Record No. 13-1360

In the

United States Court of Appeals

For the Fourth Circuit

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated,

Plaintiff-Appellant,

v.

RJR PENSION INVESTMENT COMMITTEE; RJR EMPLOYEE BENEFITS COMMITTEE; R.J. REYNOLDS TOBACCO HOLDINGS, INC.; R.J. REYNOLDS TOBACCO COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

BRIEF AMICI CURIAE OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT URGING REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-1360 Caption: Richard G. Tatum v. RJR Pension Investment Committee, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

AARP
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member: **n/a**

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Mary Ellen Signorille Date: June 4, 2013

Counsel for: AARP amicus curiae

CERTIFICATE OF SERVICE

****

I certify that on June 4, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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07/19/2012
SCC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 13-1360 Caption: Tatum v. RJ Reynolds

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Employment Lawyers Association (NELA)
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who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: ______________________ Date: May 29, 2013

Counsel for: NELA

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June 4, 2013
(date)

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INTERESTS OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization, dedicated to addressing the needs and interests of people age fifty and older, with a membership that seeks to strengthen communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local Affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique

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[1] Counsel for AARP and NELA state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

perspective on how the principles announced by the courts in employment and benefit cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace, including through cases to protect employee benefits.

The protections afforded by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, are of vital concern to workers of all ages and to retirees, as the quality of workers' lives in retirement depends heavily on their eligibility for, and the amount of, their retirement and welfare benefits. It is important to ERISA plan participants to ensure that plan assets will be available to pay the benefits to which they are entitled and that these assets are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). To this end, plan participants have a significant interest in ensuring that fiduciaries properly and prudently administer the plan and manage plan assets.

Accordingly, resolution of the issues in this case will have a direct and vital bearing on plan participants' ability to protect their retirement accounts from mismanagement and to ensure economic security in retirement. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief, as amici curiae, to facilitate a full consideration by the Court of these issues.

SUMMARY OF ARGUMENT

The policy implications of the district court's decision are substantial. The district court used a causation standard that has little substance and founders on the cliffs of common-sense. The court did not hold the plan fiduciaries responsible when these fiduciaries have, by the court's own findings, violated their duties of prudence owed to plan participants. The court's decision essentially reduces any fiduciary responsibility over the selection and retention of plan investment options in 401(k) plans from duties to best practices. Under the court's decision, as long as a plan fiduciary can find an expert to testify that some fiduciary somewhere **could have** made the same investment decision, the fiduciary never has to do more than conduct a cursory review to make sure the investment option met the bare minimum threshold of what is conceivably prudent. The court's decision ignores ERISA's focus on whether plan participants are entitled to a fiduciary's best effort, a solid investigation of what is more likely than not the best investment for that particular plan at that specific time, given all of the factors peculiar to that plan. Astonishingly, the district court's decision may well result in a significant percentage of $3.4 trillion in 401(k) accounts being even less protected and close to 60 million participants covered in those accounts being even less prepared to meet their goals for retirement security. *See* U.S. Dep't of Labor, Employee Benefits Security Admin., *Private Pension Plan Bulletin Historical Tables* 25-27 (Nov. 2012), http://www.dol.gov/ebsa/pdf/historicaltables.pdf; Investment Company Inst., *Retirement Assets Total $19.5 Trillion in Fourth Quarter 2012* (Mar. 2013), www.ici.org/research/stats/retirement/ci.ret_12_q4.

Courts have consistently recognized that one of the fundamental fiduciary duties imposed by ERISA — and one of the fundamental protections afforded plan participants — is the duty of plan fiduciaries to thoroughly and prudently investigate the merits of plan investment decisions. *See, e.g., DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410. This thorough investigation of plan investment options provides a critical safeguard towards ensuring that participants' retirement dollars are invested wisely. That means not only investment decisions that someone else might make for a different plan under different circumstances, but a decision that is, more likely than not, the right decision for that plan at that time.

Consistent with the Congressional objective of imposing sanctions for failures to abide by ERISA's substantive requirements, the majority of courts — including the Fourth Circuit — have adopted a causation standard that ensures that fiduciaries who fail to conduct thorough investigations would be held accountable. In so doing, these courts have protected the interests of plan participants by creating an effective deterrent of future misconduct. The district court erroneously veered from this standard. In its place, the court applied a causation standard that — if adopted — would significantly decrease the likelihood that fiduciaries would ever face meaningful sanctions for violating their duty to thoroughly investigate investment options. From a practical point of view, the court's decision may leave plan participants with no one minding the plan, undermining ERISA's fundamental purpose of protecting the interests of ERISA plan participants.

ARGUMENT

I. INTRODUCTION

As plan participants rely more and more on 401(k) plans for their retirement savings, they directly bear the risks associated with the investment performance of plan assets. *See generally* U.S. Gov't Accountability Office, GAO-09-642, *Private Pensions: Alternative Approaches Could Address Retirement Risks Faced by Workers but Pose Trade-Offs* 11-12, 19 (2009); *see also David v. Alphin*, 704 F.3d 327, 330 (4th Cir. 2013). These plans encourage participants to develop investment goals and an investment plan to meet those goals. *See, e.g.,* Hewitt Associates, *2009 Trends and Experiences in 401(k) Plans* 5, http://retirementmadesimpler.org/Library/Hewitt_Research_Trends_in_401k_Highlights.pdf (90% of plans offer investment education).

Investment option selection is a critical fiduciary function in 401(k) plans because of the direct consequences of investment performance on the retirement savings of participants. Indeed, courts have consistently recognized that ERISA's fiduciary duties include the duty to thoroughly investigate decisions to select or remove plan investment options. *See, e.g.*, *DiFelice v. U.S. Airways, Inc.,* 497 F.3d 410, 418 (4th Cir. 2007) ("[A] fiduciary of a defined contribution, participant-driven, 401(k) plan created to provide retirement income for employees who is given discretion to select and maintain specific investment options for participants, must exercise prudence in selecting and retaining available investment options"). The rationale for *DiFelice* and other court decisions are obvious. If 401(k) plan participants cannot rely on plan fiduciaries for the obligation of prudently conducting thorough reviews of plan investment options, it unnecessarily increases the investment risk on participants, placing them at greater peril of failing to reach an adequate level of retirement income.[2]

Without the ability of participants to straightforwardly challenge the failures of their plan fiduciaries to properly investigate plan investment options, one of the primary goals of ERISA will be undermined — protecting retirement assets from misuse and mismanagement. *See LaRue v. DeWolff, Boberg& Assocs., Inc.*, 552 U.S. 248, 254 (2008) (ERISA's legislative history showed that "the crucible of

[2] When substantial losses due to a plan's failure to determine whether investment options are prudent occur at or near retirement, the long-term effect wreaks havoc, financially and emotionally, on individuals and their families since retirement typically occurs at an age where employees do not have time to make up their losses. *See generally Musmeci v. Schwegmann Giant Super Markets*, 159 F. Supp. 2d 329 (E.D. La. 2001).

congressional concern was misuse and mismanagement of plan assets by plan administrators.") (quoting *Massachusetts Mut. Life Ins. Co. v. Russell.*, 473 U.S. 134, 141 n.8 (1985)). Thus, the nearly unmeetable loss causation standard applied by the district court in this case significantly decreases the ability of plan participants to challenge such failures. It substantially — and unjustifiably — decreases the likelihood that plan fiduciaries will exercise even a modicum amount of prudence because it is unlikely that plan fiduciaries would ever be held liable for their failures to thoroughly investigate plan investment options.

II. IT IS ESSENTIAL TO PARTICIPANTS' RETIREMENT SECURITY THAT ERISA BE CONSTRUED TO ACTUALLY PROTECT THE TRILLIONS OF DOLLARS IN 401(k) PLANS BY FINDING A FIDUCIARY'S INVESTMENT DECISION IMPRUDENT IF A HYPOTHETICAL PRUDENT FIDUCIARY MORE LIKELY THAN NOT WOULD NOT HAVE MADE THE SAME INVESTMENT DECISION FOR THE SAME PLAN AT THE SAME TIME.

A. Congress Enacted ERISA's Fiduciary Standards To Protect Pension Plan Assets And Thus Participants' Retirement Security.

Prior to the passage of ERISA, there were no federal standards requiring persons operating employee benefit plans to avoid imprudent transactions which dissipated plan assets resulting in insufficient funds to meet the vested claims of participants. *See* THE AMERICAN BAR ASSOCIATION & THE BUREAU OF NATIONAL AFFAIRS, EMPLOYEE BENEFITS LAW xcix-c (3d ed. 2012). After assembling a record that showed a history and pattern of employees failing to receive their promised employee benefits, a lack of disclosure and transparency, and varied and numerous financial abuses, Congress enacted ERISA. By "establishing standards of conduct, responsibility, and obligations for fiduciaries" and "by providing for appropriate remedies [and] sanctions" for violations of those fiduciary standards, ERISA § 2(b), 29 U.S.C. § 1001(b), Congress sought to protect "the interests of employees and their beneficiaries in employee benefit plans." ERISA § 2(b), 29 U.S.C. § 1001(b); *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 90 (1983)("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (same). In this manner, fiduciaries are held accountable for their decisions, thereby fostering ERISA's primary goal of protecting employees' benefits.

One of the significant methods Congress provided participants for protecting their plans, and thus their benefits, was through ERISA's fiduciary requirements – requirements that even now, almost 40 years later, remain a keystone in ERISA's structure. *See Central States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc*., 472 U.S. 559, 569-71 (1985) (fiduciary powers must be exercised in accordance with trust law standards); *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996) ("ERISA protects employee pensions and other benefits by . . . setting forth certain general fiduciary duties applicable to the management of both pension and non-pension benefit plans"). These fiduciary requirements imposed duties of prudence, loyalty, and care with respect to the management of trust funds upon plan fiduciaries. *See* ERISA § 404, 29 U.S.C. § 1104. Thus, §§ 404 and 406 carefully regulate the conduct of plan fiduciaries with regard to the administration and management of the plan and its assets. *See* 29 U.S.C. § 1002(21)(A). Congress established these standards of conduct to ensure fiduciaries would be held liable for their breaches. *See Laborer's Nat'l Pension Fund v. N. Trust Quantitative Advisories, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999) ("A fiduciary may not discharge his duties in a manner inconsistent with ERISA provisions."); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919-20 (8th Cir. 1994) (stating that the breach of fiduciary duty is "a standard of conduct that Congress has imposed and that the fiduciary can satisfy by acting reasonably").

B. Although 401(k) Plans Hold Trillions Of Dollars Of Assets And Have Become The Predominant Private Retirement Savings Vehicle, Individual Account Balances Are Modest, Warranting Fiduciaries' Prudent Investigation Of Investment Options.

Defined contribution plans, including 401(k) plans like the plan here, have become — aside from Social Security — the primary vehicle for providing retirement income in America. *See LaRue v. DeWolff, Boberg& Assocs., Inc.*, 552 U.S. 248, 255 & n. 5 (2008). Thus, the importance of protecting 401(k) plan participants by ensuring that their investment options are thoroughly investigated by plan fiduciaries cannot be overstated.

Since the introduction of 401(k) plans in 1980, there has been explosive growth in these plans as shown by every measure including the number of plans, number of participants, and value of assets. From 1984 to 2010, the number of 401(k) plans increased from 17,303 to 518,675, while the number of 401(k) participants increased from approximately 7.5 million to 60.5 million. U.S. Dep't Of Labor, Employee Benefits Security Admin., *Private Pension Plan Bulletin Historical Tables* 25 (Nov. 2012), http://www.dol.gov/ebsa/pdf/historical tables.pdf.

Assets in 401(k) plans increased from $91 billion in 1984 to $3.1 trillion in 2010. *Id*. At the end of 2012, 401(k) plans held $3.4 trillion in assets. Investment Company Inst., *Retirement Assets Total $19.5 Trillion in Fourth Quarter 2012*, www.ici.org/research/stats/retirement/ci.ret_12_q4. Because of the number of participants and the amount of assets in these plans, courts need to provide 401(k) plans with considerable scrutiny to ensure the safety and protection of these assets.

Sadly, most individual 401(k) account balances are modest. *See* Jack Van Derhei, et al., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity* 4, EBRI Issue Brief, no. 380 (Dec. 2012), http://www.ebri.org/pdf/briefspdf/EBRI_IB_12-2012_No380.401k-eoy2011.pdf (2011 year end average 40(k) balance was about $59,000, with the median about $16,650); Andrea Combs, *401k balances hit record highs,* MARKETWATCH (Feb. 14, 2013, 5:00 PM), http://money.msn.com/

mutual-fund/401k-balances-hit-record-highs (advising that the 2012 average of Fidelity managed 401(k) accounts at $77,300 may portend difficult retirement years). Such limited individual balances underscore the critical significance of a fiduciary's duty to perform a careful investigation before buying or selling any specific investment options. This will enable participants to follow the investment plan that fiduciaries and others have continually encouraged them to adopt and to accumulate sufficient assets in these accounts to fund their retirement years. *See* Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, 2011, EBRI Issue Brief no. 378, 7 (Nov. 2012), http://www.ebri.org/pdf/briefspdf/EBRI_IB_11-2012_No378_RetParticip.pdf; U.S. Gov't Accountability Office, GAO-09-642, *Private Pensions: Alternative Approaches Could Address Retirement Risks Faced By Workers But Pose Trade-Offs* 11-12, 19 (2009).

C. Participants Rely On Plan Fiduciaries To Prudently Investigate The Investment Options Provided In Their 401(k) Plans Especially Where Fiduciaries Have Highly Specialized Knowledge Of A Stock Like In This Case.

Employees who participate in 401(k) plans contribute a portion of their salaries to those plans and may receive matching contributions from their employers as part of their compensation package. U.S. Dep't of Labor, Employee Benefits Security Admin., WHAT YOU SHOULD KNOW ABOUT YOUR RETIREMENT 3 (Nov. 2006), http://www.dol.gov/ebsa/publications/wyskapr.html. They participate based on the assumption that "someone is minding the store," that is, fiduciaries are administering the plans prudently and solely in the participants' best interests. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

The predominance of 401(k) plans — and the shift away from traditional defined benefit plans — has caused a fundamental reallocation of investment risk in employer sponsored plans. Gone are the days when retirees could count on a predictable life-time annuity funded solely by their employers. Today, income security in retirement depends primarily on two factors: (1) the level of employee and employer contributions to 401(k) plans; and (2) the quality and performance of the investment options in which those contributions are invested. *See, e.g., LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 250 n. 1 (2008) (describing the differences between defined benefit and defined contribution plans and recognizing the impact of investment returns on the defined contribution benefits received); *see also David v. Alphin*, 704 F.3d 327, 330 (4th Cir. 2013) (same).

Significantly, unlike participants in defined benefit plans, 401(k) participants alone bear the risk if their investment choices perform poorly. *See id.* at 330 (recognizing that in a defined benefit plan a participant receives the promised benefit regardless of investment returns whereas in a defined contribution plan the participant receives only whatever is in the account); *see generally* EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED

CONTRIBUTION PARADIGM CHANGED AMERICA (Oxford 2007) (detailed book-length account by a law professor of the transformation effected by the defined contribution model). Thus, the fiduciary's duty to prudently monitor, select and retain plan investment options is critical to the proper functioning of retirement plans. Retirees and future retirees rely heavily on the prudence, knowledge and expertise of plan fiduciaries charged with evaluating those investment options. Participants trust when fiduciaries provide a pool of investment options that the good options have been included and inferior options have been excluded. They also trust that if an option that once was included, but now has been eliminated, the plan fiduciaries had a good solid reason for this change.

If, as here, a stock or fund is eliminated from the choices and can no longer be held in participants' accounts, the impact of that decision is that those participants who have chosen the eliminated stock or fund as part of their investment strategy will have to completely rebalance their portfolios and potentially change their investment plans. *Cf.* Ning Tang & Olivia S. Mitchell, *The Efficiency of Pension Plan Investment Menus: Investment Choices in Defined Contribution Pension Plans* (Retirement Research Consortium, Working Paper No. 2008-176, 2008) (investment menus significantly shape workers' accumulations of retirement wealth), *available at* http://www.mrrc.isr.umich.edu/publications/

conference/pdf/UM08-20A0708C.pdf. Decisions to compel participants to clear their accounts of a particular stock are significantly more critical, and require greater investigation, than a decision to include a stock within a menu of choices. Including a new stock in a catalogue of stocks is allowing the participants themselves to choose. Eliminating a particular stock is declaring that the stock is so bad that no reasonable participant would want to hold it. This evaluation should not be a casual decision. Thus, participants' reliance on fiduciaries is especially great in such situations, especially where the fiduciaries are expected to have a highly specialized knowledge with respect to a particular stock — as the fiduciaries had here. Yet, none of that experience or expertise was brought to bear in concluding the Nabisco stock was to be sold.

III. WHERE PLAN FIDUCIARIES HAVE FAILED TO PRUDENTLY INVESTIGATE AN INVESTMENT DECISION, THE INVESTMENT SHOULD BE DEEMED OBJECTIVELY IMPRUDENT UNLESS A HYPOTHETICAL PRUDENT FIDUCIARY MORE LIKELY THAN NOT WOULD HAVE MADE THE SAME INVESTMENT DECISION FOR THE SAME PLAN AT THE SAME TIME.

A. The Loss Causation Standard Previously Established by the Fourth Circuit Deters Fiduciary Imprudence and Thus Protects Participants' Retirement Security.

The protections provided by the fiduciary duty of prudence are only effective if the duty is backed by an effective enforcement mechanism. Indeed, in enacting ERISA Congress recognized that the policy goal of protecting the interests of plan participants could be achieved only "by establishing standards of conduct . . . and by providing appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (emphasis added). There would be little incentive for plan fiduciaries to conduct thorough investigations into the prudence of plan investment options if they knew there would be no meaningful sanction(s) for failing to do so.

Thus, although courts have held that plan fiduciaries "can only be held liable for losses to the Plan actually resulting from their failure to investigate," *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 218 (4th Cir. 2011), the loss causation standard that circuit courts have been widely adopted — including by the Fourth Circuit — has been tailored to ensure that it effectively deters imprudence. Specifically, courts have held that a fiduciary who has violated the duty of prudence is "insulated from liability" only "if a hypothetical prudent fiduciary would have made the same [investment] decision anyway." *Plasterers'*, 663 F.3d at 218 (emphasis added) (quoting *Roth v. Sawyer–Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir.1994)); *accord, In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 153-54 (3d Cir. 1999) (evaluating whether "a hypothetical prudent fiduciary would have made the same investments") (emphasis added); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000) (evaluating whether the annuity provider selected "would have been chosen had the fiduciary conducted a proper investigation") (emphasis added).

By holding imprudent fiduciaries to the standard of what a hypothetical prudent fiduciary would have done in response to the facts revealed by a thorough investigation, these courts established a causation standard that ensured that future imprudent conduct was deterred. This deterrent effect flows from the fact that fiduciaries, in deciding how thoroughly to investigate a particular investment decision, would realize there is a significant likelihood that a hypothetical prudent fiduciary conducting a thorough investigation would reach a different result than would a fiduciary relying on a haphazard, incomplete, or otherwise lacking review. As the Seventh Circuit explained in adopting this standard:

> The entire statutory scheme of ERISA demonstrates that Congress' overriding concern in enacting the law was to insure that the assets of benefit funds were protected for plan beneficiaries. . . . [H]onest but potentially imprudent trustees are adequately deterred from engaging in imprudent conduct by the knowledge that imprudent conduct will usually result in a loss to the fund, a loss for which they will be monetarily penalized. This monetary sanction adequately deters honest but potentially imprudent trustees.

Brock v. Robbins, 830 F.2d 640, 647-48 (7th Cir. 1987); *accord, Plasterers'*, 663 F.3d at 217 (quoting *Brock*, 830 F.2d 647-48); *cf. Fink v. Nat'l Sav.& Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (explaining that an imprudent investigation would result in a prudent investment generally only "through prayer, astrology or just blind luck") (Scalia, J., concurring in part and dissenting in part).

The "would" standard (1) promotes rather than discourages compliance with ERISA's mandates; (2) prevents fiduciaries from attempting to avoid the consequences of their misconduct through post hoc rationalizations of how they might have come to the same conclusion following a proper investigation; and (3) directs trial courts to not jettison a critical value of contemporaneous prudent investigation — that only those investments that are most appropriate for that plan at that time will be chosen, instead of having to later engage in self-serving litigation driven rationalizations of what could have been a passable investment for any plan at any time.

ERISA's prudent investigation mandate is more than a good suggestion. Compliance with it means that participants will get the benefit of the best investment decision for that plan at that time. Subsequently evaluating causation with the "could" standard means the participants lose the benefit of the bargain, and may wind up only with a barely acceptable investment decision, that arguably fits some plan, even though not this plan, at some time, even though not this plan at the time it was made.[3]

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[3] This analysis is not novel. For example, in examining the role of the investment of retirement plan assets in hedge funds and private equity funds as part of a plan's investment portfolio, the ERISA Advisory Council studied fiduciary issues relative to the prudent selection and monitoring of these investment options. The Council focused on the questions a plan should ask to determine whether such an investment was appropriate for that plan at the time of potential investment. *See* 2011 Advisory Council on Employee Welfare and Pension Benefit Plans, *Suggested Sample TIP Sheet in Report on Hedge Funds and Private Equity Investments*, http://www.dol.gov/ebsa/publications/2011ACreport3.html (setting twelve areas of inquiry with detailed subparts).

The "would have" standard is an analysis of what the best decision was for that plan at that time. ERISA is not meant to create "one size fits all" benefit plans. Instead, it is meant to ensure that the fiduciaries carry out their duties in accord with the facts and circumstances peculiar to that plan. Each investment decision must be evaluated in light of the plan as a whole, its stated purpose, the type of plan it is, the plan demographics, the other investment options available in a 401(k) plan, and other factors peculiar to that plan. This is the benefit of ERISA's bargain and a benefit important to protect.

Consequently, the standard that the Fourth Circuit and many other circuits have articulated to determine loss causation thus recognizes the necessity of a prudent investigation for a particular plan, at a specific point in time. This standard provides fiduciaries with the appropriate motivations to engage in thorough and prudent investigations of plan choices. And, only this standard both protects participants from breaching fiduciaries, and protects fiduciaries from losses not caused by their imprudent decisions.

B. The District Court's Application of a "Could" Standard Does Not Adequately Deter Fiduciary Imprudence Because It Does Not Focus on a Specific Plan At A Specific Time.

Although the district court initially set forth the "would" standard stated in *Plasterers,' see Tatum v. R.J. Reynolds Tobacco Co.*, 2013 U.S. Dist. LEXIS 26045, at *97 (M.D.N.C. Feb. 25, 2013), it did not apply that standard. Instead, it applied the far more lenient "could" standard. Specifically, the court held that the plan's losses were not caused by Defendants' imprudence because "a hypothetical prudent fiduciary <u>could</u> have decided to eliminate the Nabisco Funds." *Id.* (emphasis added).

Perhaps the district court's misstep came from trying to determine who is a hypothetical prudent fiduciary. After all, there are all sorts of hypothetical prudent fiduciaries making all sorts of hypothetically prudent decisions, many of which are inconsistent with each other. But when the law speaks of such a hypothetical prudent fiduciary, it must mean that this hypothetical prudent fiduciary **more likely than not** would have bought or sold a particular investment for that plan, at that time. By this analysis, the court can come to an understanding of how, with a prudent investigation, the investment decision for that plan at that time, more likely than not, would have been made.

Accordingly, the distinction between "would" and "could" is not merely semantic. The district court's applied causation standard ignores the plain fact that the scope of actions a fiduciary more likely than not would choose is necessarily narrower than the scope of actions that the fiduciary is able to make, even going to the fringes of what a reasonable fiduciary might do. A prudent fiduciary would investigate the risks associated with any investment option, would weigh the risks associated with such investment options — including the risk that on the merits the investment could be determined by a court to be imprudent — and would then choose the investment option for that plan, at that time, that is in the best interests of plan participants.

It is unquestionable that there is a broad spectrum of investment decisions that a hypothetical prudent fiduciary "could" make after a complete and thorough investigation and evaluation — *e.g.*, there may be a number of investment options that are of sufficiently high quality that, after careful investigation, a hypothetical fiduciary may desire or choose to invest in any one of those investment options. However, the existing "would" standard sufficiently accounts for the fact that there may be more than one investment decision that a prudent fiduciary would reach, making expansion to the "could" standard unnecessary.

In contrast, if the "could" standard were adopted, fiduciaries would no longer need to be concerned with whether a hypothetical prudent fiduciary — after weighing the corresponding risks — more likely than not would have actually chosen a specific investment option. Instead, despite the abundance of case law emphasizing the "thoroughness" of investigations into the merits of investment decisions, *see, e.g.*, *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007), fiduciaries would need to conduct only a cursory review to make sure the investment option met the bare minimum threshold of what is conceivably prudent. Fiduciaries could willfully neglect their duties of prudence and loyalty, knowing they will avoid liability for any resulting losses so long as their investment decisions were not so patently unreasonable that no expert would be willing to testify that the decision could have been prudent. Indeed, a rationale can always be found for most investments. Avoidance of liability would no longer require the weighing of risks that is at the heart of the duty to investigate.

No matter what the articulated standard is, it remains that the great majority of fiduciaries engage in procedural prudence and will make intelligent and reasoned investment choices. Participants need no legal protection from those fiduciaries. But for the minority of fiduciaries who, whether as a result of error or sloth, do not perform their critical duties, the law must provide a ready remedy.[4] Finding causation only where no fiduciary can be found anywhere who would have made this specific investment choice is an impossible bar that could only rarely be summited. Thus, the “could” standard virtually eliminates any deterrent for imprudent conduct, and ultimately eviscerates the important protections provided by the fiduciary duty of prudence, leaving participants at risk for suffering large losses in their 401(k) account balances — just as they did here.

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[4] ERISA does not provide for jury trials or punitive damages, making the deterrent effect of a “would” standard for causation even more important to protect participants. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (holding no punitive damages available in fiduciary breach cases); *cf. Phelps v. C.T. Enters.*, 394 F.3d 213, 222 (4th Cir. 2005) (finding no jury trial where equitable relief requested).

CONCLUSION

For the foregoing reasons, the district court order should be reversed, and the case remanded for further proceedings.

Dated: June 4, 2013

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, there are no known related cases in this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: June 4, 2013

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