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On behalf of the United States, as amicus	
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(10:03 a.m.)

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CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-856, LaRue v. DeWolff, Boberg & Associates.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE PETITIONER

MR. STRIS: Thank you, Mr. Chief Justice, and may it please the Court:

Let me begin with the first question on which this Court has granted certiorari. Sections 502(a)(2) and 409 of ERISA permit restoration of "any losses to the plan."

JUSTICE SCALIA: What are the code numbers of those? I really get confused with you people who work with ERISA all the time -- can refer, you know section 3 of ERISA. I use the code. What -- what code sections are you talking about?

MR. STRIS: I never thought the day would come, Justice Scalia, when I was described as working with ERISA all of the time, but I will tell you the code provision. The code provision is -- for 502(a)(2) of ERISA -- is 29 U.S.C. 1132(a)(2). It's found on page 10a of the blue brief. Section 409 of ERISA is 29

1 U.S.C. 1109, and I was quoting specifically from  
2 1109(a), and that is found on page 9a of the blue brief.

3 JUSTICE SCALIA: Thank you.

4 MR. STRIS: Now, the statute plainly states  
5 that "any losses to the plan" may be recovered if they  
6 were caused by fiduciary breach. Our position on the  
7 (a)(2) question is straightforward. The plain meaning  
8 of "any losses to the plan" includes any diminution in  
9 value of defined contribution plan assets, regardless of  
10 the number of participants ultimately affected.

11 CHIEF JUSTICE ROBERTS: But the plan itself  
12 is nowhere in the record, is that right?

13 MR. STRIS: Well, the summary plan  
14 description was attached to the complaint.

15 CHIEF JUSTICE ROBERTS: Right, the summary.  
16 And I looked at the summary and saw nowhere the rules  
17 about investment options, what you get to choose, how  
18 often -- and for all we know, the plan might say you  
19 have no choice about investment options, it's all going  
20 to be invested in T-bills or whatever.

21 MR. STRIS: Respectfully, Mr. Chief Justice,  
22 that's not true. I would point your attention to page  
23 19a of the appendix to the brief in opposition. And  
24 this is the page of the summary plan description that  
25 makes clear that participants in the plan like Mr. LaRue

1 will have the opportunity to direct their investments.

2 JUSTICE SCALIA: But that wasn't in the  
3 record.

4 MR. STRIS: That is in the record.

5 JUSTICE SCALIA: It is in the record?

6 MR. STRIS: Yes. And to be clear, Justice  
7 Scalia --

8 CHIEF JUSTICE ROBERTS: Where in the record  
9 is it?

10 MR. STRIS: It is page 19a of the --

11 CHIEF JUSTICE ROBERTS: No, that's in the  
12 opposition to certiorari, and I don't believe that  
13 that's in the record.

14 MR. STRIS: It is in the record; it was  
15 attached to the complaint that was filed by Mr. LaRue in  
16 this case.

17 CHIEF JUSTICE ROBERTS: Oh, that's the  
18 summary of the plan.

19 MR. STRIS: The summary plan description,  
20 that's correct. And as you know, Mr. Chief Justice, if  
21 there is a conflict between the summary plan description  
22 and the plan, the summary plan description governs; it's  
23 a legitimate document.

24 CHIEF JUSTICE ROBERTS: The summary on the  
25 page you mentioned says that you will be able to -- you

1 have certain investment choices are available to you,  
2 and that the administrator will provide you with  
3 information on what they are and how you can change it.

4 MR. STRIS: That is correct.

5 CHIEF JUSTICE ROBERTS: But we don't know  
6 those details, correct?

7 MR. STRIS: That's true, but this case was  
8 decided at the pleading stage. And so to be clear, we  
9 alleged that the right given to Mr. LaRue under the plan  
10 was violated. If true, then that would constitute a  
11 fiduciary breach.

12 CHIEF JUSTICE ROBERTS: It would also  
13 presumably more obviously constitute a breach of the  
14 plan, correct?

15 MR. STRIS: Yes, that's correct; and that is  
16 a fiduciary breach. Under 404(a)(1)(D), failure to act  
17 in accordance with the terms of a plan is a classic  
18 example of breach of fiduciary duty.

19 CHIEF JUSTICE ROBERTS: Your position is  
20 anything that is remediable -- if that's a word -- under  
21 (a)(1) can also be pursued under (a)(2)?

22 MR. STRIS: No, that is not my position. My  
23 position --

24 CHIEF JUSTICE ROBERTS: Let me step back.  
25 Do you agree that you could bring an action under (a)(1)

1 for this breach of the plan?

2 MR. STRIS: I think that's far from clear,  
3 but what is clear is that we could not recover what we  
4 wanted under (a)(1). (a)(1) only permits a lawsuit  
5 against the plan. Here the plan doesn't have the funds  
6 that are relevant.

7 JUSTICE GINSBURG: Where does it say that  
8 (a)(1) is available only against the plan?

9 MR. STRIS: The specific language of (a)(1)  
10 doesn't state that. It states that you can get benefits  
11 due under the plan, or you can enforce your rights under  
12 the plan. I'm not aware of a single case, Justice  
13 Ginsburg, where an (a)(1)(B) action has been permitted  
14 to recover personally from a fiduciary. That is the  
15 purpose of (a)(2), which specifically states that you  
16 can personally recover from a fiduciary.

17 JUSTICE SCALIA: That's fine, so why doesn't  
18 he proceed first under (a)(1)(B), against the plan?

19 MR. STRIS: Well --

20 JUSTICE SCALIA: Because the plan owes him  
21 this money. And if the plan turns around and says well,  
22 you know the fiduciary didn't invest your funds the way  
23 it was supposed to, the plan still owes him the money,  
24 doesn't it?

25 MR. STRIS: I think the answer to that -- I

1 think there are two reasons why that's incorrect. And  
2 the first reason is 502(a)(2), unlike 502(a)(3), is not  
3 a catchall provision, so if he has a remedy under  
4 502(a)(2) --

5 JUSTICE SCALIA: I'm talking about  
6 (a)(1)(B).

7 MR. STRIS: Right. And it is -- there is  
8 nothing to suggest that that provision is mutually  
9 exclusive with another provision. So my first response  
10 to your question, Justice Scalia, is that even if he  
11 could have proceeded under (a)(1)(B), there is nothing  
12 to suggest that he had to, if he wanted to proceed under  
13 the express terms of (a)(2).

14 JUSTICE SCALIA: Well, there is -- there is  
15 this to suggest that only -- only that manner of  
16 proceeding preserves the structure of -- of the  
17 legislation which is that you're supposed to first apply  
18 to the plan and exhaust your remedies there before you  
19 come into court; and interpreting it that way would  
20 preserve that -- that exhaustion requirement. You have  
21 to apply to the plan first, and if you establish that  
22 the plan owes you money, then it's a loss to the plan  
23 and you can sue in court.

24 MR. STRIS: Well, what I would say to that,  
25 Justice Scalia, and is that this administrative



1 exhaustion requirement that you're referring to is a  
2 judicial gloss on the statute. I find it hard to  
3 believe that the express terms of (a)(2), which the  
4 plain language authorizes restoration to the plan of any  
5 losses to the plan for any breach of duty --

6 CHIEF JUSTICE ROBERTS: Mr. Stris, your  
7 approach, if you can go under (a)(2) -- you're right  
8 that we judicially have developed a number of glosses  
9 on (a)(1), including I think most importantly the  
10 Firestone deference principle. But if you're right that  
11 you can go under (a)(2), then all of that work has been  
12 in vain. You can avoid all the limitations on (a)(1)  
13 just by saying we want the same relief under (a)(2).

14 MR. STRIS: I would not agree with that  
15 characterization because there are very few cases where  
16 the specific conditions for (a)(2) are met. You would  
17 need to prove a loss to the plan. In welfare plan  
18 cases, for example, you would not be able to proceed  
19 under (a)(2) because you would never be able to show  
20 that the fiduciary breach caused a loss to the plan.

21 CHIEF JUSTICE ROBERTS: You told me earlier  
22 that any breach of the plan was a fiduciary duty.

23 MR. STRIS: That's correct.

24 CHIEF JUSTICE ROBERTS: Now you're -- the --  
25 what is it -- the obverse or the converse of that you're

1 saying is not true.

2 MR. STRIS: No, that's not true. There are  
3 two requirements for an (a)(2) action. One is that  
4 there be a fiduciary breach. That's what you just spoke  
5 to when you referred to a breach of the term of a  
6 plan. But there's a second important requirement which  
7 goes to the heart of why (a)(2) is what it is. There  
8 must be a loss to the plan. As this Court recognized  
9 in --

10 JUSTICE ALITO: Could I ask you whether the  
11 (a)(2) argument would be available to you on remand even  
12 if we agree with your interpretation of that provision?  
13 Didn't Judge Wilkinson say pretty clearly that the  
14 argument had been waived? He said, "even if the  
15 argument were not therefore waived." Doesn't that mean  
16 that it was waived?

17 MR. STRIS: I don't read the Fourth  
18 Circuit's decision that way. I read it as -- as dicta,  
19 not an alternative holding. And to be clear, the  
20 Respondents concede that point on page 5 of their brief  
21 in opposition, and I quote. They state: "After  
22 suggesting this claim may have been waived" and then  
23 they proceed. So even Respondent agrees that it was  
24 merely --

25 JUSTICE ALITO: Well, maybe -- maybe they've

1 waived the waiver, but Judge Wilkinson is a careful  
2 writer, and if you use the subjunctive there -- "even if  
3 the argument were not therefore waived" -- doesn't that  
4 mean it was in fact waived?

5 MR. STRIS: Not in my opinion, but that's an  
6 issue that the Fourth Circuit and the lower courts will  
7 need to resolve. If they interpret their opinion as  
8 having held that, certainly we would be precluded. I  
9 don't think that that is what they held, and I think we  
10 have a very strong argument that we pled a 502(a)(2)  
11 claim as required under the Federal rules.

12 JUSTICE SCALIA: Let me come back to your  
13 earlier point that the second requirement of (a)(2) --  
14 it's actually a requirement of 1109 --

15 MR. STRIS: That's correct. Yes.

16 JUSTICE SCALIA: -- is not met. And that is  
17 -- that is to -- to make good to such plan any losses to  
18 the plan resulting from each such breach. In these  
19 welfare plans, if you sue the plan, claiming some  
20 welfare benefits that haven't been provided, wouldn't  
21 the plan have to provide those benefits?

22 MR. STRIS: Yes. That is a classic action  
23 under (a)(1)(B), Your Honor.

24 JUSTICE SCALIA: And that would be a loss to  
25 the plan.

1 MR. STRIS: No. I don't agree with that  
2 characterization. In a defined benefit plan of which a  
3 welfare plan is the classic example --

4 JUSTICE SCALIA: Right.

5 MR. STRIS: -- there are no assets that you  
6 have an entitlement to as a beneficiary.

7 JUSTICE SCALIA: I have an entitlement to  
8 certain -- certain welfare payments.

9 MR. STRIS: You have an entitlement  
10 to a contractually provided benefit. So, if there is a  
11 fiduciary breach in terms of the administrator stating,  
12 "We're not going to give you this cancer treatment that  
13 really was provided under plan" --

14 JUSTICE SCALIA: Right.

15 MR. STRIS: Or, "we're not going to give you  
16 this drug" --

17 JUSTICE SCALIA: Right.

18 MR. STRIS: -- that breach doesn't cause any  
19 diminution in value in plan assets.

20 JUSTICE SCALIA: It does if you sue the plan  
21 and require the plan to pay what the plan has committed  
22 to pay, whereupon the plan would have a right of action  
23 against the fiduciary, I assume, for the fiduciary's  
24 failure to do what he was supposed to.

25 MR. STRIS: Well, that may be true, but with

1 respect, I think that that is -- that's the tail wagging  
2 the dog. The argument that you've made is that a loss  
3 occurs if your fiduciary duty claim is successful.  
4 That's now how the statute works.

5 JUSTICE SCALIA: Well, but that would  
6 preserve the necessity of going through the exhaustion  
7 requirement first. You apply to the plan and say the  
8 plan owes me this cancer treatment, and the plan says  
9 "yes, we do" or "no, we don't." If it says "yes, we  
10 do," it's liable to you and then the plan can -- can  
11 recover over against the trustee.

12 MR. STRIS: Let me take a step back because  
13 I think we are 100 percent in agreement, so I want to  
14 be clear what our position is. Under the factual  
15 scenario that you described, I agree with you 100  
16 percent that you would need to proceed under (a)(1)(B),  
17 because you would be requesting a benefit that you are  
18 entitled to under the plan.

19 In this case, the only benefit that you are  
20 entitled to, if you are a participant in an individual  
21 account plan, is the value of the contributions that  
22 you've put or your employer has put into the account, as  
23 they have either appreciated or depreciated. So my  
24 first response -- it's actually the second response I  
25 was going to give earlier that I never got to -- is that

1 I believe that it's not clear that there is even a  
2 legitimate (a)(1)(B) claim that Mr. LaRue could have  
3 asserted here because --

4 JUSTICE SCALIA: Well, it isn't just if the  
5 money is payable to him today. It says, "to enforce his  
6 rights under the terms or to clarify his rights to  
7 future benefits under the terms of the plan."

8 MR. STRIS: That is correct.

9 JUSTICE SCALIA: And if there's no money in  
10 his account, it seems to me he could bring an action to  
11 clarify that even if there is no money in his account  
12 the plan owes him future benefits in that amount.

13 MR. STRIS: And then one of two things at  
14 that point would happen, Justice Scalia. Either he  
15 would get paid by the plan, which would pick the pockets  
16 of the other participants and require the plan to then  
17 bring an action under (a)(2) --

18 JUSTICE SCALIA: Right.

19 MR. STRIS: -- which is perfectly  
20 legitimate, but my response to that is there is no  
21 language in the statute to suggest that that is  
22 required. If he has an action to do that directly under  
23 (a)(2), there's no language in the statute to suggest  
24 that he need bring an (a)(1) action first and require  
25 the plan to then proceed under (a)(2).

1 CHIEF JUSTICE ROBERTS: I -- I'm not sure  
2 about your characterization that he would pick the  
3 pockets of the other plan participants. By definition  
4 he only prevails if this was a benefit to which he was  
5 entitled under the plan. So that doesn't seem unfair to  
6 the other plan participants.

7 MR. STRIS: Well, a defined contribution  
8 plan is nothing more than a collection of assets that  
9 have been allocated to a group of participants. So, if  
10 those assets are depleted through fiduciary breach,  
11 which is what occurred here, and you bring a claim  
12 saying that your interest in the plan was depleted, if  
13 you brought that claim against the plan, the plan no  
14 longer has the money. So either they can pay you --

15 CHIEF JUSTICE ROBERTS: Well, it may or may  
16 not have the money. You could have failed to follow his  
17 instructions in a way that enriched the plan, and it's  
18 simply a question of getting that money properly  
19 allocated rather than improperly allocated to the other  
20 plan participants who are picking the pocket of your  
21 client.

22 MR. STRIS: Well, I think under the example  
23 that you just gave, Mr. Chief Justice, there would not  
24 be a loss to the plan.

25 Our fundamental argument about the plain

1 text of this statute is that a loss to the plan is a  
2 diminution in plan assets. If I'm a participant in a  
3 plan, and the administrator doesn't like me and takes my  
4 money and allocates it, just because they feel like it,  
5 to another participant in the plan, it is not our  
6 position that there would be a claim under (a)(2)  
7 because there has been no diminution in plan assets.  
8 One would need to proceed under (a)(3).

9 JUSTICE SCALIA: But the plan wouldn't  
10 necessarily pay out any money. What would happen is,  
11 after the administrative determination by the plan that  
12 it does owe the money, he would sue the plan for the  
13 money and the plan would implead the trustee who was  
14 responsible for this. It ends up the same way.

15 MR. STRIS: Well, I would say two things  
16 about that. First, it may end up the same way depending  
17 on how the facts play out, which is the perfect evidence  
18 for my point, which is 502(a)(3) of ERISA has been  
19 interpreted as a catchall provision. 502(a)(2) is  
20 anything but. It sets forth very specific conditions  
21 and very specific relief that is available if those  
22 conditions are met. There is nothing to suggest that  
23 the availability of a potential remedy under (a)(1)  
24 precludes a remedy under (a)(2).

25 Now, my second response, Justice Scalia, is



1 that depending on how the facts play out, the result may  
2 not be as you suggest. The plan may choose not to go  
3 after the fiduciary, and if that's the case, all -- at  
4 most my client could get is a declaration under (a)(1)  
5 that doesn't ultimately get him any money.

6 JUSTICE SCALIA: What would happen if the  
7 trustee does not have the money? The trustee not only  
8 squandered your client's money; he squandered his own.  
9 He's just really in bad shape. He has no money to cough  
10 up. What happens to your client? Doesn't your client  
11 get that money from the plan anyway?

12 MR. STRIS: I think that that --

13 JUSTICE SCALIA: By picking, as you put it,  
14 by picking the pockets of the other plan participants?

15 MR. STRIS: I think in an individual account  
16 plan, that presents a very difficult question.

17 JUSTICE SCALIA: What's the answer to it?

18 MR. STRIS: I think probably he would not be  
19 able to recover that money. I think that money would be  
20 lost and he would have no remedy because, at that point  
21 in time, someone is going to lose. Either my client is  
22 not going to recover money that he is entitled to or  
23 other participants in the plan are going to have money  
24 taken away from them.

25 JUSTICE SCALIA: They participated in the

1 plan. It was a failure of the trustee for the plan. It  
2 seems to me the whole plan should be liable for it. I  
3 mean that's how I --

4 MR. STRIS: I don't think there's any  
5 evidence for that. ERISA imposes a duty of loyalty to  
6 all plan participants. If they breach a fiduciary duty  
7 which causes a diminution in plan assets that ultimately  
8 will affect only one participant, there is -- it goes  
9 against the very core of ERISA to say that they can  
10 remedy that by taking money from innocent fellow  
11 participants. And that really goes to the core of the  
12 difference between an (a)(2) claim and an (a)(3) claim  
13 on one hand, and an (a)(1) claim on the other hand.

14 One thing is clear here. Whether or not  
15 Mr. LaRue could have brought an (a)(1)(B) claim, it  
16 would not under any circumstances have resulted in  
17 getting money from the fiduciary back into the plan.  
18 Absent money being returned to the plan, there can be no  
19 meaningful remedy for the breach that occurred.

20 So it returns us to the core question in  
21 this case, which is were the terms of (a)(2) satisfied?

22 Now, the court of appeals basically advanced  
23 two arguments as to why the plain text of the statute  
24 should be ignored. The primary argument was a  
25 fundamental misinterpretation of this Court's opinion in

1 Russell. So I'd like to speak about that.

2 JUSTICE ALITO: If we agree to you on  
3 (a)(2), is there any need to get to (a)(3)?

4 MR. STRIS: Certainly if you agree with us  
5 on (a)(2), the court of appeals can be reversed on that  
6 issue. We ask that you also reach the (a)(3) question,  
7 because this case was decided at the pleading stage.

8 Although it may be unlikely, there are two  
9 reasons why we might need to avail ourselves of (a)(3)  
10 on remand. The first is that facts could develop. I  
11 don't have any reason to believe they will, but facts  
12 could develop where there is a loss to Mr. LaRue's  
13 beneficial interest but not a loss to the plan. In  
14 other words, they took his money and they gave it to  
15 someone else.

16 We should be able to plead, if we have a  
17 cognizable claim under two statutes, both of them and  
18 then discover the relevant facts.

19 The second reason why you should reach the  
20 (a)(3) question is additional relief may be available  
21 under (a)(3) that is not available under (a)(2).

22 JUSTICE ALITO: What would that be?

23 MR. STRIS: Well, our theory of surcharge,  
24 and it's also the government's theory, is that surcharge  
25 is a make-whole remedy for pecuniary losses that are

1 caused by a breach of trust. It is clear that the core  
2 losses are diminution in trust assets or failure of  
3 trust assets to appreciate. But there are individual  
4 pecuniary losses that were historically remediable under  
5 surcharge.

6 For example, if you paid out of pocket for  
7 an auditor to figure out what the extent of a fiduciary  
8 breach was, a premerger court of equity would not only  
9 surcharge your harm, the harm to your interest in the  
10 trust, but they also would return to you the money that  
11 you spent for that audit.

12 JUSTICE GINSBURG: I thought your own  
13 argument was that (a)(3) is the catchall. So if (a)(2),  
14 which you have described as very precise, if that's  
15 applicable, you would not get to (a)(3). You would be  
16 asking us at this point to assume that somehow the  
17 (a)(2) case folds, and then we flip over into (a)(3).

18 But why should we get there prematurely? It  
19 seems to me if it's right that (a)(2) comes before  
20 (a)(3), it isn't -- it's not quite a ripeness issue, but  
21 it's close to that.

22 MR. STRIS: Well, the Court certainly may  
23 choose not to reach the (a)(3) issue, so I can't speak  
24 to that. But what I can say is that the dicta in Varsity  
25 that describes (a)(3) as a catchall provision -- it is

1 clear that at the end of the day if the relief is  
2 coterminous under the two provisions, it would not be  
3 appropriate for us to proceed under (a)(3).

4 But that is not a pleading question. My  
5 position as to why you should reach (a)(3) is if we have  
6 a cognizable theory under (a)(2) and (a)(3), and we  
7 believe we do, we shouldn't be required to choose at  
8 this point in time if, as the litigation proceeds, it  
9 turns out that the relief we would be entitled to is  
10 coterminous, then we concede it would not be appropriate  
11 to proceed under (a)(3).

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 Mr. Stris.

14 Mr. Roberts.

15 ORAL ARGUMENT OF MATTHEW D. ROBERTS

16 ON BEHALF OF THE UNITED STATES,

17 AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONER

19 MR. ROBERTS: Mr. Chief Justice, and may it  
20 please the Court:

21 ERISA authorizes a participant in a defined  
22 contribution plan to sue to recover losses to the plan  
23 caused by a fiduciary breach even if the losses are  
24 attributable to the participant's individual plan  
25 account.

1 CHIEF JUSTICE ROBERTS: But that means every  
2 participant, right? In other words, for the failure of  
3 the plan to follow this individual's instructions, any  
4 participant in the plan can bring suit under (a)(2)?

5 MR. ROBERTS: It's -- that's theoretically  
6 possible because the loss to the -- loss to this  
7 individual account is a loss to the plan. Although it's  
8 unlikely that a participant that has no -- that is --  
9 whose own benefits are not going to be affected has much  
10 incentive to sue, and it's also possible that a court  
11 might conclude if such a participant did bring suit,  
12 that such a suit shouldn't proceed under prudential  
13 standing principles or because the suit wouldn't be  
14 appropriate, but here --

15 JUSTICE SOUTER: Wouldn't the theory be that  
16 if ultimately the other accounts could be robbed to sort  
17 of make up for at least part of the loss of this one,  
18 that for a loss to any account is a threat to all the  
19 others?

20 MR. ROBERTS: Well, we agree that a loss to  
21 any account is a threat to the plan as a whole, but I  
22 think for a different reason. We don't think that you  
23 could rob the other accounts to pay this -- this  
24 participant. That would likely violate the fiduciary's  
25 duty of loyalty to those participants and the fiduciary's

1 duty of prudence under -- under ERISA.

2 It would also probably violate the terms of  
3 the plan, because they have a right to future benefits  
4 by the amount that's in their allocation but --

5 JUSTICE SCALIA: Mr. Roberts, section (a)  
6 -- (a)(1)(B) --

7 MR. ROBERTS: Yes.

8 JUSTICE SCALIA: -- unlike section (a)(2),  
9 which refers you to 1109, does not say who gets sued.  
10 Under 1109 it's clear who gets sued. It's the fiduciary  
11 who gets sued. I find it very curious that (a)(1)(B)  
12 just says "a civil action may be brought to recover  
13 benefits due to him under the terms of his plans or to  
14 clarify his rights" under the terms of the plan.

15 MR. ROBERTS: Yes, but --

16 JUSTICE SCALIA: I think the implication  
17 there is that the suit -- the suit is against the plan.

18 MR. ROBERTS: The implication is that the  
19 suit is against the plan or against a fiduciary in --  
20 under (a)(1)(B). Against the plan or against the  
21 fiduciary in his official capacity as representative of  
22 the plan.

23 JUSTICE SCALIA: Where? I don't see the  
24 fiduciary mentioned.

25 MR. ROBERTS: If you can't sue the fiduciary

1 under (a)(1)(B), that just reinforces the point even --  
2 even more, Your Honor, that Petitioner's cause of action  
3 here arises under (a)(2) because he is seeking relief  
4 for the plan not relief from the plan.

5 JUSTICE SCALIA: It may well. But I'm just  
6 talking right now of (a)(1)(B), and it would seem to me  
7 that the logical reading of that is that the suit is  
8 against the plan.

9 MR. ROBERTS: Under (a)(1)(B), most courts  
10 require that the suit be brought against the plan. I  
11 think the suit in certain circumstances could be brought  
12 against the fiduciary to require the fiduciary to take  
13 action that is required by the terms of the plan such as  
14 if you fought against the fiduciary to pay benefits out.

15 CHIEF JUSTICE ROBERTS: How do we know that  
16 this is a breach of fiduciary duty under (a)(2) without  
17 having the plan before us? In other words, it may not  
18 be a fiduciary obligation to follow an instruction from  
19 somebody if the plan provides a different way in which  
20 those instructions are going to be handled.

21 Let's say -- as I think a lot of these  
22 plans do -- you can change your investment options only  
23 during a particular period. Well, if the instruction  
24 came at a different time, it wouldn't be a breach of  
25 fiduciary duties because it wasn't a breach of the plan.



1           MR. ROBERTS:  And if it's not a breach of  
2  fiduciary duties, Petitioner will lose on the merits or  
3  on remand in a motion for summary judgment based on  
4  undisputed facts that could be decided.

5           CHIEF JUSTICE ROBERTS:  But I thought his  
6  argument -- his argument reduces to the fact that it's a  
7  breach of fiduciary duty because it's a breach of the  
8  plan.  But if it's not a breach of the plan, then it's  
9  not a breach --

10          MR. ROBERTS:  It's a breach of fiduciary  
11  duty both of a failure to follow the terms of the plan  
12  and a breach of the duty of prudence, because when a  
13  plan provides that participants can direct their  
14  investments --

15          CHIEF JUSTICE ROBERTS:  So we need to know  
16  -- we need to know what the plan provides before we can  
17  decide.

18          MR. ROBERTS:  The case was dismissed on the  
19  pleadings, Your Honor, and it alleges that there was a  
20  breach of fiduciary duty.  And Respondent hasn't  
21  disputed, in fact, that the plan requires  
22  participants -- allows participants direct, in fact --

23          CHIEF JUSTICE ROBERTS:  The pleadings don't  
24  include the plan.  So we have to assess the pleadings  
25  without the terms of the plan.

1           MR. ROBERTS: Yes, but the inferences  
2 shouldn't be construed against the plaintiff in motion  
3 to dismiss on the pleadings, Your Honor.

4           In addition to that, Respondent's answer --  
5 this is on page 2a of the red brief -- admitted that  
6 participants in the DeWolff plan are permitted to direct  
7 the investment of their contributions to the plan.  
8 That's in paragraph eight on page 2a.

9           CHIEF JUSTICE ROBERTS: But we don't know  
10 under what terms. I mean I've seen plans where you are  
11 entitled to direct, but that's subject to conditions and  
12 limitations.

13           MR. ROBERTS: That's certainly true, Your  
14 Honor. But here, the court of appeals assumed that  
15 there was a fiduciary breach. That's on page 3a in the  
16 star footnote of the -- in the appendix to the  
17 petition for certiorari. There is no reason for this  
18 Court to second-guess that, particularly since  
19 Respondent didn't argue in its motion to dismiss that  
20 there was no fiduciary breach here. So the case comes  
21 to the Court on the assumption that there is a fiduciary  
22 breach. And these are very important questions  
23 concerning whether assuming there is a fiduciary breach,  
24 a participant in a defined contribution plan can sue to  
25 recover for the plan the losses to the plan that are

1 caused by that breach when the losses are attributable  
2 only to that individual's account.

3 JUSTICE GINSBURG: Mr. Roberts, would you  
4 clarify what the government's position is on this  
5 (a)(1)(B) argument? Are you saying it is available, but  
6 (a)(2) is available?

7 MR. ROBERTS: We don't think that there is a  
8 claim at this point under (a)(1)(B), because the -- the  
9 money the Petitioner seeks -- what's happened here is he  
10 has alleged that there has been a fiduciary breach that  
11 caused a loss to the plan. The appropriate remedy for  
12 that is a recovery from the fiduciary in its personal  
13 capacity to put the money back in the plan. That's what  
14 section 502(a)(2) provides. Once the money is back in  
15 the plan and then it's allocated pursuant to the duty of  
16 prudence to the Petitioner's account, then if the plan  
17 didn't pay out the money to him when he was entitled to  
18 it, which he appears to be entitled to it now since he  
19 has withdrawn his account balance, he would have a 502  
20 (a)(2) claim -- a 502(a)(1)(B) claim, excuse me -- but  
21 he doesn't have a claim under that provision now. We --  
22 at least we think it's very unlikely that he does,  
23 because generally plans provide that the benefits that  
24 are owed to people are the money that are in -- in the  
25 account.

1 JUSTICE GINSBURG: Well, now we know what  
2 benefits would be due because he has withdrawn, but when  
3 he made this complaint and he hadn't been withdrawn, he  
4 could have made an unwise investment the next time. And  
5 --

6 MR. ROBERTS: That's right, and then he  
7 would -- it would be even clearer, I think that he has  
8 no (a)(1)(B) claim, if he didn't have -- say he was  
9 still participating in the plan and he wasn't -- he  
10 hadn't withdrawn his account balance and didn't have a  
11 right to withdraw his account balance at that time, then  
12 he wouldn't have a right to any benefits from the plan.

13 The crux of the matter here is that the plan  
14 has suffered a loss and that the appropriate remedy is  
15 against the fiduciary in his personal capacity;  
16 (a)(1)(B) doesn't provide for suits against the  
17 fiduciary in his personal capacity to recover money for  
18 the plan. It provides, again, suits against the plan to  
19 pay money out of the plan. This money isn't in the  
20 plan; it can't be paid out from the accounts of other  
21 participants because it would breach these duties under  
22 ERISA. The appropriate remedy is to get the money back  
23 in the plan.

24 CHIEF JUSTICE ROBERTS: Do you agree that if  
25 it is within (a)(1)(B) that it's therefore not within

1 (a)(2)?

2 MR. ROBERTS: No, because (a)(1)(B) provides  
3 an action for benefits from the plan and (a)(2) provides  
4 an action against -- it's a different -- against a  
5 different defendant for a different kind of claim.

6 CHIEF JUSTICE ROBERTS: Well, I thought your  
7 answer would be yes then. In other words, if it's in  
8 (a)(1), it's not in (a)(2).

9 MR. ROBERTS: If it's a claim for benefits  
10 under (a)(1) or to enforce the terms of the plan, such  
11 as if the fiduciary says, "I'm just not going to follow  
12 your instructions," and the participant wants a  
13 clarification of that and an order compelling the  
14 fiduciary in his official capacity to do that, yes, that  
15 would be a suit under (a)(1)(B) and there would be no  
16 suit under (a)(2).

17 There's only a suit under (a)(2) if there  
18 are losses to the plan and if the remedy is to put the  
19 money back in the plan by getting it from the breaching  
20 fiduciary.

21 If I could turn to (a)(3) just very briefly,  
22 Your Honor. We think that suits against fiduciaries to  
23 recover losses by fiduciary breaches are also authorized  
24 by section 502(a)(3), which provides for appropriate  
25 action, I believe.

1 JUSTICE SCALIA: Is that 1132 we are talking  
2 about?

3 MR. ROBERTS: Yes, that's 1132(a)(3).

4 JUSTICE SCALIA: Of the United States Code.

5 MR. ROBERTS: Of the United States Code, 29  
6 U.S.C. 1132.

7 JUSTICE SCALIA: It's useful to have a code.  
8 It really is.

9 MR. ROBERTS: Okay. I apologize. That --  
10 that provision -- my time.

11 CHIEF JUSTICE ROBERTS: You can finish your  
12 sentence.

13 MR. ROBERTS: That provision provides for  
14 appropriate equitable relief, and a suit against a  
15 fiduciary to recover losses caused by a breach of  
16 fiduciary duty seeks equitable relief because it's  
17 analogous to an action for breach of trust seeking the  
18 equitable remedy of surcharge.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 Mr. Roberts.

22 Mr. Gies.

23 ORAL ARGUMENT OF THOMAS P. GIES

24 ON BEHALF OF THE RESPONDENTS

25 MR. GIES: Mr. Chief Justice, and may it

1 please the Court:

2           Petitioner in our view suggests an awkward  
3 reading of section 409, one that is particularly hard to  
4 reconcile with the structure of the civil enforcement  
5 provisions of section 502, 1132 of the U.S. Code,  
6 starting of course with section (a)(1)(B).

7           To us this is the opposite end of the  
8 spectrum of the kind of case the Court was talking about  
9 in Russell and what Russell has been assumed to have  
10 been meant --

11           JUSTICE GINSBURG: Russell was about a  
12 welfare plan, not a pension -- and as I recall, the  
13 plaintiff in Russell was seeking medical benefits that  
14 she didn't get and she wanted, not the benefits because  
15 she did get those, she wanted straight out damages,  
16 compensatory and punitive damages, for delay in the  
17 receipt of benefits. That's quite a different thing  
18 from saying I want the contributions made so that I will  
19 get the benefits to which I'm entitled.

20           MR. GIES: You're right, Your Honor, that  
21 that is certainly distinguishable on the facts. We  
22 think the central teaching of Russell, though, applies  
23 with equal force to a defined contribution case like  
24 this, for several reasons.

25           The first of which is that Russell has been

1 assumed to reflect the dicing that we are talking about  
2 about which provision in section 502 is appropriate.  
3 Individual claims have traditionally been brought either  
4 under (a)(1)(B) or under (a)(3). When a claim is being  
5 brought on behalf of the plan as a whole, Russell  
6 teaches and -- and helps define when those claims are  
7 available. It is an odd case here, where the plan is a  
8 defendant, to at the same time assert that this claim is  
9 being brought on behalf of the plan.

10 JUSTICE SOUTER: Well, that is an oddity but  
11 what do you say to Mr. Roberts' argument that the only  
12 recovery under (a)(1)(B) is against the plan, and the  
13 plan doesn't have the money in the account so that if  
14 there is going to be any relief it's got to come from  
15 the fiduciary and that gets you into (2).

16 MR. GIES: Well, because neither (a)(2) or  
17 (a)(1)(B) were invoked in the district court and the  
18 case comes up on a very sparse record, it's hard to --

19 JUSTICE SOUTER: Okay, but we've got to  
20 assume at this point that we've -- we've got a -- a  
21 section (2) claim before us and the argument simply is,  
22 is that in effect to be disallowed because it should  
23 have been an (a)(1)(B) claim? And the argument that the  
24 United States has made, the argument that the other side  
25 has made is, we cannot get to any money under (a)(1)(B).



1 We've got to get that from the fiduciary and we can only  
2 do that under (2).

3 MR. GIES: The difference between defined  
4 contribution plans and defined benefit plans in ERISA is  
5 an important consideration in answering that question.  
6 (a)(1)(B), the first clause, speaks of recovering  
7 benefits due to him. As you know from our briefs we  
8 argue this is a case for lost profits, not benefits,  
9 certainly not vested benefits in the way the Court used  
10 the term in Firestone.

11 JUSTICE GINSBURG: So then you would agree  
12 that (a)(1)(B) is not available?

13 MR. GIES: No, Your Honor. We think  
14 (a)(1)(B) definitely was available for the Petitioner  
15 here. What relief he might have recovered under  
16 (a)(1)(B) had he invoked that provision remains to --  
17 would have remained to have been seen had it been  
18 invoked. There are three --

19 JUSTICE SOUTER: Well, the argument of the  
20 United States is you can't rob Peter to pay Paul, so  
21 that if in fact his account didn't have the money, the  
22 plan didn't have any place to get the money, and the  
23 only way the money could be had would have been from a  
24 fiduciary, which again gets you to subsection (2).

25 MR. GIES: It would only get you into

1 subsection (2) if it could be argued that that claim was  
2 for the benefit of the plan as a whole, as this Court  
3 has taught in Russell; and it seems to me, Your Honor,  
4 that one way to think about this in terms of which  
5 provision applies to which of these claims, is whether  
6 Congress really intended for these individual kinds of  
7 "he said; she said" claims to be brought. We think not.

8 JUSTICE SOUTER: Okay. But it seems to me  
9 you're answering a different question in that response.  
10 The argument here is basically an argument between the  
11 possibility -- an argument based on the claim that under  
12 (a)(1)(B) you can't go against the fiduciary. The only  
13 way you can get the money is from a fiduciary and  
14 therefore (a)(1)(B) would have been of no value to you.  
15 Do you -- do you take issue with that premise?

16 MR. GIES: Well we think -- no. No, Your  
17 Honor. In general we do not take issue with that  
18 premise.

19 JUSTICE SOUTER: Okay, then doesn't that  
20 leave you in the position of having to say that you've  
21 either got to bring the claim under (a)(1)(B), or you've  
22 got -- subsection (2) -- or you've got to bring it under  
23 subsection (3)?

24 MR. GIES: We think not for this reason.  
25 The second clause of (a)(1)(B) permits a cause of action

1 to enforce his rights under the terms of the plan. This  
2 is a case that if you give the Petitioner full benefit  
3 of the doubt probably could have been resolved with a  
4 telephone call. (a)(1)(B) permits an action to enforce  
5 his rights under the terms of the plan.

6 JUSTICE SOUTER: And the answer, if the  
7 premise you have just agreed to is correct, will be,  
8 "You bet. He is entitled to have another \$150,000 in  
9 his account for the benefit of future payments to him."

10 MR. GIES: Well, we think --

11 JUSTICE SOUTER: "But we haven't got the  
12 money and we can't rob Peter to pay Paul and therefore  
13 we are very sorry, go away." That would necessarily be  
14 the answer.

15 MR. GIES: Well, we think not with respect,  
16 Justice Souter, for this reason. Keep in mind the  
17 theory here is one for lost appreciation in the account.  
18 This plan does not have pooled assets.

19 JUSTICE SOUTER: But that's going to the --  
20 it seems to -- with respect, I think that's going to the  
21 merits. And the question is, if you can recover against  
22 anybody, the claim is -- the argument is you're going to  
23 get nowhere under (a)(1)(B) because the plan can't help  
24 you by itself. The only way you can get any value from  
25 your lawsuit is by going against the fiduciary. Maybe

1 you have good reasons to defend that, but if you're  
2 going to have a suit against anyone, it's got to be  
3 under subsection (2).

4 MR. GIES: I think the answer to that,  
5 Justice Souter, is that it reflects how careful and  
6 interrelated these provisions in 502 are.

7 JUSTICE SOUTER: And they're saying they are  
8 careful and interrelated provisions mean that you got to  
9 go under subsection (2).

10 MR. GIES: To which we say --

11 JUSTICE SOUTER: And you're I think saying,  
12 we -- we agree with you that ultimately (1)(B) couldn't  
13 get you any relief because the fiduciary -- the plan  
14 doesn't have any money. And you're now arguing, well,  
15 if you go against the fiduciary, ultimately we have a  
16 good defense to that. But the fact is, the question  
17 before us is whom do you sue and under what -- under  
18 what section? And I think your own logic forces you to  
19 say that -- that has got to be subsection (2).

20 MR. GIES: Well, one more answer to your  
21 question about (a)(1)(B), Justice Souter, is this: As  
22 you know, ERISA is a statute that provides for limited  
23 remedies, and the question of what remedies might be  
24 available under (a)(1) and whether or not this defendant  
25 would be solvent or somebody else would have to be

1     impleaded in our view need not be decided in this case.  
2     We think it's sufficient to identify that --

3             JUSTICE SOUTER:   Well, it hasn't been  
4     reached yet, has it?

5             MR. GIES:  -- as another remedy that could  
6     have been pursued here.

7             CHIEF JUSTICE ROBERTS:  If there is a suit  
8     under (a)(1)(B) for a breach of the plan by a fiduciary,  
9     do you agree that the plan, if it's liable, could then  
10    sue the fiduciary?  I realize I'm talking about a suit  
11    by one of your clients against the other, but would that  
12    be a feasible result under the statute?

13            MR. GIES:  Yes, it is, and it's also  
14    possible depending on the facts.  And again, from this  
15    sparse record, it's hard to know that there could be an  
16    action filed against whoever it was who is alleged to  
17    have made the mistake.  One of the issues, of course, in  
18    this case is it's not clear who made the mistake or  
19    whether or not the mistake was in fact a breach of  
20    fiduciary duty.

21            JUSTICE SCALIA:  Is it entirely clear that  
22    the plan itself does not have any money to pay this off  
23    unless it takes the money from other individual  
24    accounts?  I thought one of the briefs said that -- that  
25    some plans have independent funds.  I forget what

1 sources they came from, but some slush fund that they  
2 could use for this purpose.

3 MR. GIES: What you're talking about I  
4 think, Justice Scalia --

5 JUSTICE SCALIA: It wasn't called a slush  
6 fund. I know that.

7 (Laughter.)

8 MR. GIES: -- was a plan that provides for  
9 pool of assets. This plan does not. And so the answer  
10 to your question is no, there is no other place to get  
11 the money from, which we think is another reason why  
12 this is not an appropriate claim under (a)(2). It is  
13 not "losses to the plan" in the conventional way we  
14 understand those words. But the --

15 JUSTICE GINSBURG: But what is the plan  
16 other than a collection of individuals -- I mean the  
17 trustee is the trustee for the plan. All of the assets  
18 are there. The individuals do not have them in their  
19 pockets. So the trustee is managing this fund, which is  
20 then segmented into accounts for each individual. So I  
21 think your -- your suggestion is that these defined  
22 contribution plans, they come out entirely because --  
23 because of the segmented accounts. So you could never  
24 bring a claim because it would always be an individual.

25 MR. GIES: Well, we think that (a)(2),

1 properly read, does not permit an individual claim.  
2 (a)(3) permits a claim for equitable relief, and  
3 (a)(1)(B) would permit a claim for benefits for the  
4 other two.

5 JUSTICE BREYER: Well, why? Why? That's  
6 the question, it seems to me, in the case. Why? I mean  
7 -- imaginary example -- a plan, a thousand members. The  
8 trustee invests in a thousand diamonds. He puts it in a  
9 bank deposit vault. One day he takes all 500 diamonds  
10 and runs off to Martinique. We catch him enjoying the  
11 sun. We can sue him under (2), right? That's what (2)  
12 is there for, right? Right. Okay. Now, everything is  
13 the same except each of the thousand diamonds was put in  
14 individual safe deposit box with the participant's name  
15 on it. Everything else is the same. Why should it  
16 matter?

17 MR. GIES: We think relief in that  
18 situation, including recovery of the diamonds and any  
19 profits associated with it, would be available under  
20 (a)(3).

21 JUSTICE BREYER: Well, I'm sorry. I'm not  
22 interested in that question. I'm interested in my  
23 question. Why isn't it available under (a)(2)? In both  
24 cases, the trustee took 500 diamonds that belonged to  
25 the plan and went to Martinique. Now, if you can sue

1 him when the plans are all put in one big safe deposit  
2 box with the diamonds, why can't you sue him when  
3 they're put in 500 small safe deposit boxes?

4 MR. GIES: I think the structure of defined  
5 contribution plans makes that a little inapt of an  
6 analogy, with respect, Justice Breyer. In this plan, as  
7 we know, the assets are not pooled. It is, of course,  
8 the sum and total of the individual plan accounts, but  
9 the question of legal ownership is different from the  
10 question of whether or not in this case it ought to be  
11 read as losses to the plan. Here it is by definition  
12 the most individual kind of claim that anybody could  
13 think about. It is a run of the mill, as alleged claim  
14 between an investor and a stockbroker essentially that  
15 the stockbroker did not execute the trade.

16 JUSTICE ALITO: But do you dispute that  
17 there was not -- that there was a loss to the plan in  
18 the literal sense?

19 MR. GIES: Yes, we do. For -- for two  
20 reasons. First of all, there was no distribution until  
21 after he cashed out and, second, the nature of this  
22 claim, again, is for lost profits. It is not for  
23 benefits as in the sense of a defined benefit plan.

24 JUSTICE ALITO: But if you accept the truth  
25 of his allegations, wouldn't the plan have greater



1 assets than it had?

2 MR. GIES: No. Because there's no way to  
3 imagine that anybody made out on this. This is a case  
4 where the investment instruction was not followed.  
5 There's no way to imagine that my clients made any money  
6 on that.

7 JUSTICE SOUTER: No, but you're arguing that  
8 ultimately he couldn't prove damages. We're talking  
9 about allegations at the pleading stage.

10 Let me ask you a slightly different  
11 question. You said there's no -- there's no, as Justice  
12 Scalia put it, there's no slush fund; there's no pooled  
13 assets here. All the assets are assets which are  
14 accounted for, attributable to, individual accounts.  
15 Therefore there can be no -- there can be no loss to the  
16 plan which is not a loss to an individual account, can  
17 there be?

18 MR. GIES: Yes, sir. That's correct.

19 JUSTICE SOUTER: Then what is your theory on  
20 how we determine whether a loss to the plan from an  
21 individual account suffices as a loss to the plan for  
22 purposes of pleading? Has it got to be, you know, 500  
23 losses out of 1000? I don't see why that should make a  
24 difference. I'm going back to Justice Breyer's  
25 question.

1           MR. GIES: Yes, I don't think the actual  
2 number makes any difference, but I think the nature of  
3 the allegation, the type of fiduciary breach, does.

4           JUSTICE SOUTER: No, but why doesn't the --

5           MR. GIES: In the "stock drop" cases --

6           JUSTICE SOUTER: There's something I'm not  
7 understanding about your argument. When you say the  
8 nature of the fiduciary breach pleaded is what makes the  
9 difference, I am understanding you to be answering the  
10 question whether on the merits ultimately there will be  
11 a -- they will be able to make out a claim. And I am  
12 saying, as I said once before, that that seems to me a  
13 question that comes after you answer the question before  
14 us. And the question before us is not whether  
15 ultimately you've stated a winning claim, but whether  
16 ultimately -- whether right now you have stated a claim  
17 for a loss to the plan.

18           Now, that is not your view. Why is it that  
19 I am taking your answer to be an answer on the merits to  
20 a different question and you're saying my answer, i.e.,  
21 nature of duty breached or -- is one that goes to the  
22 question of pleading at this stage?

23           MR. GIES: Because of the words "losses to  
24 the plan" in the text, the words on the page, in the  
25 context of the rest of 502. The words "losses to the

1 plan" connotes something collective. The example --

2 JUSTICE GINSBURG: Yes, but you said -- you  
3 said it doesn't have to be every single member of the  
4 plan.

5 MR. GIES: That is correct, Justice  
6 Ginsburg.

7 JUSTICE GINSBURG: You said it has to be  
8 more than one. How then do we read the statute to say,  
9 well, it doesn't have to be the plan as a whole because  
10 there may be some people that are not entitled to this?  
11 How do we get that number between more than one and less  
12 than everybody?

13 MR. GIES: I would -- I don't think that  
14 that's a useful way to think about it either, Justice  
15 Ginsburg, which is why I think the right way to think  
16 about it in the context of this statute is to think  
17 about the nature of the allegation at the pleading  
18 stage. In the stock drop cases, the fiduciary breach  
19 alleged is an imprudent investment in holding company  
20 stock. I think the diamond analogy is closer to that.

21 JUSTICE GINSBURG: But I'm -- I'm asking you  
22 just -- in your -- you have said, you've conceded, that  
23 to bring the suit against the trustee, it doesn't have  
24 to involve every member, every contributor to this  
25 defined contribution plan. But it has to involve --

1 MR. GIES: I think that's too harsh a rule.

2 JUSTICE GINSBURG: -- more than one. So  
3 that's the question I'd like to you address. You  
4 recognize that there can be a claim against the  
5 fiduciary for breach of trust on behalf of contributors  
6 to the plan? So in that lawsuit, how many people would  
7 there have to be to qualify? You say not everybody, but  
8 more than one.

9 MR. GIES: Well, as we've argued we think it  
10 ought to be a substantial subset reflecting the nature  
11 of the breach alleged. That is, something systemic,  
12 something that affects the interests of the plan as a  
13 whole rather than just --

14 JUSTICE GINSBURG: For example?

15 MR. GIES: -- one individual plan  
16 participant. For example, the choice of an imprudent  
17 investment, Your Honor, where -- and that's where most  
18 of these stock drop cases come -- they involve company  
19 stock held in 401(k) plans, and the allegation is that  
20 it is imprudent to continue to hold the shares of the  
21 stock.

22 JUSTICE SOUTER: If you do that in two  
23 accounts is that enough?

24 MR. GIES: It -- it very well might be. To  
25 us that is --

1 JUSTICE SOUTER: Why not one?

2 MR. GIES: Because --

3 JUSTICE SOUTER: If it -- if it is the --  
4 and I still don't get this, but if it is the nature of  
5 the particular dereliction in duty that counts, why do  
6 we need more than one?

7 MR. GIES: Because the nature of the  
8 dereliction of duty here is the most -- hard to conceive  
9 of a more individualistic kind of a breach. This is  
10 just one dispute, one he said/she said between a  
11 participant and the shareholder.

12 JUSTICE SOUTER: It's an individualistic  
13 kind of breach when it is viewed as -- as only one  
14 account, but it is a breach against the plan when it is  
15 understood that there is nothing to the plan except an  
16 aggregation of accounts. You can't have a breach  
17 against one without a breach against the plan.

18 MR. GIES: To which we would say, Justice  
19 Souter, that it's qualitatively different to breach a  
20 duty as alleged here on an individual basis, on a  
21 one-transaction basis, in one account --

22 JUSTICE SOUTER: Then why, if that is your  
23 answer, why does it matter what the nature of the  
24 dereliction is? Because you're -- you're saying the --  
25 the really important question is the nature of the

1 dereliction. If it is, then I don't see why the  
2 multiple of the number of accounts affected has anything  
3 to do with it.

4 MR. GIES: Well, I suppose you could  
5 imagine, Justice Souter, a fact pattern where there was  
6 evidence -- not in this case, of course -- that there  
7 was a pattern, a systemic failure to handle properly  
8 investment requests made by --

9 JUSTICE SOUTER: And then you've got a lot  
10 of plaintiffs but what difference does it make?

11 MR. GIES: Well we think that comes closer  
12 to what -- how we read Russell and how Russell has been  
13 understood.

14 JUSTICE SOUTER: That may be close to the  
15 way you read it, but why is your reading correct? Why  
16 should that make any difference?

17 MR. GIES: Because in context with the rest  
18 of 502, 502(a)(2) has been understood, and we think for  
19 good reason, not to apply to an individual case. There  
20 are other remedies available, in (a)(1)(B) --

21 JUSTICE GINSBURG: What? What other  
22 remedies?

23 MR. GIES: In (a)(1)(B), and in (a)(3) for  
24 equitable relief.

25 JUSTICE GINSBURG: But you just said this

1 isn't -- you said it isn't a claim for benefits. It's a  
2 clam for lost profits. You said that a few times. I  
3 thought (a)(1)(B) is a claim for benefits, current or  
4 future.

5 MR. GIES: The third part of (a)(1)(B)  
6 permits a participant to sue to enforce his rights under  
7 the terms of the plan.

8 JUSTICE SOUTER: Which will -- which will  
9 get him nothing.

10 MR. GIES: It might have got him the trade  
11 made, maybe a few days late.

12 JUSTICE BREYER: I want to go back to amend  
13 my example. He only took one diamond. It was a big  
14 vault he took it from -- one diamond. You still have  
15 the claim, right?

16 MR. GIES: And -- and is that a --

17 JUSTICE BREYER: It's a big vault. He took  
18 it from one big safe deposit box -- one diamond.

19 MR. GIES: And -- and is it identified in  
20 one account?

21 JUSTICE BREYER: No, this is just there in  
22 the big vault.

23 MR. GIES: Well, that's -- that's a  
24 fundamental difference between --

25 JUSTICE BREYER: Well, of course. Well--

1 no, no. I'm going to, of course, ask you, since you  
2 seem to be turning this thing on how individualized this  
3 loss was, well, it was just one diamond, out of  
4 the thousand.

5 Now obviously I'm going to ask you, because  
6 I haven't yet heard the answer -- at least I didn't seem  
7 to hear it -- what the difference is whether that one  
8 diamond came from a big vault or from one little safe  
9 deposit box with the participant's label on it.

10 MR. GIES: It's still the same kind of loss,  
11 obviously. You're correct, Justice Breyer.

12 JUSTICE BREYER: Exactly, the same kind of  
13 loss. And what we have here is the footnote that was  
14 alleged in -- written in the opinion -- we assume the  
15 defendant's conduct amounted to a breach of its  
16 fiduciary duties. So therefore all of the discussion  
17 you have, that maybe it didn't -- well, maybe you're  
18 right. But we better send it back so that they can  
19 decide that question. And I just don't see what the  
20 other difference is. It can't be a difference in the  
21 size of the diamond. And people are saying, well, why  
22 -- well, you see the question.

23 MR. GIES: I do indeed, Justice Breyer. I  
24 think the structure of the plan bears something on the  
25 right answer because this plan does not have pooled



1 assets accounts, there is no way that this alleged loss  
2 could have had any impact on any other plan participant,  
3 nor could any recovery here benefit the plan as a whole.

4 JUSTICE STEVENS: Can I ask this question  
5 about your individual point? What if the individual's  
6 account was 60 percent of the assets of the total plan?  
7 Because different accounts are of different sizes. Would  
8 you give the same answer to that?

9 MR. GIES: I'd give the same answer, Justice  
10 Stevens, in a situation like this with what I call the  
11 classic one-off, he said/she said request to make a  
12 brokerage trade.

13 JUSTICE STEVENS: Even if it was 90 percent,  
14 you'd give the same answer?

15 MR. GIES: I could imagine a situation where  
16 the percentage gets so high that the assets might be  
17 held in such a way that there could -- easily be -- more  
18 easily seen to be a loss to the plan as a whole. For  
19 example, in some of these plans there's an investment  
20 in --

21 JUSTICE STEVENS: So just one individual, as  
22 far as we know it's a very small percentage of the  
23 total. That's the whole case as I understand it.

24 MR. GIES: That -- that's correct, Justice  
25 Stevens. I think it probably depends in your

1 hypothetical on the nature of the asset. If it's mutual  
2 fund shares, as in this plan held by individuals, I  
3 don't think it would make any difference. Some plans  
4 hold assets in common. This one does not.

5 JUSTICE SCALIA: You know I could understand  
6 your case if you said even if there were a hundred  
7 diamonds, each of them in an individual plan, there  
8 still is no "loss to the plan" until the plan itself has  
9 been held liable to make up for the loss. Up until that  
10 point, it's just a loss in each of the individual  
11 accounts.

12 But you're not willing to say that. You say  
13 at some ineffable point it becomes a loss to the plan.  
14 I think there is a clear line between -- between saying  
15 there is no loss to the plan unless -- unless the plan  
16 is first adjudicated to be liable; then there is a loss  
17 to the plan.

18 MR. GIES: Well, we certainly --

19 JUSTICE SCALIA: Prior to that it's just a  
20 loss to the individual account. That makes some sense.  
21 I mean, I can understand how that works. I can't  
22 understand how your system works. You're telling me it  
23 depends on how big the diamond is and -- and what kind  
24 of a breach it was. How can we write an opinion like  
25 that?

1 (Laughter.)

2 MR. GIES: I'm fortunate to have that not as  
3 my job, Justice Scalia.

4 (Laughter.)

5 MR. GIES: But I think -- I think it's  
6 clearly right as this discussion indicates that the  
7 right place to begin here is with (a)(1)(B). If you  
8 have a claim like this, you look at the statute, it  
9 comes first. It has the benefit of being first on the  
10 page.

11 JUSTICE GINSBURG: I don't recall you making  
12 the -- hitching your wagon to the (a)(1)(B) -- I thought  
13 you were arguing -- what did you say the remedy for this  
14 person would be? Assuming it's true that he put in his  
15 slip and he said invest in X set of mutual funds and the  
16 trustee missed it, lost it?

17 MR. GIES: Right.

18 JUSTICE GINSBURG: What is his remedy?

19 MR. GIES: That's a very difficult question  
20 to answer because this is a defined contribution plan  
21 and not a defined benefit plan and this is a claim for  
22 lost profits. It's not an easy claim for lost benefits.  
23 Now that's why the second clause of (a)(1)(B), to  
24 enforce his rights under the plan, we think is the best  
25 part of (a)(1)(B) that this individual could pursue.

1 JUSTICE GINSBURG: Is that what you argued  
2 in your brief?

3 MR. GIES: We did not, but our amici did.

4 JUSTICE GINSBURG: So what did you argue  
5 was his remedy in your brief?

6 MR. GIES: What we argue in our brief and  
7 what we still say is that he could have pursued  
8 equitable relief under (a)(3).

9 JUSTICE GINSBURG: What would that be?

10 MR. GIES: He could have picked up the  
11 telephone and called and said, like I think most of us  
12 would, say I asked you to sell my sells of stock and it  
13 hasn't happened yet. And --

14 JUSTICE GINSBURG: He didn't know until he  
15 got the report.

16 MR. GIES: Well, that's not so clear from  
17 the record, Justice Ginsburg, but in any case what  
18 equitable relief under (a)(3), just as (a)(1)(B) would  
19 permit him, is to get an injunction to force the trade  
20 to be executed.

21 JUSTICE GINSBURG: But it's much too late.  
22 It's over and done. It wasn't made.

23 MR. GIES: It may or may not be much too  
24 late, Justice Ginsburg, which we think is another reason  
25 why as to (a)(2), we think it's unlikely that Congress

1 intended every one of these he said/she said cases to  
2 give rise to a cause of action for damages. There would  
3 be no end to the kinds of claims that one could imagine.

4 JUSTICE GINSBURG: This is a -- let's take,  
5 because this case was tossed out on the pleadings, the  
6 -- there are forms to fill out and says I want this set  
7 of investments as opposed to that set of investments.  
8 The contributor fills out that form, gives it to the  
9 fiduciary. A careless employee for the fiduciary loses  
10 it, and that's the story. So what's the remedy for the  
11 contributor who gave his instruction that weren't  
12 followed, not out of anything deliberate but just  
13 carelessness?

14 MR. GIES: Well, certainly injunctive relief  
15 under (a)(3) would have been available.

16 JUSTICE GINSBURG: Enjoin him from being  
17 careless?

18 MR. GIES: Enjoining him to execute the  
19 trade was clearly a remedy available. And perhaps there  
20 would have been a remedy --

21 JUSTICE GINSBURG: If you say I want these  
22 funds invested in this particular set of shares for this  
23 period, for this six-month period, then two years later  
24 you can have that trade made? I don't understand it.

25 MR. GIES: Well, we think the fact that it

1 took him so long to sue is another reflection of the  
2 fact that this is a claim for damages. Had he really  
3 intended the trade to have been made, the normal thing  
4 to have done would be to call up and say my trade wasn't  
5 made, please make it. And if that he didn't get an  
6 adequate response, you'd bring an action for an  
7 injunction.

8 JUSTICE SCALIA: The stock's gone up  
9 meanwhile. He came in right at the bottom and a week  
10 later, it had gone up 30 points.

11 MR. GIES: And we think that Congress --

12 JUSTICE SCALIA: -- no remedy?

13 MR. GIES: We think that Congress did not  
14 want those kinds of claims to be brought under (a)(2)  
15 precisely for that kind of reason. There would be no  
16 end to the kind of arguments about damages. And those  
17 kind of cases impose costs that will ultimately be borne  
18 by the plans, which is inconsistent with the  
19 congressional purpose in ERISA to encourage plan  
20 formation.

21 So this statute on this kind of a situation  
22 may provide him some remedies but maybe not a complete  
23 remedy for loss of all the profits that he claims he was  
24 denied.

25 CHIEF JUSTICE ROBERTS: You view it as a

1 lost profits claim. Would your position be different if  
2 he directed a sale of the stock and then the stock went  
3 down 30 points instead of going up? That's not lost  
4 profits. That's avoiding losses to the plan.

5 MR. GIES: We think we have a different  
6 situation indeed if there actually had been a  
7 distribution here and the amount of the account had gone  
8 down between the alleged mistake and the distribution.  
9 There is clear as a claim for benefits under (a)(1)(B),  
10 and there I think quite easily the Court could say that  
11 in that situation the full value of the account at the  
12 time of the alleged mistake would be benefits under the  
13 terms of the plan. And we think that's a material  
14 distinction between this case and others, including the  
15 case called Goeres v. Charles Schwab that comes out of  
16 the Ninth Circuit.

17 Now with respect to (a)(3), we think that  
18 the equitable relief is properly understood not to  
19 include compensatory damages and that this Court's  
20 decisions have been clear on that. As to surcharge, it  
21 would seem to me that the one -- the best that one could  
22 say is that it was the exception and not the rule and  
23 not typically available in the courts of equity as this  
24 Court has understood --

25 JUSTICE GINSBURG: And never available in a

1 court of law.

2 MR. GIES: And never available in a court of  
3 law. You're exactly right.

4 JUSTICE GINSBURG: Well, then what is it?  
5 It's got to be something.

6 MR. GIES: Well, I think what it was, as I  
7 understand the history of the equity jurisprudence, is  
8 that you could only sue the trustee in the equity  
9 courts. And so if you needed to get money and if it was  
10 a damages claim, that was the only place where you could  
11 bring the action.

12 JUSTICE GINSBURG: This isn't like a  
13 cleanup.

14 MR. GIES: It is not, Your Honor. As we  
15 understand the argument on surcharge, it is separate  
16 from clean up and we understand that and accept that.  
17 But it still sounds more like damages. It sounds  
18 something very different from what Congress, we think,  
19 meant when they wrote the language of 502.

20 Unlike the Landrum Griffin Act, which  
21 permits actions for damages, ERISA does not, and Landrum  
22 Griffin was one of the statutes on which ERISA was  
23 based.

24 It also has fiduciary duty obligations. It  
25 also has the interests of beneficiaries, members of



1 labor unions at heart. And unlike this provision in  
2 ERISA, the Landrum Griffin Act explicitly permits an  
3 action for damages. And we think that's further  
4 evidence of the fact that appropriate equitable relief  
5 in a situation like this under (a)(3) does not include a  
6 claim like this for compensatory damages.

7 If there are no further questions, thank you  
8 very much.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr. Gies.  
10 The case is submitted.

11 (Whereupon, at 11:03 a.m., the case in the  
12 above-entitled matter was submitted.)

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