

No. _____

In the Supreme Court of the United States

JAMES J. THOLE and SHERRY SMITH, APPLICANTS

v.

U.S. BANK, N.A., ET AL.

**Application for an Extension of Time
to File Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

To the Honorable Neil M. Gorsuch,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eighth Circuit

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE
PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Pursuant to this Court’s Rule 13.5, Applicants James Thole and Sherry Smith respectfully request a 58-day extension of time, to and including Friday, July 20, 2018, within which to file a petition for a writ of certiorari in this case. The judgment sought to be reviewed is the decision of the United States Court of Appeals for the Eighth Circuit in *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2017) (attached as Exhibit A). The Eighth Circuit issued its decision, over the partial dissent of Judge Kelly, on October 12, 2017. The court denied a timely filed petition for rehearing en banc, over the votes of Judge Stras and Judge Kelly, on February 22, 2018 (order attached as Exhibit B). Pursuant to this Court’s Rules 13.1, 13.3, and 30.1, a petition for certiorari would be due on May 23, 2018. This application is made at least 10 days before that date. This Court’s jurisdiction would be invoked under 28 U.S.C. 1254(1).

BACKGROUND

This case cleanly presents exceptionally important issues of law under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, which have divided the courts of appeals and caused confusion in lower courts across the nation.

1. Under ERISA, those who manage employee retirement plans bear strict fiduciary duties of prudence and loyalty, derived from the common law of trusts. See *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). When these fiduciaries violate their duties, ERISA

relies on lawsuits brought by plan participants to remedy those violations. Following a centuries-old common law tradition, the statute authorizes plan participants to sue for (a) restoration of plan losses caused by fiduciary breach under 29 U.S.C. 1132(a)(2), and (b) injunctive relief to stop or otherwise remedy ongoing violations of the statute under 29 U.S.C. 1132(a)(3)(A). This is how Congress chose to safeguard the retirement benefits of the millions of ERISA plan participants.

2. In this case, Applicants James Thole and Sherry Smith allege the defendants caused \$748 million in losses to their “defined-benefit” retirement plan by investing the plan entirely in high-risk assets and by engaging in improper self-dealing transactions—both fiduciary breaches under ERISA.¹ These breaches left the plan “84 percent underfunded.” Ex A at 8. Applicants accordingly sought restoration of the \$748 million in losses under Section 1132(a)(2), along with an injunction under Section 1132(a)(3)(A) to stop defendants’ imprudent and disloyal actions. After the lawsuit commenced, however, defendants contributed \$339 million to the plan, bringing it back to “overfunded” status.

3. Over a partial dissent from Judge Kelly, the Eighth Circuit concluded that because the plan had become overfunded, and thus Mr. Thole and Ms. Smith did not suffer individual monetary loss, the statute did not authorize their suit either under Section 1132(a)(2) for loss restoration or under Section 1132(a)(3)(A) for injunctive relief. Ex. A at 15.

¹ A “defined-benefit” plan is one in which participants receive a fixed, contractually pre-determined benefit regardless of market performance (unless of course the plan’s reserves fall short of the amount necessary to make benefit payments). It is contrasted with a “defined-contribution” plan, such as a 401(k), in which participants invest money in individual retirement accounts that may fluctuate with the market.

a. In doing so, the Eighth Circuit read Section 1132(a)(2) contrary to every other circuit that has addressed it in this context. See *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 544, 546-47 (5th Cir. 2016); *David v. Alphin*, 704 F.3d 327, 332 (4th Cir. 2013); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Dev. Comm'n of Nassau Cty., Inc.*, 710 F.3d 57, 65 (2d Cir. 2013); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 607-08 (6th Cir. 2007); *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006). To be sure, there is conflict over whether *Article III* precludes participants in overfunded defined-benefit plans from bringing suit. Compare, e.g., *Lee*, 837 F.3d at 546-48, with *L.I. Head Start*, 710 F.3d at 67 n.5. But every other circuit has read the *statute* precisely opposite to the Eighth Circuit.

b. The Eighth Circuit also created a circuit split on the Section 1132(a)(3)(A) issue. The court held, over Judge Kelly's dissent, that participants must show individual *monetary* harm before they may seek *injunctive* relief against fiduciary misconduct. Ex. A at 17-18. The other circuits to address this issue have rejected the Eighth Circuit's position, holding instead that a plaintiff need only allege a fiduciary breach, not individual monetary harm, in order to seek injunctive relief under Section 1132(a)(3)(A) and to satisfy the requirements of Article III. See *Loren*, 505 F.3d at 609-10; *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 455-56 (3d Cir. 2003); see also *Soehnlén v. Fleet Owners Ins. Fund*, 844 F.3d 576, 584-85 (6th Cir. 2016) (holding that standing in this context requires "showing [a] specific fiduciary duty or specific right owed to [the plaintiff] was infringed"); *Kendall v. Emp. Ret. Plan of Avon Prods.*, 561 F.3d 112, 120-21 (2d Cir. 2009) ("While the participants did not have to show they were specifically injured, pecuniarily or otherwise, they did

have to show that they were generally harmed by the deprivation of a specific right to receive information.”).

The Eighth Circuit has accordingly diverged from its sister circuits on both of these critically important questions. It has thereby undermined the national uniformity of interpretation that this Court has held is paramount in the ERISA context. See, *e.g.*, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). And even more importantly, it has undermined the statutory enforcement scheme Congress created to secure the retirement benefits of millions of plan participants.

4. After the Eighth Circuit issued its opinion, undersigned counsel was retained to file a petition for rehearing en banc in the Eighth Circuit and, if necessary, a petition for certiorari in this Court. On February 22, 2018, the Eighth Circuit denied Applicants’ petition for rehearing en banc over the votes of Judge Stras and Judge Kelly. Exh. B.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicants respectfully request a 58-day extension of time, to and including July 20, 2018, to prepare a petition for a writ of certiorari on the important questions presented by this case.

1. An extension of time is warranted because Applicants’ Supreme Court counsel have had a substantial number of significant obligations in the period between the Eighth Circuit’s denial of rehearing en banc and the petition’s current due date of May 23, 2018. Many of these obligations remain ongoing over the coming weeks and months. They include:

- a. Assisting in the filing of merits briefing before this Court, along with preparation for oral argument, in *Lagos v. United States*, No. 16-1519.
- b. Assisting in the filing of a petition for certiorari in *Obduskey v. McCarthy & Holthus LLP*, No. 17-1307.
- c. Assisting in the filing of a petition for certiorari in *Humble Surgical Hosp., LLC v. Conn. Gen. Life Ins. Co.*, No. 17-1325.
- d. Assisting in the filing of a petition for certiorari in *Greer v. Green Tree Servicing LLC*, No. 17-1351.
- e. Assisting in the preparation for oral argument before the Vermont Supreme Court in *Tanzer v. MyWebGrocer, Inc.*, No. 2017-193.
- f. Serving as lead counsel in the filing of the opening brief in *Teets v. Great-West Life & Annuity Ins. Co.*, No. 18-1019 (10th Cir.). A reply brief will be due in this case on July 31, 2018.
- g. Serving as lead counsel in the filing of the opening brief in *Depot, Inc. v. Carving for Montanans, Inc.*, No. 17-35597 (9th Cir.). A reply brief will be due in this case on June 22, 2018.
- h. Serving as lead counsel in the filing of the opening brief in *Green v. Aranas*, No. 16-15903 (9th Cir.). A reply brief will be due in this case on June 19, 2018.
- i. Serving as lead counsel in the filing of the reply brief in *Wilson v. Fidelity Mgmt. Trust Co.*, No. 17-55726 (9th Cir.).
- j. Assisting in the preparation for oral argument in *Frommert v. Conkright*, No. 17-114 (2d Cir.).

- k. Filing a complaint, preparing a response to the defendant's anti-SLAPP motion, negotiating a settlement agreement, and engaging in extensive and ongoing media and public relations efforts in *McDougal v. American Media, Inc.*, No. BC698956 (L.A. Sup. Ct.).
 - l. Filing a motion to dismiss, an anti-SLAPP motion, and reply briefs for both motions, along with presenting oral argument in *Grasshopper House, LLC v. Clean & Sober Media, LLC*, No. 18 Civ. 924 (SVW) (RAO) (C.D. Cal.). Counsel expect a response to the plaintiff's amended complaint to be due on approximately June 15, 2018.
 - m. Presenting oral argument on behalf of a class of ERISA plaintiffs to defeat a motion to dismiss in *Baleja v. Northrop Grumman Space & Mission Sys. Corp. Salaried Pension Plan*, No. 17 Civ. 235 (JGB) (SP) (C.D. Cal.). Discovery is set to commence in this case and will be a significant ongoing obligation over the next several months.
 - n. Filing a response to the complaint in a patent infringement action in *Aeritas v. McDonald's Corp.*, No. 18 Civ. 140 (E.D. Tex.), due May 21, 2018.
2. No prejudice would arise from granting this extension. If this Court ultimately grants the petition, it will in all likelihood hear oral argument and issue its opinion in the October 2018 Term regardless of whether an extension is granted.
3. Under these circumstances, the requested extension is warranted to allow counsel to adequately prepare a petition on the important questions presented by this case.

CONCLUSION

For the foregoing reasons, Applicants respectfully request a 58-day extension of the time to file a petition for certiorari, to and including July 20, 2018.

Respectfully submitted,

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