No. 12-751

IN THE

Supreme Court of the United States

FIFTH THIRD BANCORP, *et al.*,
Petitioners

v.

JOHN DUDENHOEFFER, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the complaint in this case plausibly alleged a claim for relief for a breach of fiduciary duty in violation of ERISA Section 404(a)(1), 29 U.S.C. Section 1104(a)(1).

2. Whether an ERISA fiduciary is absolutely immune from liability for a fiduciary breach for false statements made in a document that the fiduciary decided to incorporate by reference in a Summary Plan Description required by ERISA, *see* ERISA Section 102, 29 U.S.C. Section 1022, merely because the fiduciary himself was not the original author of the document.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	10
I. FURTHER REVIEW IS NOT WARRANTED TO CONSIDER THE ADEQUACY OF THE INVESTMENT-BASED ALLEGATIONS IN THE COMPLAINT	11
A. There Is No Conflict In The Circuits Because Petitioners' Obligations Turn On the Particular Terms of the Plan In This Case	12
B. In Any Event, The Sixth Circuit Applied The Standard Urged By Petitioners	20
II. FURTHER REVIEW OF PETITIONERS' CLAIM THAT THEY ARE ABSOLUTELY IMMUNE FOR MAKING FALSE STATEMENTS BECAUSE THEY CHOSE TO INCORPORATE THOSE STATEMENTS FROM SEC FILINGS IS UNWARRANTED	27
A. The Court of Appeals Correctly Held That A Fiduciary Violates ERISA Obligations By Knowingly Incorporating By Reference A False Statement From an SEC Filing Into A Summary Plan Description	27
B. There is No Conflict in the Circuits	31
CONCLUSION	33

TABLE OF AUTHORITIES

CASES Page(s)

Ashcroft v. Iqbal, 556 U.S. 662 (2009)............2, 8, 24

Christopher v. Harbury, 536 U.S. 403 (2002).... 22

Edgar v. Avaya, 503 F.3d 340 (3d Cir. 2007)..15, 16, 17, 18

Fisher v. JP Morgan Chase & Co., 133 S. Ct. 617 (2012) 12

Gearren v. McGraw-Hill Cos., Inc., 133 S. Ct. 476 (2012) 12

Gearren v. The McGraw-Hill Cos., 660 F.3d 605 (2d Cir. 2011) 32, 33

Gray v. Citigroup, Inc., 133 S. Ct. 475 (2012). 12

In re Citigroup ERISA Litig., 662 F.3d 128 (2d Cir. 2011), cert. denied, 133 S. Ct. 475 (2012) 15, 16, 18, 19, 21

In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861 (S.D. Tex. 2004) 31

Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008).......................17, 18, 19, 31, 32

Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995)..6, 8, 18

Lanfear v. Home Depot, Inc., 679 F.3d 1267 (11th Cir. 2012)..*passim*

LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008) 2

Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995)..6, 18, 19, 20

Page

Pegram v. Herdrich, 530 U.S. 211 (2000) 28

Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320 (7th Cir. 1983) .. 27

Pfeil v. State Street Bank & Trust Co., 671 F.3d 585 (6th Cir. 2012), cert. denied, 133 S. Ct. 758 (2012) 8, 20-21

Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010)..17, 18, 19

Varity Corp. v. Howe, 516 U.S. 489 (1996) ... 19, 27, 28

Warth v. Seldin, 422 U.S. 490 (1975).............. 22

STATUTES

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002, *et seq*.:
§ 102(a), 29 U.S.C. § 1022(a)........................ 3
§ 104(b), 29 U.S.C. § 1024(b)........................ 3
§ 402(a)(1), 29 U.S.C. § 1102(a)(1) 3
§ 404(a), 29 U.S.C. § 1104(a)........................ 27
§ 404(a)(1), 29 U.S.C. § 1104(a)(1) 1, 3, 4, 27
§ 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B)........*passim*
§ 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C) 4
§ 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) 4, 24
§ 404(a)(2), 29 U.S.C. § 1104(a)(2) 5, 25, 26

Tax Reform Act of 1972, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590 26

RULES

Fed. R. Civ. P. 8 8

Fed. R. Civ. P. 12(b)(6) 8

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page

S. Rep. No. 1236, 94th Cong., 2d Sess. (1976).. 26

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BRIEF IN OPPOSITION

STATEMENT

This case arises from respondents' claim that petitioners breached their fiduciary duties to act prudently under ERISA Section 404(a)(1), 29 U.S.C. Section 1104(a)(1). The complaint alleges that petitioners, fiduciaries of a defined-contribution ERISA plan that held employer stock, knew or should have known that continuing to own and invest in the employer stock was imprudent and that its price was artificially inflated due to undisclosed risks of which they knew. The complaint alleges that, despite their knowledge, petitioners took no steps whatsoever to protect employees by restricting further investment in the employer stock or divesting the stock already owned. The complaint also alleges that petitioners knowingly made materially false and misleading statements regarding the financial condition and prospects of the employer, and hence about the value of the employer's stock that the participants and beneficiaries were holding. Petitioners made those statements by incorporating by reference certain SEC filings, which petitioners knew contained the false and misleading statements, into the ERISA-required Summary Plan Description (SPD). The district court dismissed the complaint, but a unanimous panel of the court of appeals reversed, holding that the complaint plausibly alleged a breach of fiduciary duty under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and it remanded for further proceedings.

1. Fifth Third Bancorp is a bank holding company with operations in a number of States. This case concerns the Fifth Third Bancorp Master Profit Sharing Plan (Plan), which is a "defined contribution" retirement plan for employees that is sponsored by the bank. *See generally LaRue v. DeWolff, Boberg & Assocs., Inc.,* 552 U.S. 248, 250 n.1, 255-256 (2008). Participants may specify that a portion of their salaries be directed to the Plan for investment. They may choose specific investments for their contributions, but only from among options preselected by the Plan fiduciaries. One of the authorized investments is the Fifth Third Stock Fund, which invests in Fifth Third stock itself. Pet. App. 4.

As the court of appeals explained:

> [T]he Plan is not invested solely in Fifth Third Stock, nor is it required to be: the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and

> does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates.

Pet. App. 4. For those who participate in the Plan, Fifth Third, as part of the employment bargain, matches up to the first 4% of an employee's contribution. Fifth Third's matching funds are initially invested in the Fifth Third Stock Fund, but participants may direct that the funds be moved to other investments. Pet. App. 4.

ERISA Section 102(a) requires that "[a] summary plan description [SPD] of any employee benefit plan shall be furnished to participants and beneficiaries," and it is to include a variety of information about the plan. 29 U.S.C. § 1022(a); see ERISA § 104(b), 29 U.S.C. § 1024(b) (requirements for publication of SPD). In this case, the Fifth Third Plan fiduciaries "chose to incorporate by reference Fifth Third's SEC filings into the Summary Plan Description," Pet. App. 4, to provide Plan participants with "important" information, Pet. App. 18.

2. Under ERISA, one or more named fiduciaries must have "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The complaint in this case alleges that petitioners were fiduciaries of the Fifth Third Plan for at least some purposes—an allegation that they do not contest before this Court.

Section 404(a)(1) of ERISA, entitled "Fiduciary Duties," imposes a duty of loyalty on fiduciaries, who must "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). It also provides that ERISA fiduciaries must act

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). ERISA fiduciaries must also act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

ERISA expressly requires fiduciaries to "diversify[ ] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Concentration in the stock of any issuer—including the employer—would likely violate both this specific diversification requirement and ERISA's general prudence requirement. In order to permit plans to hold concentrated investments in qualified employer stock, therefore, Congress provided an express exception from both the prohibition on diversification and the diversification component—but *only* the diversification component—of the prudence requirement:

> [I]n the case of an eligible individual account plan . . . , the diversification requirement of paragraph (1)(C) and the prudence requirement (*only to the extent that it requires diversification*) of paragraph (1)(B) is not violated by acquisition or holding of . . . qualifying employer securities.

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2) (emphasis added). Thus, holdings of qualified employer stock are an exception from the express diversification requirement and from the prudence requirement "*only to the extent that it requires diversification*." ERISA contains no other exception from the prudence requirement for employer stock. Buying or holding employer stock, insofar as it is imprudent for reasons *other than* lack of diversification, may violate ERISA.

3. The complaint in this case alleges that in the period prior to July 19, 2007, Fifth Third "switched from being a conservative lender to a subprime lender, its loan portfolio became increasingly at risk due to defaults, and it either failed to disclose the resulting damage to the company and its Stock or provided misleading disclosures." Pet. App. 4-5. The complaint alleges that petitioners, who include Fifth Third's President and CEO and other high-ranking executives, were aware of all these facts, and that, because these facts were not disclosed, Fifth Third's stock price was "artificially inflated before plummeting" in the ensuing period. Pet. App. 5.

The complaint alleges that petitioners, although aware of that "artificially inflated" price, "failed to take any action to protect participants from losses" and "continued to invest and to allow investment of the Plan's assets in [Fifth Third] stock even as Fifth Third's problems came to light." Complaint at 58 (¶ 198). Moreover, they did not make "appropriate public disclosures as necessary," did not "consult[] with DOL or independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan," and did not "resign[] as fiduciaries . . . to the extent that they could not loyally serve the Plan." *Ibid*. (¶197). Because Fifth Third stock constituted a substantial portion of the Plan's overall assets, the result was devastating losses for Plan participants. *Id*. at 56-57 (¶¶ 188-196). The complaint alleges that petitioners' failure to act to protect participants was a violation of the requirement that they exercise ordinary "care, skill, prudence, and diligence" under the circumstances, as required by ERISA Section 404(a)(1)(B), 29 U.S.C. Section 1104 (a)(1)(B).

The complaint also alleges that several of the Fifth Third SEC filings, which petitioners chose to incorporate by reference into the Plan SPD, contained materially false and misleading statements concerning Fifth Third's activities in the subprime and related areas. The complaint alleges that petitioners' decision to incorporate those filings into the SPD for distribution to Plan participants, notwithstanding their knowledge of the false and misleading statements in those filings, also violated their fiduciary duties under ERISA. Pet. App. 17.

4. The district court dismissed the complaint. The court applied what has been called the "*Moench* presumption," or, in the Sixth Circuit, the "*Kuper* presumption," under which "the plan fiduciaries start with a presumption that their 'decision to remain invested in employer securities was reasonable.'" Pet. App. 37 (*quoting Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995)); *see Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). Applying that presumption and analyzing the complaint, the district court held that it "must accept that Fifth Third embarked on an improvident and even perhaps disastrous foray into subprime lending, which in turn caused a substantial decline in the price of its common stock." Pet. App. 45. But the court held that, because the complaint did not in the court's view allege that Fifth Third was in a

"dire financial predicament," it was not "sufficient to establish a breach of fiduciary duty." Pet. App. 45.

In concluding that the complaint had not sufficiently alleged that Fifth Third faced a "dire situation," the court relied heavily on its conclusion that Fifth Third remained "viable," Pet. App. 44, and "was not in danger of collapsing," Pet. App. 43. In turn, it rested that conclusion in significant part on its views that Fifth Third's participation in the government's Capital Purchase Program—one of the government's TARP-related programs—showed the bank's viability, rather than, as the complaint alleged, the extreme distress in which Fifth Third found itself. Pet. App. 45. The court also decided to credit and give weight, on this motion to dismiss, to the fact that some large state pension funds continued to invest in Fifth Third stock during this period. The court accepted those evidentiary facts as proof of Fifth Third's viability, despite respondents' lack of opportunity to introduce evidence on those matters. Pet. App. 44.

The court also held that the complaint failed to state a claim when it alleged that petitioners breached their fiduciary duty by virtue of the misrepresentations in the Plan SPDs. The court noted that "the alleged misstatements and omissions to which the complaint refers . . . for the most part were made in corporate SEC filings," Pet. App. 47, which were "required under the federal securities laws and regulations," Pet. App. 50. The court did not address the fact that the SPD was a document required by ERISA, not the federal securities laws or regulations, and that respondents chose to incorporate the SEC filings into the ERISA-required SPD.

5. A unanimous panel of the court of appeals reversed. The court began by noting that it must de-

termine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Pet. App. 7 (*quoting Iqbal*, 556 U.S. at 678). The court held that no special presumption should apply in either direction in analyzing the complaint, because "it would be inconsistent to apply the *Kuper* presumption—which concerns questions of fact—at the pleading stage where the court must accept the well pled factual allegations of the complaint as true." Pet. App. 12. Nonetheless, the court held that, applying "the normal rules of notice pleading under Federal Rule of Civil Procedure 8," "the proper question at the Rule 12(b)(6) stage of the case is whether the Amended Complaint pleads 'facts to plausibly allege that a fiduciary has breached its duty to the plan.'" Pet. App. 13 (*quoting Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 596 (6th Cir. 2012)).

a. The court noted that the complaint "specifically enumerates and describes . . . warnings and public information of which [petitioners] were aware" that "should have led [petitioners] to investigate whether the Fifth Third Stock Fund was still a prudent investment given its own exposure to subprime lending." Pet. App. 14. In particular, the complaint alleges that, by July 19, 2007, petitioners "had knowledge of . . . 2007 warnings by industry watchdogs of subprime lending practices, the rise of foreclosures and delinquency rates in real estate loans, several published articles warning of the risks of loosening standards in order to invest in the subprime lending market, and the closure of several mortgage companies due to their investment in the subprime mortgage industry." Pet. App. 13-14. The complaint further alleges that petitioners "knew or should have known of the existence of these problems because of their high-ranking positions within the company." Pet. App. 14.

In short, the complaint alleges "that Fifth Third engaged in lending practices that were equivalent to participation in the subprime lending market, that [petitioners] were aware of the risks of such investments . . . , and that such risks made Fifth Third Stock an imprudent investment." Pet. App. 15. Based on those allegations, the court concluded that the complaint "plausibly alleges a claim of breach of fiduciary duty and the requisite causal connection . . . regarding [petitioners'] failure to divest the Plan of Fifth Third Stock and remove that stock as an investment option." Pet. App. 15. In reaching that conclusion, the court criticized the district court for resolving disputed questions of fact in favor of petitioners—such as "Plaintiffs' alleged evidence of Fifth Third's participation in the TARP program and its effect on the reasonableness of holding Fifth Third Stock"—in ruling on the motion to dismiss in this case. Pet. App. 14-15 n.1.

b. The court of appeals also concluded that the complaint "plausibly alleges [petitioners] breached their fiduciary duties by intentionally incorporating Fifth Third's SEC filings into the Plan's SPD and thereby conveying misleading information to Plan participants." Pet. App. 22. The court noted that, although the district court had relied on the fact that petitioners were not acting as ERISA fiduciaries when the SEC filings were originally prepared, that is of no consequence. Indeed, respondents "concede[d] that the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA." Pet. App. 17. But the allegation in this case is that petitioners "violated their fiduciary duties when they chose to incorporate SEC filings into ERISA Plan documents," not when they originally prepared documents for the SEC or filed them. Pet. App. 17.

The court explained that "ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD." Pet. App. 22. Therefore, because the complaint alleged that petitioners "exercised discretion in choosing to incorporate the filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock," the complaint stated a claim on which relief could be granted. Pet. App. 22. As the court noted, "[t]o hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach." Pet. App. 23.

6. The court of appeals denied petitioners' petition for rehearing en banc, with no judge having requested a vote on it. Pet. App. 56

ARGUMENT

There is no doubt that ERISA imposes a duty on plan fiduciaries to act with proper "care, skill, prudence, and diligence" under the circumstances. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Applying settled standards, the court of appeals held that the complaint in this case was sufficient to state a claim that petitioners violated that duty by making and holding imprudent investments in Fifth Third stock. That result is correct, and it does not conflict with any decision of any other court of appeals. The varying results in cases of this sort turn on their underlying facts, and an important fact in this case—

unlike in the cases that petitioners rely on—is that the Plan "does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates." Pet. App. 4a. In any event, the court of appeals' conclusion that the particular allegations of the complaint in this case are sufficient to state a claim would not warrant further review, especially in light of the absence of a more developed factual record. The Court has recently denied review in three cases presenting essentially the same question presented in this case, and the same result is warranted here.

The court of appeals also concluded that petitioners can be held responsible under ERISA for knowingly incorporating false statements into the ERISA-required Summary Plan Description that were originally made in SEC filings, just as they are responsible for any other statements that they know to be false and nonetheless choose to include in the SPD to influence decisions of Plan participants. That holding does not conflict with any decision of any other court of appeals. There is no support for petitioners' contention that, merely because the false statements were originally made in SEC filings, petitioners are immune from liability under ERISA for deciding to include them in the ERISA-required SPD.

I. FURTHER REVIEW IS NOT WARRANTED TO CONSIDER THE ADEQUACY OF THE INVESTMENT-BASED ALLEGATIONS IN THE COMPLAINT

Petitioners argue that the court of appeals' decision "conflicts with the decisions of other circuits holding that an ESOP fiduciary's decision to invest in employer stock is presumed reasonable at the pleading stage and only reviewed for an abuse of discretion." Pet. 12. This Court has recently denied certiorari in three cases presenting essentially the same question. *See Fisher v. JP Morgan Chase & Co.*, 133 S. Ct. 617 (2012); *Gearren v. McGraw-Hill Cos., Inc.*, 133 S. Ct. 476 (2012); *Gray v. Citigroup, Inc.*, 133 S. Ct. 475 (2012). The same result is warranted here. With respect to the key underlying issue, the circuits have uniformly held that there is a presumption of prudence that governs plan fiduciaries' conduct in this context, and the court of appeals reaffirmed that position here. *See* Pet. App. 10-11.

In any event, the court of appeals' decision was correct, there is no conflict in the circuits, and the evaluation of the particular complaint in this case to determine if it sufficiently states a claim under ERISA presents no question that warrants a grant of certiorari. Indeed, if there were a question regarding the standards of fiduciary liability under ERISA that warranted this Court's attention, it would be better considered on the more complete factual record that will be developed after the case is permitted to proceed in the lower courts.

A. There Is No Conflict In The Circuits Because Petitioners' Obligations Turn On the Particular Terms of the Plan In This Case

There is no conflict in the circuits, because varying results in this area in large measure turn on the varying duties of the fiduciaries, which in turn depend on the terms of the particular ERISA plan in each case. In each of the cases from other circuits cited by petitioners, the plan directed the fiduciaries to invest in employer stock, and the complaint alleged that the fiduciaries violated their duties by following the plan's command. By contrast, in this case, the Plan gave petitioners full authority to cease investing in or divest the employer's stock, and the complaint alleges that they acted imprudently in failing to exercise that authority. Whatever may be the ERISA obligation of the constrained fiduciaries in the cases cited by petitioners from other circuits, the decisions in those cases do not control the outcome here, where the fiduciaries were under no such constraints.

1. The court of appeals was quite clear that

> the Plan Document does not mandate that the Fifth Third Stock Fund invest solely in Fifth Third Stock and does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates.

Pet. App. 4. That statement repeats an express allegation of the complaint, Complaint ¶ 47, which in turn is supported by the terms of the Plan's foundational document, which recites without qualification that "the Administrator shall change the investment funds if and when it deems it prudent to do so." Complaint ¶ 47 (quoting Trust Agreement, § 3.3(a)). On this motion to dismiss, the court thus had no choice but to conclude that the Plan did not charge petitioners with an obligation to invest in the employer's stock, as in the cases cited by petitioners. Instead, it charged them with an obligation to use their judgment prudently in deciding what investments to offer—including whether to continue to offer Fifth Third Stock Fund to participants and whether to divest the employer stock currently invested in the Fund.

a. Petitioners nonetheless appear to dispute that conclusion, asserting that "[t]he Plan document *required* that one investment option be the Fifth Third Stock Fund, which the Plan defined as an ESOP *required* to invest primarily in qualifying employer securities." Pet. 4 (emphasis added). They did not make that argument to the court of appeals, and any such argument would have been futile in light of the allegations of the Complaint and the terms of the Plan cited above. Moreover, petitioner's disagreement with the court of appeals about the meaning of the particular terms in the Plan document in this case would not in any event warrant this Court's attention.

b. Petitioners mistakenly cite the district court's opinion in support of their assertion that they were "required" to invest in Fifth Third stock. Pet. 4 (citing Pet. App. 30, 35-36). Even if the district court had reached that conclusion, it would be of no consequence, because this Court should not grant review in order to resolve claims that a court of appeals disagreed with a decision of one of its own district courts on the interpretation of a particular legal document. But there was in fact no disagreement between the court of appeals and the district court on this point.

The district court did recite the undisputed fact that "one fund [offered to participants] invests entirely in Fifth Third common stock" with some exceptions. Pet. App. 30. But, although it is undoubtedly true that the Fund did "invest[] entirely in" employer stock, the court did not state or imply that petitioners were *required* to offer the Fund to participants. To the contrary, in addressing whether the Fifth Third Stock Fund is an Employer Stock-

Ownership Plan (ESOP)—a fact not at issue on this petition—the district court noted that respondents alleged that "the Plan *allows* the plan administrator to discontinue or change investment options when it becomes prudent to do so." Pet. App. 36 (emphasis added). The district court did not reject that allegation, and on this motion to dismiss it could not have done so. Instead, the court assumed the allegation to be correct, and then merely commented that the allegation does not alter the conclusion that "the stock fund is an ESOP because the principal inquiry [as to whether a fund is an ESOP] is not whether the plan administrators have authority to discontinue the fund," but rather whether it in fact invests primarily in employer securities. Pet. App. 36.

2. The fact that petitioners had "the ability . . . to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates," Pet. App. 4, makes the legal analysis in this case different from that in each of the allegedly conflicting cases cited by petitioners and refutes petitioners' claim that there is a conflict in the circuits.

a. Petitioner argues that the decision in this case conflicts with *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011), cert. denied, 133 S. Ct. 475 (2012), *Edgar v. Avaya*, 503 F.3d 340 (3d Cir. 2007), and *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012). *See* Pet. 13-14. There is no conflict.

Initially, the Third Circuit's decision that the complaint failed to state a claim in *Edgar v. Avaya* was based on the fact that the plaintiff there had "pleaded himself out of court" by pleading facts sufficient to establish that he was not entitled to relief. In particular, because the complaint in Edgar alleged only that the company stock had dropped slightly as a result of "corporate developments" but had then fully recovered, the plaintiff had not identified any imprudence. See 503 F.3d at 349 & n. 14 ("[A] duty of prudence claim that is on its face inadequate as a matter of law obviates the need for discovery.").

The Third Circuit's holding that the *Edgar* plaintiff essentially pleaded himself out of court did not establish any general rule that complaints alleging an ERISA fiduciary breach of this kind must overcome an exceptionally high hurdle in order to state a claim. The decision in *Edgar* does not conflict with the court of appeals' determination in this case that, given the factually supported allegations that petitioners knew that Fifth Third stock was artificially inflated and bound to fall dramatically but continued to hold it for the Plan, the complaint here stated a claim for relief.

b. In any event, neither *Edgar* nor the other cases cited by petitioners addressed a plan like the one here, in which plan fiduciaries had full authority to discontinue investment in, or entirely to divest, the company stock.

In *Citigroup*, the plans "*mandate[d]* that the [employer stock] Fund be included as an investment option." 662 F.3d at 133 (emphasis added). The Second Circuit relied on the fact that the plans gave the "fiduciary . . . little discretion to alter the composition of investments" in the employer stock fund. *Id.* at 139. No such fact was present here.

In *Edgar*, the plans provided that the investment options offered to participants "*shall include* the [employer] Stock Fund, which shall be invested primarily in shares of [employer's] common stock, with a small portion in cash and other liquid investments." 503 F.3d at 343 (emphasis added). The allegations in *Edgar* would have "require[d] defendants to disobey the terms of the Plans by not offering [the employer stock fund] as an investment option, or by divesting the Plans of [employer stock]," thus "risk[ing] liability for having failed to follow the terms of the Plans." *Id*. at 348-349. The allegations in this case would not have required petitioners to disobey any terms of the Plan here, but instead sought to hold them to the obligations the Plan itself (and ERISA) impose.

In *Lanfear*, the Eleventh Circuit explained that "[t]he language of the Plan *requires* that one of the available investment funds be a 'Company Stock Fund,'" which is "invested primarily in shares of [the employer's] stock." 679 F.3d at 1271-1272 (emphasis added). While the fiduciaries were thus not required to invest the fund "exclusively" in company stock, *id*. at 1277, "[t]he limitation on their discretion was the Plan's requirement that the fund's *primary* investment be [employer] stock." *Id*. at 1277 (emphasis added). Thus, the case involved a challenge to the "fiduciary's decision to continue to invest or to remain invested in company stock *in obedience to the plan's directions*." *Id.* at 1281 (emphasis added); *see id*. at 1280 ("continued adherence to the ESOP's direction" to invest in company stock). The Plan in this case did not subject petitioners to any such directions.

c. Petitioners also assert that the Fifth and Ninth Circuits require plaintiffs to surmount a higher bar in order to plead a claim that ERISA fiduciaries breached their duty by imprudently holding and continuing to purchase employer stock. See Pet. 18. But both of the cases cited by petitioners—*Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), and *Quan v. Computer Scis. Corp.*, 623 F.3d 870

(9th Cir. 2010)—simply adopted the same *Moench* presumption that petitioners concede the Sixth Circuit too adopted in *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). *See* Pet. 13. Indeed, the court of appeals here *reaffirmed* its allegiance to that standard: "A fiduciary's decision to remain invested in employer securities is presumed to be reasonable," and the Sixth Circuit has "adopted an abuse of discretion standard of review for an ESOP fiduciary's decision to invest in employer securities, the so-called *Kuper* or *Moench* presumption." Pet. App. 10-11. Because both *Kirschbaum* and *Quan* arose on review of a grant of summary judgment, neither case analyzed or discussed what is necessary to state a claim of fiduciary breach on a motion to dismiss. Accordingly, neither decision conflicts with the Sixth Circuit's decision in this case.

Moreover, even if they had arisen on a motion to dismiss, both *Kirschbaum* and *Quan* would not conflict with the decision here, because *Kirschbaum* and *Quan* also involved fiduciary obligations under plans like those at issue in *Citigroup, Edgar*, and *Lanfear*, in which the fiduciaries were *required* to offer an employer stock fund to participants. *See Kirschbaum*, 526 F.3d at 250 ("It is clear that the Plan required the Fund to be invested almost exclusively in [employer] common stock."); *id*. at 253 (noting that "the Plan's requirements to invest in [employer] stock are mandatory"); *Quan*, 623 F.3d at 875 ("Under the Plan's governing document, the [employer] Stock Fund was a mandatory investment offering."). The fiduciary's obligations under such a plan could be different from those in a plan like the one here, in which the fiduciaries were charged only with exercising prudence in deciding on investment options.

3. Because petitioners had much more responsibility merely to follow the dictates of prudence in deciding whether to divest or continue to invest in employer stock than the fiduciaries in each of the cases cited by petitioners, it is natural that the results in those cases would differ. Indeed, the courts are in general agreement that the fiduciary's duty to invest in employer stock is critical. As the Ninth Circuit in *Quan* explained, "[a] guiding principle . . . is that the burden to rebut the presumption [of prudence] varies directly with the strength of a plan's requirement that fiduciaries invest in employer stock." 623 F.3d at 883. *Accord Kirschbaum*, 526 F.3d at 255 & n.9 (noting that "a greater degree of deference, and hence a lesser degree of judicial scrutiny, would be appropriate to" plans that "afford[] no discretion to enter into other investments"); *Citigroup*, 662 F.3d at 138 ("judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest" in employer stock); *Moench*, 62 F.3d at 571 (noting different standards applicable depending on degree to which fiduciary is "required to invest in employer securities").

That difference between fiduciaries who are directed to invest exclusively or primarily in employer securities and those who have full authority not to do so is entirely consistent with the abuse-of-discretion standard that petitioners urge. As the Court explained in *Varity Corp. v. Howe*, "the primary function of the [ERISA] fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust document or the legal regime." 516 U.S. 489, 504 (1996) (emphasis in original). Where, as in this case, the Plan "does not limit the ability of the Plan fiduciaries to remove the Fifth Third Stock Fund or divest assets invested in the Fifth Third Stock Fund, as prudence dictates," the courts uniformly accept that an abuse-of-discretion standard subjects the fiduciary's decisions to more searching judicial scrutiny. On the other hand, where, as in the cases cited by petitioners, the fiduciary is *required* to offer and invest exclusively or primarily in employer stock, the courts cited by petitioners reason that more deference and less judicial scrutiny of the fiduciary's decision to obey the plan terms is appropriate.

B. In Any Event, The Sixth Circuit Applied The Standard Urged By Petitioners

Petitioners allege that further review is warranted because the court of appeals departed from the decisions of other circuits to apply the presumption of prudence at the pleading stage of a case. If that were true, there would still be no conflict, because, as explained above, the Plan fiduciaries in this case had substantially more authority—and, accordingly, were subject to substantially more rigorous judicial review—than the fiduciaries in each of the cited cases. But in any event, the result reached by the court of appeals here is consistent with the decisions of each of those courts.

1. The court of appeals in this case did state that it would not apply the *Moench* presumption at the motion to dismiss stage. Pet. App. 13. But it nonetheless required respondents to plead "facts to plausibly allege that a fiduciary has breached its duty to the plan" and "that an adequate investigation would have revealed to a reasonable fiduciary that the investment [in Fifth Third Stock] was improvident." Pet. App. 13 (*quoting Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 596 (6th Cir.), cert. denied,

133 S. Ct. 758 (2012)). It reviewed the allegations of the complaint, including the allegations that "Fifth Third switched from being a conservative lender to a subprime lender," that "its loan portfolio became increasingly at risk due to defaults," and that "it either failed to disclose the resulting damage to the company and its Stock or provided misleading disclosures." Pet. App. 4-5. Those factors "caused the price of Fifth Third Stock to be artificially inflated before plummeting." Pet. App. 5.

As the court of appeals concluded, it would surely be an abuse of discretion under ERISA (or any other regime) for a prudent fiduciary to knowingly continue to invest funds in a highly risky investment whose risk factors had not been publicly disclosed and whose stock was therefore being sold at prices that were artificially inflated and ultimately bound to fall very substantially. The court of appeals' conclusion is indistinguishable from what petitioners allege a court should require of a complaint in a case like this: that the complaint "plausibly allege that the ESOP fiduciary abused its discretion in order to state an ERISA breach of fiduciary duty claim." Pet. 11.

2. Although verbal formulations may differ, there is no reason to believe that, even disregarding the Plan's lack of limits on petitioners' decisions on investments in Fifth Third stock, any other court of appeals would have reached a different conclusion in this case. The Second and Eleventh Circuits have required a complaint to allege that the plan fiduciaries knew they faced a "dire situation" before being required to divest the company stock. *See Citigroup*, 662 F.3d at 140; *Lanfear*, 679 F.3d at 1282. But the complaint in this case did in effect allege that Fifth

Third faced a "dire situation," for the reasons outlined by the court of appeals. Pet. App. 4-5, 13-15.

The district court reached the contrary conclusion only by misconceiving the inquiry at the motion to dismiss stage of the case. It is settled law that, on a motion to dismiss, the court "must accept as true all material allegations of the complaint," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and "take them in the light most favorable to the [plaintiff]," *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). Nonetheless, the district court relied on evidence that some completely unrelated pension funds continued to invest in Fifth Third throughout the relevant period as a reason to conclude that respondents should not have the opportunity to prove their allegations that petitioners acted imprudently. Pet. App. 44a-45a. The court did so despite the fact that respondents had no chance to offer proof on how the risk profiles of the cited funds differed from the Plan at issue, why the unrelated state pension funds were making their investment decisions, or whether and how many other pension funds had concluded that they must *avoid* Fifth Third stock. Obviously, this kind of evaluation of a snippet of evidence at the motion to dismiss stage—*and construing it as establishing the defendant's case as a matter of law*—is improper.

Similarly, the complaint alleges that Fifth Third's participation in a government "bailout" program—the Capital Purchase Program—was a sign of deep financial stress. That was certainly a reasonable inference, and it is therefore binding at least unless and until it is disproven at a later stage of the litigation. The district court, however, chose to draw the opposite inference that Fifth Third's "participation in the [Program] is actually a sign of its viability and another indication that [petitioners'] decision to remain invested in Fifth Third stock was not imprudent." Pet. App. 45. The court of appeals correctly held that "the district court erred to the extent it weighed [respondents'] alleged evidence of Fifth Third's participation in the . . . program and its effect on the reasonableness of holding Fifth Third Stock" at this stage of the litigation. Pet. App. 14-15 n.1.

In short, the complaint alleges facts in this case that, if evaluated under the standards applicable to a motion to dismiss, are sufficient to state a claim of breach of fiduciary duty under the standards of any circuit. This Court's review is unwarranted.

3. Petitioners' arguments that they should not be held liable can be addressed at a later stage of this case, after at least some development of the facts. But it is appropriate to correct a few errors.

a. Petitioners allege that the Sixth Circuit's decision will inappropriately spur frivolous litigation "every time the employer's stock price fluctuates." Pet. 12. That is not true. A drop in stock price is neither necessary nor sufficient for a showing of an ERISA fiduciary breach. Stock prices may drop for a wide variety of reasons that have nothing to do with a fiduciary breach, including changes in the supply and demand for a firm's products, general business conditions, the failure of a new technology or product to work as hoped, and many other factors. By the same token, although there may be no damages, a fiduciary breach can occur without a drop in stock price, when, for example, fortuities in demand for a firm's products lead to an increased stock price despite the presence of even large, undisclosed risks that were known to plan fiduciaries and would otherwise have led to huge losses. The fiduciary's duty is to act with "care, skill, prudence, and diligence" under the circumstances, ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), not to guarantee a stock price or a profit.

The gravamen of the complaint here is not that Fifth Third's stock price fluctuated, but that petitioners, who were given broad authority to choose Plan investments, invested *imprudently* in Fifth Third stock despite their awareness of specific and extraordinary risks that were not disclosed to the market and that made the stock subject to an inevitable and devastating decline. Respondents pleaded specific facts that, under *Iqbal* made such a claim plausible, and they were therefore entitled to proceed to prove that claim. By contrast, petitioners would exclude all such claims, thus leaving fiduciaries entirely free to gamble Plan funds as they wish, to the potential benefit of the employer and at the risk of devastating losses to Plan participants—all in contravention of the ERISA-enforced employment bargain they made to help employees save for their retirement.

b. Petitioners acknowledge that "the Sixth Circuit correctly noted that the *general* standards of prudence and loyalty apply to ESOP fiduciaries." Pet. 23. But they err when they charge that the court "disregarded the ESOP-*specific* exemptions included in ERISA." Pet. 23. One such arguable "exemption" or limitation could be for fiduciaries who own employer stock because they are required to do so by the terms of the plan (although even then, the terms of ERISA itself trump the plan's terms). *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). As explained above, the terms of the Plan here do *not* require petitioners to invest in Fifth Third stock, and they accordingly cannot take advantage of this sort of "exemption."

The only other exemption on which petitioners rely is the statutory exemption from the requirement to diversify investments:

> In the case of an eligible individual account plan . . . , the diversification requirement of [29 U.S.C. 1104(a)(1)(B)] and the prudence requirement (only to the extent that it requires diversification) is not violated by acquisition or holding of . . . qualifying employer securities.

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2). That provision makes clear that fiduciaries may invest in qualified employer stock without fearing liability for failure to diversify, and the complaint in this case did not charge or rely on petitioners' failure to diversify. But Section 404(a)(2) also makes clear that Congress intended no *further* diminution of ERISA's fiduciary duties in order to encourage employee stock ownership. In carefully written and unmistakable terms, Congress relaxed ERISA's prudence requirement "*only to the extent that it requires diversification*." ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2) (emphasis added). Insofar as acquiring or holding company stock is imprudent for any reason *other than the requirement to diversify*—such as when its price is known to be artificially inflated and enormously overvalued—ERISA unmistakably subjects fiduciaries to its unqualified "care, skill, prudence, and diligence" requirement.

c. Petitioners also argue that Congress intended to permit imprudent investment in ESOPs, citing an uncodified provision of the Tax Reform Act of 1976 stating that Congress "is deeply concerned" by "regulations and rulings" that "treat [ESOPs] as conventional retirement plans." Pet. 23 (*citing* Tax Reform Act of 1972, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590). That statement of "concern" does not purport to, was not intended to, and does not amend or dilute any provision of ERISA. It certainly does not leave fiduciaries of ESOPs free to act imprudently, just as it does not give them freedom to defraud a plan, engage in self-dealing, fail to pay claims or follow the terms of a plan, or otherwise contravene ERISA's express requirements. When Congress wanted to make exceptions to ERISA's prudence or other requirements, it did so expressly, as the diversification exception in Section 404(a)(2) discussed above makes clear.

In any event, Congress's "concern" was directed at "proposed regulations issued by both the Department of the Treasury and the Department of Labor on July 30, 1976" that "may make it virtually impossible for all ESOPs, and especially leveraged ESOPs, to be established and function effectively." S. Rep. No. 1236, 94th Cong., 2d Sess. 539 (1976). The conference report itemizes the specific parts of the proposed regulations with which Congress was concerned, which generally have to do with issues such as loans to ESOPs, options on ESOP stock, voting rights and dividend restrictions applicable to ESOP stock, etc. None has anything whatsoever to do with ERISA's general fiduciary duties or the issues in this case.

II. FURTHER REVIEW OF PETITIONERS' CLAIM THAT THEY ARE ABSOLUTELY IMMUNE FOR MAKING FALSE STATEMENTS BECAUSE THEY CHOSE TO INCORPORATE THOSE STATEMENTS FROM SEC FILINGS IS UNWARRANTED

As this Court held in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA," ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). 516 U.S. at 506 (*quoting Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.,* 698 F.2d 320, 326 (7th Cir. 1983)). It appears to be petitioners' position, however, that, because they incorporated false statements from SEC filings into the SPD rather than paraphrasing or repeating the false statements verbatim, they cannot be held liable. Nothing in ERISA or elsewhere in the law grants them such absolute immunity. The court of appeals correctly rejected their extraordinary claim, and its decision does not conflict with that of any other court of appeals.

A. The Court of Appeals Correctly Held That A Fiduciary Violates ERISA Obligations By Knowingly Incorporating By Reference A False Statement From an SEC Filing Into A Summary Plan Description

1. ERISA requires fiduciaries to act "solely in the interest of participants and beneficiaries," ERISA § 404(a), 29 U.S.C. § 1104(a), and with "care, skill, prudence and diligence," ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Petitioners do not dispute that making knowingly false or misleading statements to

ERISA participants in an effort to encourage them to make a decision with respect to their ERISA benefits or investments is inconsistent with those duties and is actionable. See *Varity Corp. v. Howe*, 516 U.S. at 506; see also Pet. App. 16 (*citing Varity Corp.*).

As the court of appeals recognized, "[t]he threshold question in all cases charging breach of ERISA fiduciary duty is whether the defendant was 'acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.'" Pet. App. 16 (*quoting Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). For that reason, the court also recognized—and respondents acknowledged—that "the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA" and cannot themselves violate any duty under ERISA. Pet. App. 17.

In this case, the complaint does not base any claim on whatever role petitioners may have had in preparing, signing, and filing SEC documents. It claims that petitioners breached their fiduciary duty when they knowingly "chose to provide Plan participants with selected information—alleged to include material misrepresentations about Fifth Third and its Stock—by incorporating only specifically enumerated SEC filings and specific future filings into the SPD." Pet. App. 18. Indeed, petitioners themselves explained in the SPD that the information they were incorporating from SEC documents was material. As the SPD stated, petitioners were "disclos[ing] important information to you by referring you to" documents filed with the SEC, and "[t]he information incorporated by reference is an important part of [the SPD]." Pet. App. 18. They also urged that participants "should rely" on that information: "in case of a conflict or inconsistency between information contained in this booklet and information incorporated by reference into this booklet, you *should rely* on the information that was filed later." Pet. App. 18 (emphasis added).

As the court of appeals explained, "ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD." Pet. App. 22. While petitioners were not responsible for preparing or filing the SEC documents, they were plainly acting as ERISA fiduciaries and "exercised discretion in choosing to incorporate the [SEC] filings into the SPD . . . as a direct source of information for Plan participants about the financial health of Fifth Third and the value of its stock." Pet. App. 22. The conclusion is ineluctable that, if petitioners knew that the incorporated statements were false or misleading, their decision to add them to the SPD was a breach of their duty under ERISA.

2. Petitioners repeatedly argue that "none of the alleged misstatements in the SEC filings were made by an ERISA fiduciary or connected to fiduciary statements about the future of plan benefits," Pet. 27, that the court's holding "completely ignores the context in which the challenged statements were made," Pet. 27, and that "[n]o ERISA fiduciary made these alleged misleading statements or took action that is 'subject to complaint.'" Pet. 28. All of those statements could be true if petitioners had not incorporated the SEC filings into the SPD. But they did choose to incorporate them, and that choice is the basis of the complaint in this case.

Like the district court, petitioners repeatedly confuse the act of writing or filing the documents with the SEC (which were not ERISA fiduciary acts) with the act of incorporating the documents by reference into the SPD while emphasizing to participants that they were "important" and that "you should rely on" them (which were ERISA fiduciary acts). Pet. App. 18. It could not possibly make a difference that the material was incorporated by reference from SEC filings, rather than paraphrased or reprinted verbatim in the SPD. As the court of appeals explained, "[t]o hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach." Pet. App. 23. There is no reasonable construction of ERISA that would lead to that result.

Petitioners argue that "[t]he Sixth Circuit's opinion will require plan fiduciaries to investigate the truth of every single statement made in SEC filings that is incorporated by reference into plan documents," Pet. 33, and they refer to "strict liability" that will be imposed on ERISA fiduciaries who incorporate false or misleading statements into ERISA documents. Pet. 26, 29. ERISA fiduciaries have the duty to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). That is not strict liability. It does, however, require that fiduciaries act with appropriate care and diligence. Knowingly incorporating "important" false statements into an ERISA SPD that the participants "should rely on" is inconsistent with that duty, and it is actionable under ERISA.

B. There is No Conflict in the Circuits

Petitioners claim that the court of appeals' holding that they are not absolutely immune from liability for knowingly incorporating false statements from SEC filings into the SPD conflicts with decisions of the Fifth, Second, and Eleventh Circuits. There is no conflict.

1. In *Kirschbaum*, the Fifth Circuit held that an individual who was an ERISA fiduciary and who incorporated SEC filings into the plan *prospectus* was merely "discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary." 526 F.3d at 257. But *Kirschbaum* did not involve an ERISA-required SPD. As the courts of appeals both here and in *Kirschbaum* explained, a plan prospectus may be required by the securities laws, not ERISA, and accordingly the individual's conduct in incorporating material into a plan prospectus may not be an ERISA fiduciary function. Pet. App. 20; *see* 526 F.3d at 257. Indeed, in *Kirschbaum* itself, the Fifth Circuit found "easily distinguishable"—and did not disapprove of—a district court case in which the court *refused* to dismiss a complaint alleging that an ERISA fiduciary "had used the . . . Prospectus as the Summary Plan Description." 526 F.3d at 257 (*citing In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 869 (S.D. Tex. 2004)). The court noted that the plaintiff in *Kirschbaum* "makes no such claim, and the record reveals that [the fiduciaries] issued a separate document to serve as the SPD." *Ibid*. As the court of appeals concluded, "*Kirschbaum* is, on its face, inapplicable." Pet. App. 21.

For the same reason, the court of appeals' decision here is entirely consistent with *Lanfear*. In that case, the defendants "took . . . inaccurate statements in the Form 10-K annual reports and in the Form 10-Q quarterly reports and put them into the Form S-8s and into the stock prospectuses" of the ERISA plan. 679 F.3d at 1283. The Eleventh Circuit held that "[i]t is securities law, not ERISA, that requires registration of securities," including filing the prospectuses and the 10-Q and S-8 forms. *Ibid*. Agreeing with *Kirschbaum*, the court held that "[w]hen the defendants . . . filed the Form S-8s and created and distributed the stock *prospectuses*, they were acting in their corporate capacity and not in their capacity as ERISA fiduciaries." *Id*. at 1284 (emphasis added). The Eleventh Circuit was not asked to, and did not, reach the conclusion that knowingly incorporating false and misleading material into an *SPD* that is required by ERISA is anything but an ERISA fiduciary function for which the fiduciary may be liable.

2. Nor does the decision in this case conflict with the Second Circuit's decision in *Gearren v. The McGraw-Hill Cos.*, 660 F.3d 605 (2d Cir. 2011). In *Gearren*, the SPD did incorporate SEC filings containing allegedly false and misleading statements. *Id*. at 610-611. Petitioners are correct that the Second Circuit held that "defendants who *signed or prepared the SEC filings* were acting in a corporate, rather than a fiduciary, capacity when they did so," and the court held that those defendants accordingly "may not be held liable under ERISA for misstatements contained in the SEC filings." Pet. 30-31 (emphasis added) (*quoting Gearren*, 660 F.3d at 611). The Sixth Circuit in this case reached exactly the same conclusion: "the preparation, signing, and filing of SEC documents are not fiduciary acts under ERISA." Pet. App. 17.

Gearren also addressed a claim similar to the one in this case that, "because the Plans' SPDs incorporated the SEC filings, the SPDs contained the same misstatements as the SEC filings." 660 F.3d at 611. Nothing in the Second Circuit's opinion casts any doubt on that theory of liability. Instead, the Second Circuit held that the complaint filed in that case had not "provided any specific allegations as to how [the fiduciary] knew or should have known . . . that . . . the SEC filings contained misstatements or omissions." *Ibid*. Because there was no allegation of the fiduciary's knowledge—and not because the fiduciary had an immunity from liability for knowingly incorporating false statements into an ERISA SPD—the court held that the claim was properly dismissed.

In this case, by contrast, the court of appeals correctly concluded that the complaint did adequately allege that petitioners knew the statements were false and misleading. That conclusion was correct, and in any event it is a conclusion about the specific facts alleged in the complaint here that would not warrant this Court's review. There is no conflict between the decision in this case and *Gearren*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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