). Those circuits also afford participants an opportunity to overcome the presumption by alleging that the fiduciary committed an abuse of discretion because it had reasonable grounds to believe that the plan sponsor would no longer wish it to allow investment in employer stock. In other words, the participant can allege that the company was in such dire financial circumstances that continued investment in its stock undermined the plan sponsor's purpose in mandating such stock as a plan investment.

Of all the circuit courts that have considered the question, the Sixth Circuit alone has erroneously treated this standard as an evidentiary presumption and declined to apply it at the motion to dismiss stage. The Sixth Circuit's decision contravenes ERISA's statutory scheme, undermines Congress's interest in promoting company stock ownership, and fundamentally misunderstands the roles of ERISA plan sponsors, fiduciaries, and service providers in matters of employee ownership of employer stock. It should be reversed.

I. COMPANY STOCK INVESTMENTS ARE GOVERNED BY THE PRESUMPTION OF PRUDENCE STANDARD

Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Consistent with this objective, ERISA fiduciaries are required to "discharge [their] duties . . . with the care, skill, prudence, and diligence under the circumstances . . . 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)(B); to follow "the documents and interests governing the plan insofar as [they] are consistent with [ERISA]," *id.* § 1104(a)(1)(D); and to diversify investments, *id.* § 1104(a)(1)(C). A plan participant who complains that any investment option—including the opportunity to invest in company stock—was imprudent must plead, and ultimately prove, that these standards were transgressed.

A. Congress Favors Investment In Company Stock

Company stock, like other non-diversified equity securities, carries more risk and is subject to greater price volatility than diversified investment options such as mutual funds, index funds, or other "baskets" of investments. Nevertheless, Congress favors employee ownership of company stock and has repeatedly encouraged the offering of such investment options as a means of promoting economic growth. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590 (noting Congress's interest in "encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system"); *see also* 129 Cong. Rec. S16629, S16636 (daily ed. Nov. 17, 1983) (statement of Sen. Long) (describing ESOPs as both an employee retirement plan and a "technique of corporate finance" that would encourage employee ownership).

Congress's encouragement of company stock investment is also evident in numerous federal taxation statutes that grant favorable tax status to employer stock offerings and appreciation on such investments. Among other benefits, appreciation on company stock is taxed at long-term capital gains rates, while appreciation on other investments in 401(k) plans is taxed as ordinary income on distribution. *See* 26 U.S.C. § 402(e)(4). Congress has also provided ESOPs with a corporate tax credit and made employer contributions to such plans fully deductible by the employer. *See* Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26; Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

Congress has sought to bolster company stock investment by expressly instructing courts to refrain from judicial action that would thwart investment in company stock or "treat employee stock ownership plans as conventional retirement plans." 26 U.S.C. § 4975 (notes); *see also* Tax Reform Act of 1976, § 803(h), 90 Stat. at 1590. Favorable legislative treatment of employee investment in company stock is not limited to ESOPs, but extends to company stock investment options in 401(k) plans.

As a result of Congress's encouragement and its tax-favorable treatment of company stock investments, the majority of public companies offer employees opportunities to invest in company stock through a 401(k) plan. These plans are overseen by fiduciaries, often with the help of plan service providers who assist in carrying out the plan sponsor's directions.

B. Company Stock Investments Raise Particularized Issues

In keeping with its general preference for employee ownership of company stock, Congress exempted fiduciaries of defined contribution plans that offer company stock as an investment option from the duty to diversify investments. *See* 29 U.S.C. § 1104(a)(2). Congress also limited the duty of prudence for these fiduciaries to eliminate any obligation to diversify to reduce risk. *See ibid.* Congress's favorable treatment of company stock investment options through ESOPs and 401(k) plans is consistent with its general support for employee ownership of employer stock.

Notwithstanding the exemption from the duty to diversify, fiduciaries continue to be subject both to a duty to follow the plan terms and to offer appropriate investment options to plan participants. In complying with these duties, fiduciaries face particularized concerns that are unique to the company stock context and are rooted in the risks associated with investment in a non-diversified, single equity security.

It is well established that employer stock investments are generally subject to greater price volatility than diversified investments, such as mutual funds, that are common to 401(k) plans. Like other single equity investments, the price of company stock is subject to a variety of influences, including conditions in the general economy, factors specific to the sector in which the company operates, matters unique to the company, or some combination of all three.

As a result of company stock's greater price volatility, those charged with administering a plan that mandates an option to invest in company stock must determine how best to address significant drops in the price of company stock. Frequently, only hindsight will reveal whether one course or the other would have maximized returns to plan participants. Fiduciary decisionmaking, however, cannot be reviewed *ex post*; the question in every case is whether the fiduciaries acted, on the information then available, as would a reasonably prudent person in like circumstances. *See* 29 U.S.C. § 1104(a)(1)(B); *see also Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008).

This market reality puts plan fiduciaries and their advisers in a veritable Catch-22: On the one hand, if they continue to offer the option to invest in employer stock despite declining stock prices, and the stock price continues to fall, they are vulnerable to suit for failing to act to prevent further plan losses, whereas if they divest or eliminate employer stock investment options from the plan, and the stock price rebounds, they may be sued for violating the terms of the plan. This dilemma prompted one court to describe the fiduciary's position as falling in "a narrow channel between two different forms of liability—the Scylla of unwarranted disobedience to the plan documents lurks on one side, while the Charybdis of imprudence swirls on the other." *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883 (E.D. Mich. 2008).

The fiduciary's position is particularly precarious given that stock prices rise and fall with some regularity. Indeed, given the inevitability of stock market fluctuation, a prudence standard that exposes an ERISA fiduciary to liability on the basis of declining company stock prices alone, as affirmance of the decision below would allow, would require constant vigilance and second-guessing of the plan terms by the fiduciary—a result that is inconsistent with ERISA's express command to fiduciaries to comply with the plan documents. *See* 29 U.S.C. § 1104(a)(1)(D). It would also create an incentive for fiduciaries to overreact to stock price fluctuations, possibly exacerbating decreases in stock values and ultimately injuring the very plan participants the fiduciaries are charged with protecting. *Cf. In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009) (observing that eliminating company stock as an investment option "is a clarion call to the investment world that the [plan fiduciary] lacked confidence in the value of its stock, and could have a catastrophic effect on [the] stock price, severely harming . . . Plan members"), *aff'd sub nom. Quan* v. *Computer Scis. Corp*, 623 F.3d 870 (9th Cir. 2010).

The "damned if you do, damned if you don't" dilemma is not merely hypothetical, but real, as illustrated in twin cases brought by participants in the same ERISA plan. In one case, one set of plan participants claimed that the plan fiduciaries breached their duties by failing to eliminate company stock from the plan when the company's financial woes sent it into bankruptcy. In the second case, another group of participants in the same plan claimed that the fiduciaries violated their duties by divesting company stock during the company's bankruptcy after the price of the stock rose significantly, even though the bankruptcy sale price was in excess of market. *Compare Evans* v. *Akers*, 534 F.3d 65 (1st Cir. 2008), *with Bunch* v. *W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009); *see also Tatum* v. *R.J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004) (involving suit by plan participants that were required to divest from employer stock investments before the stock rebounded). For plan fiduciaries and service providers confronted with the need to make a decision in the face of declining stock price, these lawsuits are a cautionary tale that highlights the risks associated with *any* course of action.

To add further uncertainty, there are numerous historical examples of companies that experienced a steep decline in stock price, followed by a dramatic rebound. For example:

- Between December 10, 2007 and March 6, 2009, the price of Textron stock dropped from a high of $74.40 to $3.57. Within a year, however, the price rose to over $28.00.

- Between August 31, 2000 and October 8, 2002, Intel Corp.'s stock price declined more than 80% from its high of approximately $75.00 to $13.04. Intel recovered and became the best performing stock in the Dow Jones Industrial Average in 2003. *See* Paul R. La Monica, *Chip Chip Hooray for Intel?*, CNNMoney (Jan. 12, 2004), http://money.cnn.com/2004/01/12/technology/intel/.

- Between March 27, 2000 and October 8, 2002, the price for Cisco Systems' stock dropped from $80.00 to $8.60. By June 30, 2004, Cisco stock closed at $23.70, up more than 175% from its low price.[3]

- The stock price for Yahoo, Inc. declined more than 95% from its year-end 1999 adjusted price in excess of $100.00 to $4.06 on September 26, 2001. As of June 30, 2004, Yahoo stock closed at $36.40, up almost 800% from its low price.

In each instance, employees that maintained investments in the stock, following the steep decline in the stock price, would have benefitted from a price rebound. To be sure, the possibility that stock prices will rebound makes it difficult for ERISA fiduciaries to determine *ex ante* whether divesting or prohibiting

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[3] Closing stock prices are derived from the Center for Research in Security Prices.

employees from investing in company stock is an appropriate investment strategy or merely shortsighted.

Ultimately, ERISA fiduciaries must choose between complying with the plan terms and trusting that the company's misfortunes are temporary and disregarding the plan terms on the expectation that the company's business will fail—an expectation that could turn into a self-fulfilling prophecy as the market absorbs the information that the company's retirement plan is no longer permitting investment in company stock. Plan participants and their class-action lawyers have exploited this quandary in bringing hundreds of suits against ERISA fiduciaries on the theory that plan fiduciaries and others acted imprudently by failing to divest from or eliminating the option to invest in employer stock following a decrease in the stock price.

Facing a deluge of stock-drop litigation, courts have followed this Court's directive to apply federal common law to determine fiduciary obligations in the ERISA context. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). The "presumption of prudence" is the moniker used by most courts to describe the standard of substantive conduct applicable to plan fiduciaries facing the exigencies of overseeing a plan that directs investment in company stock. It strikes the necessary balance between the fiduciary's duty to follow the direction of the plan sponsor, and the duty to act prudently in the interest of plan participants when the employer's continuing viability is in jeopardy.

C. The Presumption Of Prudence Addresses The Particularized Issues Of Company Stock Investments

This Court has observed that "ERISA abounds with the terminology and language of trust law." *Firestone*, 489 U.S. at 110. The lower courts thus have looked properly to the common law when determining how to construe ERISA's duty of prudence in the context of significant declines in the employer's stock price. These courts have been guided by ERISA's statutory structure, which protects and encourages company stock investment options, *see* 29 U.S.C. § 1104(a)(2), and by longstanding principles of trust law. They have also been guided by the practical realities of non-diversified equities, in particular, their greater price volatility and Congress's encouragement of employee ownership of company stock. *See*, *e.g.*, *Moench* v. *Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) (observing that "the concept of employee ownership constituted a goal in and of itself"); *Donovan* v. *Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983) (observing that employer stock option plans "expand[] the national capital base among employees—an effective merger of the roles of capitalist and worker").

In construing the duty of prudence in the context of company stock ownership, the courts of appeals have relied on two principles from the common law of trusts. First, a trustee is bound to follow mandatory trust terms to the letter. *See* Restatement (Third) of Trusts § 91 & cmt. e (2007); *see also White* v. *Marshall Ilsley Corp.*, 714 F.3d 980, 986 n.4 (7th Cir. 2013) (observing that the duty to comply with the terms of the plan originates in trust law, "which requires a trustee to act in accord with the terms of the trust"). This principle is based on the notion that designing a plan is a *settlor*, not a *fiduciary*, function. *See Pegram* v. *Herdrich*, 530 U.S. 211, 226 (2000); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 443-45 (1999); *Lockheed* v. *Spink*, 517 U.S. 882, 890 (1996). It is also based on the recognition that it would be nonsensical both to encourage employers to prescribe employer stock funds and company stock investment options, as Congress has done, and simultaneously impose on fiduciaries a burden to override the employer's plan design choices under penalty of fiduciary liability. To this end, trust law holds that mandatory terms "displac[e] the normal duty of prudence" that is imposed on trustees. *See* Restatement (Third) of Trusts § 91 & cmt. e; *see also Edgar* v. *Avaya, Inc.*, 503 F.3d 340, 346 (3d Cir. 2007) ("if the trust 'requires' the trustee to invest in a particular stock, then the trustee is 'immune from judicial inquiry'").

Second, a trustee should only deviate from the terms of the trust where, "owing to circumstances not known to the settlor and not anticipated by him[,] compliance would defeat or substantially impair the accomplishment of the purposes of the trust." Restatement (Second) of Trusts §§ 167(1), 227 cmt. q (1959); *see also Lanfear* v. *Home Depot, Inc.*, 679 F.3d 1267, 1281 (11th Cir. 2012). Accordingly, where (and only where) circumstances have changed such that compliance with the plan terms would no longer further the purposes of the trust, the trustee is permitted to disregard the settlor's direction.

Based on these principles, courts have developed the "presumption of prudence," whereby an ERISA fiduciary's paramount obligation, like that of other trustees, is to follow the intent of the settlor, as reflected in the terms of the plan. That obligation is overcome only if "the ERISA fiduciary could not have believed reasonably that continued adherence to the [plan's] direction was in keeping with the settlor's expectations of how a prudent trustee would operate." *Moench*, 62 F.3d at 571. Consistent with the common law, plaintiffs are required to show that, owing to unforeseen circumstances, the prescribed investment "'would defeat or substantially impair the accomplishment of the purposes of the trust.'" *Id.* (quoting Restatement (Second) of Trusts § 227 cmt. q).

The presumption of prudence standard was first recognized by the Third Circuit in *Moench* and has been adopted by every subsequent circuit to address the issue. *See*, *e.g.*, *White*, 714 F.3d at 994-95; *Lanfear*, 679 F.3d at 1281; *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140-41 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 475 (2012); *Quan*, 623 F.3d at 882; *Kirschbaum*, 526 F.3d at 256.[4]

Each of these courts has recognized that ERISA fiduciaries should not be liable for lack of prescience and that employer-issued stock, like any security or non-diversified investment, is inherently volatile and

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[4] Although different circuits have phrased the standard in different terms, the majority of them agree on the substance, namely that a plaintiff must show that the fiduciary knew or should have known that the employer's survival was in serious peril. *See*, *e.g.*, *White*, 714 F.3d at 986 (observing that if the company's "viability is in jeopardy, the employer's stock may not be a prudent investment"); *Citigroup*, 662 F.3d at 140-41 (plaintiffs must prove that company faced "impending collapse" or "dire circumstances"); *Quan*, 623 F.3d at 882 (plaintiffs must allege facts that implicate the company's viability as an ongoing concern); *Kirschbaum*, 526 F.3d at 255-56 (same); *Edgar*, 503 F.3d at 348-49 & n.13 (affirming dismissal because plaintiff did not show that company was in a "dire situation").

subject to changes in price and valuation. *See Moench*, 62 F.3d at 568 (observing that employer stock option plans, "unlike pension plans, are not intended to guarantee retirement benefits, and indeed, by [their] very nature . . . place[] the employee retirement assets at much greater risk than does the typical diversified ERISA plan") (internal quotation marks omitted); *see also DeBruyne* v. *Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) (ERISA "requires prudence, not prescience") (internal quotation marks omitted). Accordingly, they have applied the presumption of prudence standard as an objective standard that is reviewed from an *ex ante* perspective.[5]

Contrary to the decision below, the "presumption of prudence" is not evidentiary in nature. *See Citigroup*, 662 F.3d at 139 ("The 'presumption' is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary."); *see also Edgar*, 503 F.3d at 349. Rather, it is a substantive standard of conduct against which a fiduciary's continued offering of employer stock is measured. *See Lanfear*, 679 F.3d at 1281 (disavowing "any intention of using . . . the word 'presumption' in a sense that has any evidentiary weight").

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[5] Applying the presumption of prudence in this situation is comparable to applying an "abuse of discretion" standard to review decisions of a plan's fiduciaries concerning plan interpretation. *See Conkright* v. *Frommert*, 559 U.S. 506 (2010). In both instances, the court is directed to ask whether the fiduciary's interpretation of what was required by the plan, and by extension, the plan sponsor, was objectively reasonable. There is no rational reason to show less deference to fiduciaries who are acting consistently with unambiguous plan provisions than to fiduciaries who are exercising discretion regarding the meaning of ambiguous plan terms.

Ultimately, the presumption of prudence standard works to enhance clarity and predictability for ERISA fiduciaries and their advisers by relieving fiduciaries from liability for failing to require divestiture or to withdraw the option to invest in company stock merely because the stock price declined, while holding them accountable to plan participants if they fail to act when it is readily apparent that the company faces truly dire financial circumstances. The presumption is consistent with the "long-term horizon of retirement investing" (*Kirschbaum*, 526 F.3d at 254), and is premised on the understanding that, if company stock ownership is to occur, as Congress intended, fiduciaries who allow employees to choose to invest in company stock, as directed by the terms of the plan, need protection from liability for doing so.

As the Seventh Circuit has explained, "[w]ithout this shield, 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." *White*, 714 F.3d at 990. Indeed, a less rigorous standard would effectively convert fiduciaries into insurers against loss from significant stock market declines. That dynamic is not what Congress contemplated, nor what ERISA commands.

D. The Presumption Of Prudence Is Consistent With ERISA

As noted above, ERISA is rooted in the common law of trusts. *Firestone*, 489 U.S. at 110. Indeed, Congress referred to the common law of trusts throughout ERISA and its legislative history. *See*, *e.g.*, 29 U.S.C. § 1103(a) ("assets of an employee benefit plan shall be held in trust"); S. Rep. No. 93-127, at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (identical language).

In keeping with ERISA's history and structure, this Court has directed lower courts "to develop a federal common law of rights and obligations under ERISA-regulated plans" (*Firestone*, 489 U.S. at 110 (internal quotation marks omitted)), and to use trust law in evaluating the actions of ERISA plan administrators. *See Metro. Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 111 (2008) ("In determining the appropriate standard of review, a court should be guided by principles of trust law.") (internal quotation marks omitted); *LaRue*, 552 U.S. at 253 n.4 ("common law of trusts . . . informs [the Court's] interpretation of ERISA's fiduciary duties"). The presumption of prudence standard is an answer to this call.

The presumption is also consistent with Congress's preference for employee ownership of company stock, as demonstrated in the exemption for 401(k) plans and other EIAPs from ERISA's duty to diversify. *See* 29 U.S.C. § 1104(a)(2). The special treatment afforded these defined contribution plans is consistent with Congress's recognition that employee stock ownership serves a "special purpose" by allowing for employee investment in the employer plan sponsor itself. *See* H.R. Rep. No. 93-1280 at 317 (1974) (Conf. Rep.). It also suggests that Congress wished to insulate ERISA fiduciaries from an obligation to divest or eliminate options to invest in employer stock merely because the stock price declined, even substantially.

Congress has demonstrated its support for company stock ownership through numerous federal tax laws, which encourage employer stock investment options by granting favorable tax treatment to employer contributions to ESOPs and appreciation on employer stock held through 401(k) and other EIAPs. *See* App. A; *see also* American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418; Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788; Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 383; Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494; Revenue Act of 1978, Pub. L. No. 95-600, § 141, 92 Stat. 2763; Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26.

Congress has made clear that courts should not impede the offering of employer stock option plans by treating them like conventional retirement investments. Specifically, Congress expressed

> deep[] concern . . . that the objectives sought by [the laws encouraging employer stock investment options] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, § 803(h), 90 Stat. at 1590.

Courts construing the scope of fiduciary responsibilities under ERISA are required to do so against the backdrop of Congress's endorsement of employee investment in company stock and its admonition to refrain from limiting or discouraging these investments by treating them like more conventional retirement plan investment options. The presumption of prudence standard is consistent with ERISA's common law backdrop, while also advancing Congress's interests in promoting employee ownership of employer stock and protecting plan participants from action by ERISA fiduciaries that is contrary to the directions of the plan sponsor.

E. The Presumption Of Prudence Standard Serves Other Important Policy Interests

The presumption of prudence standard also constitutes good public policy by reinforcing longstanding principles of investor choice and protecting ERISA fiduciaries from unreasonable theories of liability.

First, the presumption of prudence rightly recognizes that the price of company stock will fluctuate, sometimes greatly. Only through hindsight can a fiduciary know whether a substantial decline in the price of the employer's stock is a temporary consequence of general economic conditions, or a reflection of the company's dire financial circumstances. The presumption of prudence protects fiduciaries from liability for "lack of omniscience and foresight." *White*, 714 F.3d at 992.

Second, the presumption of prudence standard reinforces the principle that investors in 401(k) plans in particular are autonomous actors who are generally responsible for making ultimate decisions about how to invest their funds. *See White*, 714 F.3d at 994 (observing that ERISA fiduciaries "do not have enough information about an employee's other assets, family circumstances, risk tolerance, and so on, to provide such individual advice"). Relatedly, the presumption recognizes that, while Congress favors employee stock ownership in defined contribution plans, plan sponsors and administrators do not guarantee the performance of any investment, including company stock. Plan participants retain both the opportunity and the obligation to manage their own investment portfolios. The presumption promotes investor autonomy by imposing a high threshold before fiduciaries are permitted to deprive plan participants of the ability to invest in employer stock, in contravention of the plan terms.

Third, the existence of the option to invest in company stock in a 401(k) plan encourages employees to participate in the plan, thereby serving the national goal of increasing employee participation in retirement savings plans. *See* U.S. Dep't of Treasury, Report on Employer Stock in 401(k) Plans, 2002 WL 313307 (Feb. 28, 2002). Eliminating the presumption of prudence standard would almost certainly result in fewer opportunities to invest in company stock and therefore lower rates of employee participation in retirement investment plans. Thus, the position taken by the Executive Branch at the petition stage of this case directly contravenes the frequently expressed views of the Legislative Branch.

Fourth, the presumption of prudence standard plays a crucial role in facilitating the inclusion of options to invest in company stock in 401(k) plans, consistent with Congress's intent under ERISA. In contrast, adopting the position that fiduciaries should not be subject to a presumption of prudence at all, as the government advocates here, will expose fiduciaries to unpredictable and unmanageable risks and will likely cause employers, which regularly indemnify plan fiduciaries, to forego offering employer stock plans and investment opportunities altogether. *See*

White, 714 F.3d at 987 (observing that "[s]uch a high exposure to litigation risks in either direction could discourage employers from offering ESOPs, which are favored by Congress, or even from offering employee retirement savings plans altogether"). The Department of Labor has made that argument in many cases, but no court of appeals has adopted it. This Court should not do so either.

Finally, the presumption protects fiduciaries from the temptation to act on inside company information to protect plan participants, in violation of federal insider trading laws. *See* 15 U.S.C. § 78j(b). While participants might (or might not) benefit if fiduciaries acted on adverse non public information, ERISA's fiduciary obligations do not require fiduciaries to violate the securities laws. *See Kopp* v. *Klein*, 722 F.3d 327, 339-40 (5th Cir. 2013), *petition for cert. filed*, No. 13-578 (2013); *see also White*, 714 F.3d at 992. As the Eleventh Circuit put the point in *Lanfear*, "[j]ust as plan participants have no right to insist that fiduciaries be corporate insiders, they have no right to insist that fiduciaries who are corporate insiders use inside information to the advantage of the participants." 679 F.3d at 1282; *see also Quan*, 623 F.3d at 881 (the *Moench* presumption "gives fiduciaries a safe harbor from failing to use insider information"); *Kirschbaum*, 526 F.3d at 256 ("in some cases, requiring a fiduciary to override the terms of a company stock purchase plan could suggest the necessity of trading on insider information. Such a course is prohibited by the securities laws"). Indeed, whatever Congress may have meant by the obligation to exercise "prudence" in supervising an ERISA plan, it could not have meant that ERISA fiduciaries are required to violate insider trading laws.

Abrogating the presumption, and thus requiring ERISA fiduciaries to second-guess the wisdom of mandatory company stock investment options, would make it considerably harder for ERISA fiduciaries to reconcile their duties under ERISA with securities law compliance. Fiduciaries would be bound not to make use of material non public information under securities laws, but would be required to use that information for the benefit of plan participants under ERISA. Because personal liability attaches under ERISA, the stakes can be considerable. *See* 29 U.S.C. § 1109(a).

The government dismisses this possibility, suggesting that plan fiduciaries who have undisclosed inside information can avoid a securities violation by "publicly disclosing the inside information" to protect plan participants. U.S. Invitation Br. 12. That offhand suggestion does not withstand scrutiny. Not only would it impose heightened disclosure requirements on ERISA fiduciaries, but it ignores the possibility that public statements about the employer's financial state, made by ERISA fiduciaries, may be based on incomplete information and contrary to disclosures made by company officials tasked with the responsibility to provide the markets with such information.[6] Moreover, putting ERISA fiduciaries to the task of disclosures greater than those required by the statute itself ignores the possibility that ERISA fiduciaries providing incomplete information could

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[6] While barring plan participants from further purchases of company stock based upon adverse non public information might not violate the securities laws, it would certainly send a signal—perhaps an erroneous one—regarding the future prospects of the company, potentially contributing to the very losses that the fiduciaries intended to prevent.

lead to overcorrection in the market, thereby harming the plan participants the fiduciary is charged with protecting.[7]

For all of these reasons, the presumption of prudence standard plays an essential role in clarifying for ERISA fiduciaries and their advisers both when the fiduciaries are required to depart from plan terms, and when they can be held liable for failing to do so. It is consistent with ERISA, is essential to the continued operation and availability of company stock investment options, and should be adopted by this Court.

II. THE PRESUMPTION OF PRUDENCE STANDARD IS APPROPRIATELY APPLIED AT THE PLEADING STAGE

The Sixth Circuit's refusal to apply the presumption of prudence standard at the pleading stage is tantamount to depriving ERISA fiduciaries of the benefits of the presumption and is inconsistent with this Court's precedents.

A. A Fiduciary-Breach Plaintiff Must Allege Facts That, If Proved, Would Establish Liability

This Court has established that a claim must have facial plausibility to survive a motion to dismiss, meaning that "the plaintiff [must] plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the

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[7] ERISA fiduciaries are subject to limited disclosure obligations, including a duty to furnish to participants a summary plan description, *see* 29 U.S.C. § 1102(a)(1), and a duty to disclose specified financial information in annual reports filed with the Secretary of Labor and made available to plan participants upon request, *see id.* §§ 1023(b), 1024(b).

misconduct allowed." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). To satisfy this standard, a plaintiff must include allegations to support every element of his claim and must provide "more than labels and conclusions, [or] a formulaic recitation" of a cause of action's elements. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

This Court has observed that requiring plaintiffs to allege plausible grounds for providing relief at the pleading stage serves the practical purpose of preventing a plaintiff "with a largely groundless claim" from "tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 558 (internal quotation marks omitted). It has further cautioned that, when the allegations in a complaint do not give rise to a plausible claim of entitlement to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Ibid.* (internal quotation marks omitted).

Here, a plaintiff can satisfy the plausibility standard only by alleging that the fiduciary acted imprudently. A conclusory assertion of "imprudence," however, will not suffice. *See Twombly*, 550 U.S. at 557. For that reason, a participant cannot plausibly allege imprudent conduct on the part of a plan fiduciary or service provider without knowing what it means to act imprudently in the specific circumstances at issue. In the company stock context, a fiduciary acts imprudently if it abuses its discretion by continuing to permit investment in company stock in obedience to the plan's directions despite a change in circumstances that would lead a reasonable fiduciary to conclude that the plan terms should no longer govern. The fiduciary's abuse of discretion is an element of the claim that the fiduciary's decision was imprudent. *See Edgar*, 503 F.3d at 349 (observing that there is "no reason to allow [an ERISA stock-drop case] to proceed to discovery when, even if the allegations are proven true, [plaintiff] cannot establish that defendants abused their discretion") (footnote omitted). Accordingly, it must be alleged in the complaint.

The Second, Third, Fifth, Seventh, and Eleventh Circuits have recognized this reality and properly applied the presumption at the pleading stage. *See, e.g.*, *Kopp*, 722 F.3d at 339; *White*, 714 F.3d at 990-91; *Lanfear*, 679 F.3d at 1281; *Citigroup*, 662 F.3d at 139; *Edgar*, 503 F.3d at 359. In light of this consensus and the Court's precedents, this Court should do the same.

B. There Are Compelling Policy Reasons To Apply The Presumption Of Prudence Standard At The Pleading Stage

ERISA stock-drop cases are both abundant and expensive, and there has been no indication that their popularity among the plaintiffs' bar is waning. The majority of public companies provide an option to invest in company stock as part of their 401(k) offerings, and over one-third of the work force of these companies owns stock in their employers. *See* National Center for Employee Ownership, *A Brief Overview of Employee Ownership in the U.S.*, http://www.nceo.org/articles/employee-ownership-esop-united-states (last visited Feb. 3, 2014).

With the rise in company stock investment options, the incidence of ERISA litigation has ballooned. Between 1997 and June 30, 2013, more than 250 stock-drop cases were filed by participants in defined contribution plans. *See* App. B. Despite the number of cases filed, in cases involving publicly offered securities, the plaintiffs have not obtained a single, final, litigated judgment in their favor. *See Securities Litigation: A Practitioner's Guide*, Practicing Law Institute, ch. 16:1 at 16-2 (Jonathan C. Dickey ed. 2012) ("PLI Treatise").

Defendants in these stock-drop cases face two significant problems at the outset. First, these cases are often brought, and frequently certified, as class actions (*see* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5:5 (10th ed. 2013)), meaning the liability exposure is generally in the tens of millions of dollars.[8] Second, even when the suit is meritless, the underlying allegations go to the heart of the company's business operations. When faced with expensive litigation and discovery that is invasive, broad, and costly, defendants often have little choice but to settle a case regardless of its merits or lack thereof. *See*, *e.g.*, *Twombly*, 550 U.S. at 559 (noting, in a class action case, that "the threat of discovery expense [can] push cost-conscious defendants to settle even anemic cases"); *Hearings on Securities Litigation Reform Proposals S.240, S.667, and H.R. 1058 Before the Subcomm. on Sec. of the Comm. on Banking, Hous. & Urban Affairs*, 104th Cong. 49, 52 n.17 (1995) (statement of J. Carter Beese, Jr., Chairman, Capital Markets Regulatory Reform Project, Center for Strategic and International Studies) (observing that companies are often induced to settle even a meritless securities fraud case if it survives a motion to dismiss, as avoiding discovery alone can avoid approximately 80% of the costs of the action in some

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[8] The propriety of such certifications is not at issue in this case.

cases). These cost burdens cause detrimental ripple effects throughout the industry, unfairly burdening fiduciaries, plan advisers, and shareholders alike.

A survey of cases, settlements, and average settlement amounts before and after the recognition of the presumption of prudence standard in each circuit demonstrates the standard's utility in weeding out meritless litigation. Specifically, according to data collected by Cornerstone Research, the average settlement amount decreased from over $20 million to less than $5 million following the recognition of the presumption of prudence by the Second, Fifth, Seventh, Ninth, and Eleventh Circuits.[9]

U.S. Court of Appeals	Average Settlement Overall (Millions USD)	Date of Decision Recognizing Presumption of Prudence	Average Settlement Before Recognition (Millions USD)	Number of Settlements Before Recognition	Average Settlement After Recognition (Millions USD)	Number of Settlements After Recognition
First	15.5	n/a				
Second	26.2	10/19/11	29.5	19	4.6	3
Third	18.1	08/10/95	n/a	0	18.1	18
Fourth	4.6	n/a				
Fifth	34.9	04/25/08	50.3	7	8.0	4
Sixth	14.4	10/04/95	n/a	0	14.4	23
Seventh	10.1	04/19/13	10.1	13	n/a	0
Eighth	4.5	n/a				
Ninth	15.0	09/30/10	20.3	14	4.4	7
Tenth	19.9	n/a				
Eleventh	7.3	05/08/12	10.0	7	2.4	4
DC	4.1	n/a				

The Sixth Circuit's refusal to apply the presumption of prudence at the pleading stage exposes fiduciaries and service providers to meritless litigation and significant expenditures that may ultimately dis-

9 Many factors play a role in the decision whether to settle a case and, if so, in what amount. While there may not be enough examples to draw any statistically significant conclusion, the decrease in both the number of settlements and the average amount of the settlements after the various circuit courts recognized the presumption is nonetheless telling as to the effect the presumption has had in weeding out meritless cases.

courage employers from providing opportunities to own employer stock. Indeed, in the Sixth Circuit, there have been 23 ERISA stock-drop settlements since the presumption was recognized in 1995, the largest number of any of the circuits, with an average settlement amount of $14.4 million.

The decision below also ignores the fact that plan participants often have alternative avenues of relief via the securities laws, which must be read in *pari materia* with ERISA. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (statutes must be read to create coherent and symmetrical statutory scheme); *see also* 29 U.S.C. § 1144(d) (providing that nothing in Title I "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law"). In particular, where plaintiffs allege that a fiduciary has knowingly permitted continued investment in artificially inflated company stock, an ERISA stock-drop suit will often resemble a securities suit and may be resolved through securities litigation. *See* PLI Treatise, ch. 16:4.2 at 16-35–36).

In addition, ERISA stock-drop cases are frequently accompanied by securities fraud suits. *See* PLI Treatise, ch. 16:2) at 16-4. Indeed, the overlap between ERISA and the securities laws counsels in favor of applying the presumption of prudence at the pleading stage to discourage plaintiffs from using ERISA to disguise securities claims and circumvent the procedural hurdles associated with the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. These hurdles include heightened pleading standards, an automatic stay on discovery, and a heavily structured lead plaintiff appointment process. By making it easier to allege a plausible ERISA imprudence claim, the Sixth Circuit's decision could very well undermine the PSLRA's procedural hurdles and prompt more securities litigation under a thin veneer of ERISA fiduciary-breach liability. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740 (1975) (acknowledging "the danger of vexatious [securities] litigation which could result from a widely expanded class of plaintiffs"). Only cases in which the plaintiffs can plausibly plead an actionable violation of ERISA's substantive standards should expose defendants to such costly litigation.

For all of these reasons, the presumption of prudence standard is appropriately applied at the pleading stage.

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Affirmance of the Sixth Circuit's ruling would undermine ERISA's statutory scheme and Congress's longstanding support for employee ownership of company stock. It would force ERISA fiduciaries charged with offering company stock as an investment option onto a tightrope between the duty to comply with the terms of the plan and a duty to second-guess those terms whenever the stock price declines. In contrast, reversing the decision below and making clear that, as every other court of appeals to have considered similar issues has recognized, the presumption of prudence standard provides a standard of primary conduct and must be applied at the pleading stage would strike the proper balance between the fiduciary's statutory responsibilities to follow the terms of the plan and protect the interests of plan participants.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted.

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