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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

6 Mr. Stris.

7 ORAL ARGUMENT OF PETER K. STRIS

8 ON BEHALF OF THE PETITIONER

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

11 Let me begin with the first question on
12 which this Court has granted certiorari. Sections
13 502(a)(2) and 409 of ERISA permit restoration of "any
14 losses to the plan."

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

20 MR. STRIS: I never thought the day would
21 come, Justice Scalia, when I was described as working
22 with ERISA all of the time, but I will tell you the code
23 provision. The code provision is -- for 502(a)(2) of
24 ERISA -- is 29 U.S.C. 1132(a)(2). It's found on page
25 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: It 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's in
13 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 the 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: Your approach, if
7 can you go under (a)(2) -- you're right that we
8 judicially have developed a number of glosses on (a)(1),
9 including I think most importantly the Firestone
10 deference principle. But if you're right that you can
11 go under (a)(2), then all of that work has been in vain.
12 You can avoid all the limitations on (a)(1) just by
13 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 the
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. This Court recognizes --

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

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

24 JUSTICE ALITO: Well, maybe -- maybe they've
25 waived the waiver, but Judge Wilkinson is a careful

1 writer, and if you use the subjunctive there -- "even if
2 the argument were not therefore waived" -- doesn't that
3 mean it was in fact waived?

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

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

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

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

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

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

25 MR. STRIS: No. I don't agree with that

1 characterization. In a defined benefit plan of which a
2 welfare plan is the classic example --

3 JUSTICE SCALIA: Right.

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

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

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

13 JUSTICE SCALIA: Right.

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

16 JUSTICE SCALIA: Right.

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

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

24 MR. STRIS: Well, that may be true, but with
25 respect, I think that that is -- that's the tail wagging

1 the dog. The argument that you made is that a loss
2 occurs if your fiduciary duty claim is successful.
3 That's another statute. That's --

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

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

18 In this case, the only benefit that you are
19 entitled to, if you are a participant in an individual
20 account plan, is the value of the contributions that
21 you've put or your employer has put into the account, as
22 they have either appreciated or depreciated. So my
23 first response -- it's actually the second response I
24 was going to give earlier that I never got to is that I
25 believe that it's not clear that there is even a

1 legitimate (a)(1)(B) claim that Mr. LaRue could have
2 asserted here because --

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

7 MR. STRIS: That is correct.

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

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

17 JUSTICE SCALIA: Right.

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

25 CHIEF JUSTICE ROBERTS: I -- I'm not sure

1 about your characterization that he would pick the
2 pockets of the other plan participants. By definition
3 he only prevails if this was a benefit to which he was
4 entitled under the plan. So that doesn't seem unfair to
5 the other plan participants.

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

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

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

24 Our fundamental argument about the plain
25 text of this statute is that a loss to the plan is a

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

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

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

24 Now, my second response, Justice Scalia, is
25 that depending on how the facts play out, the result may

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

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

11 MR. STRIS: I think that that --

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

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

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

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

24 JUSTICE SCALIA: They participated in the
25 plan. It was a failure of the trustee for the plan. It

1 seems to me the whole plan should be liable for it. I
2 mean that's how I --

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

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

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

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

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

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

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

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

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

21 JUSTICE ALITO: What would that be?

22 MR. STRIS: Well, our theory of surcharge,
23 and it's also the government's theory, is that surcharge
24 is a make-whole remedy for pecuniary losses that are
25 caused by a breach of trust. It is clear that the core

1 losses are diminution in trust assets or failure of
2 trust assets to appreciate. But there are individual
3 pecuniary losses that were historically remediable under
4 surcharge.

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

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

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

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

1 coterminous under the two provisions, it would not be
2 appropriate for us to proceed under (a)(3).

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

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

13 Mr. Roberts.

14 ORAL ARGUMENT OF MATTHEW D. ROBERTS

15 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

16 SUPPORTING PETITIONER

17 MR. ROBERTS: Mr. Chief Justice, and may it
18 please the Court:

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

24 CHIEF JUSTICE ROBERTS: But that means every
25 participant, right? In other words, for the failure of

1 the plan to follow this individual's instructions, any
2 participant in the plan can bring suit under (a)(2)?

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

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

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

25 It would also probably violate the terms of

1 the plan, because they have a right to future benefits
2 by the amount that's in their allocation but --

3 JUSTICE SCALIA: Mr. Roberts, Section (a),
4 (a)(1)(B) --

5 MR. ROBERTS: Yes.

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

13 MR. ROBERTS: Yes, but --

14 JUSTICE SCALIA: I think the implication
15 there is that the suit -- the suit is against the plan.

16 MR. ROBERTS: The implication is that the
17 suit is against the plan or against a fiduciary in --
18 under (a)(1)(B). Against the plan or against the
19 fiduciary whose initial capacity is representative of
20 the plan.

21 JUSTICE SCALIA: Where?

22 MR. ROBERTS: If you can't sue the fiduciary
23 under (a)(1)(B), that just reinforces the point even --
24 even more, Your Honor, that Petitioner's cause of action
25 here arises under (a)(2) because he is seeking relief

1 for the plan not relief from the plan.

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

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

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

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

23 MR. ROBERTS: And if it's not a breach of
24 fiduciary duties, Petitioner will lose on the merits or
25 on remand in their motion for summary judgment based on

1 facts that could be decided.

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

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

12 CHIEF JUSTICE ROBERTS: So we need to know
13 -- we need to know what the plan provides before we can
14 decide.

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

20 CHIEF JUSTICE ROBERTS: The pleadings don't
21 include the plan. So we have to assess the pleadings
22 without the terms of the plan.

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

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

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

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

25 JUSTICE GINSBURG: Mr. Roberts, would you

1 clarify what the government's position is on this
2 (a)(1)(B) argument? Are you saying it is available, but
3 (a)(2) is available?

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

23 JUSTICE GINSBURG: Well, now we know what
24 benefits would be due because he has withdrawn, but when
25 he made this complaint and he hadn't been withdrawn, he

1 could have made an unwise investment the next time. And
2 --

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

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

21 CHIEF JUSTICE ROBERTS: Do you agree that if
22 it is within (a)(1)(B) that it's therefore not within
23 (a)(2)?

24 MR. ROBERTS: No, because (a)(1)(B) provides
25 an action for benefits from the plan and (a)(2) provides

1 an action against -- it's a different -- against a
2 different defendant for a different kind of claim.

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

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

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

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

23 JUSTICE SCALIA: Is that 1132 we are talking
24 about?

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

1 JUSTICE SCALIA: Of the United States Code.

2 MR. ROBERTS: Of the United States Code, 29
3 U.S.C. 1132.

4 JUSTICE SCALIA: It's useful to have a code.
5 It really is.

6 MR. ROBERTS: Okay. I apologize. That --
7 that provision -- my time.

8 CHIEF JUSTICE ROBERTS: You can finish your
9 sentence.

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

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Roberts.

19 Mr. Gies.

20 ORAL ARGUMENT OF THOMAS P. GIES

21 ON BEHALF OF RESPONDENT

22 MR. GIES: Mr. Chief Justice, and may it
23 please the Court:

24 Petitioner in our view suggests an awkward
25 reading of Section 409, one that is particularly hard to

1 reconcile with the structure of the civil enforcement
2 provisions of Section 502, 1132 of the U.S. Code,
3 starting of course with Section (a)(1)(B).

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

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

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

22 The first of which is that Russell has been
23 assumed to reflect the dicing that we are talking about
24 which provision in Section 502 is appropriate.
25 Individual claims have traditionally been brought either

1 under (a)(1)(B) or under (a)(3). When a claim is being
2 brought on behalf of the plan as a whole, Russell
3 teaches and -- and helps define when those claims are
4 available. It is an odd case here, where the plan is a
5 defendant, to at the same time assert that this claim is
6 being brought on behalf of the plan.

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

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

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

25 MR. GIES: The difference between defined

1 contribution plans and defined benefit plans in ERISA is
2 an important consideration in answering that question.

3 (a)(1)(B), the first clause, speaks of recovering
4 benefits due to him. As you know from our briefs we
5 argue this is a case for lost profits, not benefits,
6 certainly not vested benefits in the way the Court used
7 the term in Firestone.

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

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

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

22 MR. GIES: It would only get you into
23 subsection (2) if it could be argued that that claim was
24 for the benefit of the plan as a whole, as this Court
25 has taught in Russell; and it seems to me, Your Honor,

1 that one way to think about this in terms of which
2 provision applies to which of these claims, is whether
3 Congress really intended for these individual kinds of
4 "he said; she said" claims to be brought. We think not.

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

13 MR. GIES: Well we think -- no. No, Your
14 Honor. In general we do not take issue with that
15 premise.

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

21 MR. GIES: We think not for this reason.
22 The second clause of (a)(1)(B) permits a cause of action
23 to enforce his rights under the terms of the plan. This
24 is a case that if you give the Petitioner full benefit
25 of the doubt probably could have been resolved with a

1 telephone call. (a)(1)(B) permits an action to enforce
2 his rights under the terms of the plan.

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

7 MR. GIES: Well, we think --

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

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

16 JUSTICE SOUTER: But that's going to the --
17 it seems to -- with respect, I think that's going to the
18 merits. And the question is, if you can recover against
19 anybody, the claim is, the argument is you're going to
20 get nowhere under (a)(1)(B) because the plan can't help
21 you by itself. The only way you can get any value from
22 your lawsuit is by going against the fiduciary. Maybe
23 you have good reasons to defend that, but if you're
24 going to have a suit against anyone, it's got to be
25 under subsection (2).

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

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

7 MR. GIES: To which we say --

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

17 MR. GIES: Well, one more answer to your
18 question about (a)(1)(B), Justice Souter, is this: As
19 you know, ERISA is a statute that provides for limited
20 remedies, and the question of what remedies might be
21 available under (a)(1) and whether or not this defendant
22 would be solvent or somebody else would have to be
23 impleaded in our view need not be decided in this case.
24 We think it's sufficient to identify that --

25 JUSTICE SOUTER: Well, it hasn't been

1 reached yet, has it?

2 MR. GIES: -- as another remedy that could
3 have been pursued here.

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

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

18 JUSTICE SCALIA: Is it entirely clear that
19 the plan itself does not have any money to pay this off
20 unless it takes the money from other individual
21 accounts? I thought one of the briefs said that -- that
22 some plans have independent funds. I forget what
23 sources they came from, but some slush fund that they
24 could use for this purpose.

25 MR. GIES: What you're talking about I

1 think, Justice Scalia --

2 JUSTICE SCALIA: It wasn't called a slush
3 fund. I know that.

4 (Laughter.)

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

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

22 MR. GIES: Well, we think that (a)(2),
23 properly read, does not permit an individual claim.
24 (a)(3) permits a claim for equitable relief, and
25 (a)(1)(B) would permit a claim for benefits for the

1 other two.

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

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

18 JUSTICE BREYER: Well, I'm sorry. I'm not
19 interested in that question. I'm interested in my
20 question. Why isn't it available under (a)(2)? In both
21 cases, the trustee took 500 diamonds that belonged to
22 the plan and went to Martinique. Now, if you can sue
23 him when the plans are all put in one big safe deposit
24 box with the diamonds, why can't you sue him when
25 they're put in 500 small safe deposit boxes?

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

13 JUSTICE ALITO: But do you dispute that
14 there was not -- that there was a loss to the plan in
15 the literal sense?

16 MR. GIES: Yes, we do. For --

17 JUSTICE ALITO: If --

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

23 JUSTICE ALITO: But if you accept the truth
24 of his allegations, wouldn't the plan have greater
25 assets than it had?

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

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

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

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

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

25 MR. GIES: Yes, I don't think the actual

1 number makes any difference, but I think the nature of
2 the allegation, the type of fiduciary breach, does.

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUSTICE GINSBURG: For example.

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

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

23 MR. GIES: It -- it very well might be. Two
24 --

25 JUSTICE SOUTER: Why not one?

1 MR. GIES: Because --

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

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

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

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

21 JUSTICE SOUTER: Then why, if that is your
22 answer, why does it matter what the nature of the
23 dereliction is? Because you're -- you're saying the --
24 the really important question is the nature of the
25 dereliction. If it is, then I don't see why the

1 multiple of the number of accounts affected has anything
2 to do with it.

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

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

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

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

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

20 JUSTICE GINSBURG: What? What other
21 remedies?

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

24 JUSTICE GINSBURG: But you said this isn't
25 -- you said it isn't a claim for benefits. It's a clam

1 for lost profits. You said that a few times. I thought
2 (a)(1)(B) is a claim for benefits, current or future.

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

6 JUSTICE SOUTER: Which will -- which will
7 get him nothing.

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

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

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

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

17 MR. GIES: And -- and is it identified in
18 one account?

19 JUSTICE BREYER: No, this is just there in
20 the big vault.

21 MR. GIES: Well, that's -- that's a
22 fundamental difference.

23 JUSTICE BREYER: Well, of course. Well--
24 no, no. I'm going to, of course, ask you, since you
25 seem to be turning this thing on how individualized this

1 loss was, well, it was just one diamond, out of
2 thousand.

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

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

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

21 MR. GIES: I do indeed, Justice Breyer. I
22 think the structure of the plan bears something on the
23 right answer because this plan does not have pooled
24 assets accounts, there is no way that this alleged loss
25 could have had any impact on any other plan participant,

1 nor could any recovery here benefit the plan as a whole.

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

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

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

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

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

21 MR. GIES: That -- that's correct, Justice
22 Stevens. I think it probably depends in your
23 hypothetical on the nature of the asset. If it's mutual
24 fund shares, as in this plan held by individuals, I
25 don't think it would make any difference. Some plans

1 hold assets in common. This one does not.

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

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

15 MR. GIES: Well, we certainly --

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

23 (Laughter.)

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

1 (Laughter.)

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

8 JUSTICE GINSBURG: I know, because in making
9 this, hitching your wagon to the (a)(1)(B) -- I thought
10 you were arguing -- what did you say the remedy for this
11 person would be? Assuming it's true that he put in his
12 slip and he said invest in X set of mutual funds and the
13 trustee missed it, lost it?

14 MR. GIES: Right.

15 JUSTICE GINSBURG: What is his remedy?

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

23 JUSTICE GINSBURG: Is that what you argue in
24 your brief?

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

1 JUSTICE GINSBURG: So what did you argue is
2 his remedy, in your brief?

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

6 JUSTICE GINSBURG: What would that be?

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

11 JUSTICE GINSBURG: He didn't know until he
12 got the report.

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

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

20 MR. GIES: It may or may not be much too
21 late, Justice Ginsburg, which we think is another reason
22 why as to (a)(2), we think it's unlikely that Congress
23 intended every one of these he said/she said cases to
24 give rise to a cause of action for damages. There would
25 be no end to the kinds of claims that one could imagine.

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

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

13 JUSTICE GINSBURG: Enjoining him to be
14 careless?

15 MR. GIES: Enjoining him to execute the
16 trade was clearly a remedy available. And perhaps there
17 would have been a remedy --

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

22 MR. GIES: Well, we think the fact that it
23 took him so long to sue is another reflection of the
24 fact that this is a claim for damages. Had he really
25 intended the trade to have been made, the normal thing

1 to have done would be to call up and say my trade wasn't
2 made, please make it. And if that he didn't get an
3 adequate response, you'd bring an action for an
4 injunction.

5 JUSTICE SCALIA: What's done meanwhile? He
6 came in right at the bottom and a week later, it had
7 gone up 30 points.

8 MR. GIES: And we think the Congress --

9 JUSTICE SCALIA: -- no remedy?

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

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

22 CHIEF JUSTICE ROBERTS: You view it as a
23 lost profits claim. Would your position be different if
24 he directed a sale of the stock and then the stock went
25 down 30 points instead of going up? That's not lost

1 profits. That's avoiding losses to the plan.

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

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

22 JUSTICE GINSBURG: And never available in a
23 court of law.

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

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

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

9 JUSTICE GINSBURG: This isn't like a
10 cleanup.

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

17 Unlike the Landrum Griffin Act, which
18 permits actions for damages, ERISA does not, and Landrum
19 Griffin was one of the statutes on which ERISA was
20 based.

21 It also has fiduciary duty obligations. It
22 also has the interests of beneficiaries, members of
23 labor unions at heart. And unlike this provision in
24 ERISA, the Landrum Griffin act explicitly permits an
25 action for damages. And we think that's further

1 evidence of the fact that appropriate equitable relief
2 in a situation like this under (a)(3) does not include a
3 claim like this for compensatory damages.

4 If there are no further questions, thank you
5 very much.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr. Gies.
7 The case is submitted.

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

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