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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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FIFTH THIRD BANCORP ET AL. *v.* DUDENHOEFFER ET AL.

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

No. 12–751. Argued April 2, 2014—Decided June 25, 2014

Petitioner Fifth Third Bancorp maintains a defined-contribution retirement savings plan for its employees. Plan participants may direct their contributions into any of a number of investment options, including an "employee stock ownership plan" (ESOP), which invests its funds primarily in Fifth Third stock. Respondents, former Fifth Third employees and ESOP participants, filed this lawsuit against petitioners, Fifth Third and several of its officers who are alleged to be fiduciaries of the ESOP. The complaint alleges that petitioners breached the fiduciary duty of prudence imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. §1104(a)(1)(B). Specifically, the complaint alleges that petitioners should have known—on the basis of both publicly available information and inside information available to petitioners because they were Fifth Third officers—that Fifth Third stock was overpriced and excessively risky. It further alleges that a prudent fiduciary in petitioners' position would have responded to this information by selling off the ESOP's holdings of Fifth Third stock, refraining from purchasing more Fifth Third stock, or disclosing the negative inside information so that the market could correct the stock's price downward. According to the complaint, petitioners did none of these things, and the price of Fifth Third stock ultimately fell, reducing respondents' retirement savings. The District Court dismissed the complaint for failure to state a claim, but the Sixth Circuit reversed. It concluded that ESOP fiduciaries are entitled to a "presumption of prudence" that does not apply to other ERISA fiduciaries but that the presumption is an evidentiary one and therefore does not apply at the pleading stage. The court went on to hold that the complaint stated a

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claim for breach of fiduciary duty.

Held:

1. ESOP fiduciaries are not entitled to any special presumption of prudence. Rather, they are subject to the same duty of prudence that applies to ERISA fiduciaries in general, §1104(a)(1)(B), except that they need not diversify the fund's assets, §1104(a)(2). This conclusion follows from the relevant provisions of ERISA. Section 1104(a)(1)(B) "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 143, n. 10. Section 1104(a)(1)(C) requires ERISA fiduciaries to diversify plan assets. And §1104(a)(2) establishes the extent to which those duties are loosened in the ESOP context by providing that "the diversification requirement of [§1104(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [§1104(a)(1)(B)] [are] not violated by acquisition or holding of [employer stock]." Section 1104(a)(2) makes no reference to a special "presumption" in favor of ESOP fiduciaries and does not require plaintiffs to allege that the employer was, *e.g.*, on the "brink of collapse." It simply modifies the duties imposed by §1104(a)(1) in a precisely delineated way. Thus, aside from the fact that ESOP fiduciaries are not liable for losses that result from a failure to diversify, they are subject to the duty of prudence like other ERISA fiduciaries. Pp. 4–15.

2. On remand, the Sixth Circuit should reconsider whether the complaint states a claim by applying the pleading standard as discussed in *Ashcroft* v. *Iqbal*, 556 U. S. 662, 677–680, and *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544, 554–563, in light of the following considerations. Pp. 15–20.

(a) Where a stock is publicly traded, allegations that a fiduciary should have recognized on the basis of publicly available information that the market was overvaluing or undervaluing the stock are generally implausible and thus insufficient to state a claim under *Twombly* and *Iqbal*. Pp. 16–18.

(b) To state a claim for breach of the duty of prudence, a complaint must plausibly allege an alternative action that the defendant could have taken, that would have been legal, and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. Where the complaint alleges that a fiduciary was imprudent in failing to act on the basis of inside information, the analysis is informed by the following points. First, ERISA's duty of prudence never requires a fiduciary to break the law, and so a fiduciary cannot be imprudent for failing to buy or sell stock in violation of the insider trading laws. Second, where a complaint faults fiduciaries for failing to decide, based on negative inside infor-

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mation, to refrain from making additional stock purchases or for failing to publicly disclose that information so that the stock would no longer be overvalued, courts should consider the extent to which imposing an ERISA-based obligation either to refrain from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements set forth by the federal securities laws or with the objectives of those laws. Third, courts confronted with such claims should consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund. Pp. 18–20.

692 F. 3d 410, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.