No. 03-3812

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Penny/Ohlmann/Nieman, Inc.;
Penny/Ohlmann/Nieman, Inc. Employee Stock Ownership Plan;
Penny/Ohlmann/Nieman, Inc. Employee Savings Plan,

Plaintiffs-Appellants,

v.

Miami Valley Pension Corporation;
National City Corporation, doing business as National City Bank,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of Ohio
Western Division Case No. 3:02-CV-000156

FINAL BRIEF OF DEFENDANT-APPELLEE NATIONAL CITY BANK

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26, 1, Appellee National City Bank
(Name of Party)

1. Is said party a subsidiary or affiliate of a publicly owned corporation? Yes

   National City Corporation, a publicly traded financial holding company incorporated in Delaware, is the parent company for National City Bank.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

_____ _____
(Signature of Counsel) (Date)

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee National City Bank requests the opportunity to present oral argument. National City Bank believes that oral argument will aid the discussion and resolution of the ERISA issues raised in this appeal.

JURISDICTIONAL STATEMENT

National City Bank agrees with the jurisdictional statement contained in Appellants' Brief. (*See* PONI's Br. at 1-2.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the lower court correctly held that PONI's state law claims are preempted by ERISA, entitling National City Bank to a judgment on the pleadings.

2. Whether, even if PONI's state law claims are not preempted by ERISA, judgment on the pleadings was nevertheless appropriate in light of PONI's failure to allege any cognizable theory of damages.

INTRODUCTION

In this ERISA-based action, two ERISA plans and their sponsor, collectively referred to as "PONI," asserted claims against National City Bank to recover contributions for the ERISA plans that are payable to plan beneficiaries. National City, according to PONI's complaint, serves as a trustee and fiduciary for PONI's ERISA Savings Plan. PONI asserted an ERISA fiduciary breach claim against National City to recover Plan benefits owed to "non-key" employees. That claim was rejected by the lower court, which held that ERISA's limited remedial scheme did not afford PONI a remedy for the ERISA violations they alleged. PONI has not appealed that ruling.

Today, PONI seeks to revive its ERISA theories through state law claims for breach of contract and negligent misrepresentation. If successful, these claims would allow PONI to recover Plan contributions based on National City's alleged failure to ensure that PONI's Savings Plan complied with ERISA and the ERISA Savings Plan document. Citing ERISA's broad preemption clause, the lower court dismissed PONI's state law theories.

The Court should affirm the lower court's straight-forward application of ERISA's preemption clause. The lower court correctly held that plaintiffs' ERISA-based common law claims are preempted. Those claims plainly "relate to" ERISA. Indeed, they involve the exact same allegations and conduct underlying PONI's

ERISA fiduciary duty claim, one that plainly arises under ERISA and one that was also addressed by the lower court. All of PONI's claims address top-heavy contributions to the combined ERISA plans made for the purpose of preserving benefits for non-key employees. Their claims require interpretation of the ERISA Plan documents. They involve application of federal law, including federal rules for top-heavy contributions. And they involve traditional ERISA parties, including the ERISA Plans, which are both plaintiffs, the employer (also a plaintiff), and National City, the defendant and an alleged trustee and fiduciary.

Despite all of this, PONI maintains that their state law claims survive ERISA's broad preemption clause. This contention fails on a host of fronts. First, the claims involve ERISA principals and the determination of amounts owed to the ERISA plan for the benefit of non-key beneficiaries, traditional ERISA functions that are preempted by federal law. Second, in attempting to distinguish this case from the legion of ERISA preemption decisions, PONI ignores the allegations in their own complaint. There, PONI makes plain that National City is a "fiduciary" and "trustee," confirming the fact that any recovery here may only be pursued through ERISA's remedial scheme — not through state law theories. Third, plaintiffs cite no decision — and most conspicuously no decision from the Sixth Circuit — holding what they urge here: that ERISA-based top-heavy claims by ERISA principals against an alleged fiduciary and trustee seeking benefits for plan

beneficiaries are not preempted by ERISA. Accordingly, the Court should affirm the lower court's decision.

STATEMENT OF THE CASE AND FACTS

In understanding this employee benefit plan dispute, one concept is of primary significance: A benefit plan may be considered "top-heavy" when too large a percentage of the benefits held by the plan are dedicated to corporate officers and executives, or "key" employees. The federal top-heavy rules "are designed to protect non-key employees by making sure they get a minimum amount of benefit from an employer's pension plan." 146 Cong. Rec. H6476, H6505 (July 19, 2000) (statement of Rep. Neal). "Key" employees include officers of the company earning a specified compensation level and company employees with the highest salaries and ownership interests. *See* 26 U.S.C. § 416(i)(1). Under the Internal Revenue Code, a benefit plan is considered top-heavy where "as of the determination date, the present value of the cumulative accrued benefits under the plan for key employees exceeds 60 percent of the present value of the cumulative accrued benefits under the plan for all employees." 26 U.S.C. § 416(g)(1)(A)(i); *see also In re Feldman*, 171 B.R. 731, 735-36 (Bankr. E.D.N.Y. 1994) ("A top-heavy plan provides greater benefits to 'key-employees.'"). If the top-heavy ratio exceeds 60% as of a determination date, then the top-heavy minimum employer contributions and vesting are applicable for the following plan year. The minimum top-heavy employer contributions are 3% of pay for all non-

key employees. There are also rules applying this test to multiple plan situations. *See* 26 U.S.C. § 416(g)(2).

PONI filed this lawsuit on April 5, 2002, against defendants National City and Miami Valley Pension Corporation. According to PONI's complaint, National City serves as a trustee and fiduciary for the PONI ERISA Savings Plan. (R.1 Compl. ¶¶ 11, 21-23, Apx. pgs. 11, 13-14.) PONI alleges that its Defined Benefit Plan, the assets of which included life insurance, was terminated June 30, 1990, with the participants having the option of cashing-out the insurance portion of their accrued benefits or rolling the policy over into the Savings Plan. All employees cashed out the insurance portion of their accrued benefits save for Mr. Ohlmann, a principal in the company and thus a "Key" employee as defined in Section 416 of the Internal Revenue Code. Mr. Ohlmann rolled the insurance policy into the Savings Plan. (*Id*. at ¶ 12, Apx. pgs. 11-12.)

According to PONI's complaint, in 1998 it discovered that the Savings Plan and the ESOP, a second employee benefit plan maintained by PONI, were top-heavy for the period of 1991 through 1998. (*Id*. at ¶ 14, Apx. pg. 12.) PONI in turn advised the Internal Revenue Service that its Plans were in violation of the top-heavy minimum contribution requirements of IRC ¶ 416(c) and IRC Reg. ¶ 1.416-1, M-7. (*Id*. at ¶ 19, Apx. pg. 13.) The IRS required PONI to make the

obligatory contributions to the Plans that PONI had failed to make between 1991 and 1998. (*Id.* at ¶¶ 19, 32, Apx. pgs. 13, 15.)

In its complaint, PONI alleged that Miami Valley and National City had affirmative duties to run the top-heavy testing. (*Id*. at ¶ 18, Apx. pg. 13.) In its first cause of action, PONI alleged that National City breached its fiduciary responsibilities as trustee under Section 404 of ERISA by "incorrectly concluding that the Savings Plan was not Top-Heavy." (*Id*. at ¶¶ 21-23, Apx. pgs. 13-14.) Equally true, according to PONI, National City failed "to coordinate the Top-Heavy testing of the Savings Plan with the Top-Heavy testing of the ESOP." (*Id.* at ¶ 23, Apx. pg. 14.) As a result of these asserted fiduciary failures, PONI sought "damages for additional plan contributions and fines totaling $161,513.00." (*Id.* at ¶ 32, Apx. pg. 15.)

PONI also asserted two tag-along state law claims before the lower court, each based on the same alleged wrongdoing supporting their first claim. Their second cause of action alleged that National City and Miami Valley breached their contracts with PONI for reasons identical to those alleged in Count One. (*Id*. at ¶¶ 24-27, Apx. pg. 14.) The third cause of action also mirrored the first, alleging that National City and Miami Valley negligently misrepresented "their knowledge of the applicable law and their ability to operate the respective Plans in conformity with the applicable law and requirements." (*Id*. at ¶¶ 28-30, Apx. pgs. 14-15.)

In response, National City filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). (R.16 Motion, Apx. pg. 24.) Miami Valley joined this motion. (R.17 Joinder, Apx. pg. 43.) On February 7, 2003, the magistrate issued a report and recommendation, concluding that PONI was not entitled to relief under ERISA on its breach of fiduciary duty claim against National City, as ERISA's limited remedial scheme did not afford PONI a remedy for their ERISA-based claims. (R.29 Report and Recommendations (the "Op."), Apx. pg. 120.) In addition, the magistrate held that PONI's breach of contract and negligent misrepresentation claims were preempted by ERISA. (R.29 Op. at 7, Apx. pgs. 8-12.) The district court adopted the magistrate's report and recommendation in its entirety and dismissed PONI's complaint with prejudice. (R.37 Order, Apx. pg. 174.) PONI now appeals the lower court's determination that the state law claims are preempted by ERISA; PONI has not challenged the lower court's decision dismissing the fiduciary breach claim. (*See* PONI's Br. at 5.)

SUMMARY OF ARGUMENT

In their complaint, PONI asserts three claims, each one arising from the same alleged course of conduct on the part of National City. PONI's primary claim is that National City "violated its fiduciary responsibility as a Trustee under Section 404 of ERISA" when it failed to perform top-heavy related responsibilities for the ERISA Plans. (R.1 Compl. ¶ 21-23, Apx. pgs. 13-14.) In making this claim, PONI emphasized the close connection their case has to ERISA. PONI alleged that their "action arises under Sections 404-409 of the Employee Retirement Income Security Act of 1974 ('ERISA')," (*id*. at ¶ 5, Apx. pg. 10), that National City created the ERISA Savings Plan for PONI, and that National City has provided "trust" and other services to the Savings Plan since its inception, (*id*. at ¶ 11-12, Apx. pg. 11). National City, according to PONI, "violated its fiduciary responsibility" when it failed to take certain steps "required to comply with the applicable law (IRC Section 416), the terms of the Plan, and its fiduciary service obligations." (*Id.* at ¶ 23, Apx. pg. 14.) Accepting all of PONI's allegations as true, as is required at this stage, the lower court dismissed PONI's fiduciary claim, concluding that PONI "undoubtedly [could] prove no set of facts in support of their claims that would entitle them to relief" under ERISA's remedial scheme. (R.29 Op. at 12, Apx. pg. 131.) PONI has not appealed that decision. (*See* PONI's Br. at 5.)

Today, PONI attempts to recast these same allegations in a different light. What plaintiffs described in their complaint as National City's violation of "the terms of the [ERISA] plan" and its "fiduciary responsibility as a Trustee under Section 404 of ERISA," (R.1 Compl. ¶¶ 21-23, Apx. pgs. 13-14), they now describe as claims "involv[ing] laws of general application not directed at the ERISA plans," (PONI's Br. at 13), claims that, in their minds, surely steer clear of ERISA's broad preemption clause. PONI's complaint, however, confirms that their state law claims are based upon the exact same facts underlying their ERISA fiduciary claim. That is why the lower court held that ERISA's broad preemption clause applied to PONI's state law claims. (R.29 Op. at 7-8, Apx. pgs. 126-27.)

This Court should affirm the lower court's decision. Simply put, PONI's state law claims are preempted by ERISA. As trustee for the Savings Plan, National City functioned as an ERISA principal. And ERISA, of course, preempts state law claims between ERISA principals that "relate to" the ERISA plan. PONI's new assertion — that National City performed in two capacities, ministerial recordkeeper on the one hand and ERISA trustee and fiduciary on the other — does nothing to save their state law claims. The fiduciary duty claim PONI pursued under ERISA, keep in mind, is based on the *identical* operative facts that underlie their state law claims. Put differently, PONI is not alleging that National City has worn two different hats in completing two different tasks.

Rather, they assert that National City wore two hats in performing (or failing to perform) *one* task, the top-heavy testing. According to PONI's complaint, which all must accept as true, National City was an ERISA trustee and fiduciary. PONI has lost on its ERISA claim, and it may not recast that claim and those allegations in a new light to avoid ERISA's broad preemption.

Even if they could, PONI's position would nevertheless require the Court to embrace the untenable argument that National City's failure to ensure that PONI's ERISA-governed benefit plans complied with the requirements of ERISA is not "related to" ERISA. Because PONI's state law causes of action seeking contributions for non-key beneficiaries clearly relate to ERISA, the lower court properly held that they were preempted by ERISA.

Lastly, even if these claims are not preempted, they still fail because they involve no cognizable theory of damages. The money PONI was required to pay into the Savings Plan is money that PONI would have otherwise had to invest in the Plans at an earlier point in time. Thus, PONI suffered no actual loss as a result of its failure to comply with ERISA.

ARGUMENT

I. PONI'S STATE LAW CLAIMS ARE PREEMPTED BY ERISA.

A. Standard of Review.

The Court reviews an appeal from the grant of a Rule 12(c) motion for judgment on the pleadings de novo. *See Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001). The relevant standard is the same as that applied to Rule 12(b)(6) motions. *Id.* While the Court must accept all of a plaintiff's allegations as true, it need not accept as true legal conclusions or unwarranted factual inferences. *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999) (affirming the district court's grant of a motion for judgment on the pleadings).

B. Through ERISA, Congress Broadly Preempted the Area of Employee Benefit Plans.

"ERISA was enacted to replace a patchwork scheme of state regulation of employee benefit plans with a uniform set of federal regulations." *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (holding that ERISA preempts breach of contract claim). Through ERISA, Congress enacted a comprehensive system for regulating various types of employee benefit and welfare plans. *See* 29 U.S.C. § 1001 (Congressional findings and declaration of policy); 29 U.S.C. § 1003(a) ("this subchapter shall apply to any employee benefit plan" that touches upon interstate commerce). In so doing, Congress intended to make the regulation of pension plans solely a federal concern. *See Firestone Tire & Rubber Co. v.*

Neusser, 810 F.2d 550, 552 (6th Cir. 1987). As a result, ERISA's comprehensive scope covers nearly every aspect of these plans, including potential litigation generated over their terms. Indeed, "ERISA's preemption clause casts a wide net," *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 938 (6th Cir. 1997), so wide that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). "The phrase 'relate to' is given broad meaning such that a state law cause of action is preempted if it has connection with or reference to [an ERISA] plan." *Fisher v. Combustion Eng'g, Inc.*, 976 F.2d 293, 297 (6th Cir. 1992) (quotation and citations omitted).

In dismissing PONI's state law claims, the lower court correctly applied ERISA's intent to "completely preempt the area of employer benefit plans." *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991). First, the court noted that "ERISA comprehensively regulates employee benefit plans." (R.29 Op. at 5, Apx. pg. 124.) The court also recognized that "[s]tate laws which have incidental impacts on ERISA plans and their trustees or participants are not preempted by ERISA." (*Id.* at 6, Apx. pg. 125.) Applying these principles, the court concluded that "Plaintiffs' breach of contract and negligent misrepresentation claims clearly 'relate to' an ERISA plan." (*Id.* at 7, Apx. pg. 126.) After discussing relevant Supreme Court and Sixth Circuit precedent, the court articulated a series of reasons why the claims relate to an ERISA plan,

including the facts that all claims relate to "the Plans at issue," (*id.)*, involve the valuation of assets and benefits held by the Plans for payment to non-key beneficiaries, (*id.* at 8, Apx. pg. 127), and regard National City's abilities "to conform the ERISA plans with the terms of the Plan documents." (*Id.*)

That decision should be affirmed. The Sixth Circuit affords great deference to Congress's intent "to make regulation of benefit plans solely a federal concern" through ERISA. *Cromwell*, 944 F.2d at 1276 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 41 (1987)). Based on its interpretation of congressional intent and the Supreme Court's repeated emphasis on the "broad scope of preemption under ERISA," *see id.* at 1276, the Sixth Circuit routinely dismisses state law claims seeking to recover for ERISA-related injuries. In *Cromwell*, the Sixth Circuit held that ERISA preempted breach of contract and negligent misrepresentation claims arising from a dispute over an employee benefit plan:

> [O]nly those state laws and state law claims whose effect on employee benefit plans is merely tenuous, remote or peripheral are not preempted. This circuit, too, has repeatedly recognized that virtually all state law claims relating to an employee benefit plan are preempted by ERISA.

Id. at 1276; *see also Peters v. Lincoln Elec. Co.*, 285 F.3d 456 (6th Cir. 2002) (holding that breach of contract claim was preempted by ERISA); *Lion's Volunteer Blind Indus., Inc. v. Automated Group Admin., Inc.*, 195 F.3d 803, 809 (6th Cir. 1999) (holding that state law misrepresentation claim is preempted as ERISA

preemption applies in all cases except when a claim "in no way depend[s] on an ERISA plan for determination"); *Muse v. Int'l Bus. Machs. Corp.*, 103 F.3d 490, 495 (6th Cir. 1996) (preempting "five common law claims," including state law claims based upon "alleged misrepresentations"); *Tassinare v. Am. Nat'l Ins. Co.*, 32 F.3d 220, 225 (6th Cir. 1994) (preempting breach of contract claim). These decisions are in line with legions of others, including those from the Supreme Court. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) ("There is no dispute that the common law causes of action [including breach of contract] asserted in Dedeaux's complaint 'relate to' an employee benefit plan and therefore fall under ERISA's express pre-emption clause. . . .").

C. PONI's State Law Claims "Relate to" an Employee Benefit Plan and Thus Fall Under ERISA's Express Preemption Clause.

The lower court correctly held that PONI's state law claims are preempted by ERISA. PONI's Ohio common law claims are based upon the same alleged conduct supporting the ERISA breach of fiduciary duty claim. All of the claims involve National City's operation of the ERISA benefit plans, (*see* R.1 Compl. ¶¶ 22, 26 and 29, Apx. pgs. 14-15), as well as National City's alleged failure to adhere to the ERISA-plan document, (*see id.* at ¶¶ 23, 27 and 29, Apx. pgs. 14-15). Plainly, these claims "relate to" the ERISA plans and are preempted by ERISA.

1. PONI's claims may not be resolved without reference to and reliance upon the ERISA-governed plans.

To resolve PONI's claims, the Court must look to the terms of PONI's ERISA-governed plans. This fact alone dooms PONI's state law claims. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990) ("Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan.").

PONI's claims call for the Court to interpret PONI's ERISA Plans and their top-heavy requirements. "The ESOP and Savings Plan documents and operation," all agree, "were intended to comply with all federal labor and tax law requirements." (R.1 Compl. ¶ 1, Apx. pg. 10.) As to those ERISA Plans, "[b]oth the ESOP and the Savings Plan contain provisions describing the Top-Heavy rules of Section 416 of the Code, including language attempting to coordinate the Top-Heavy minimum contributions requirements in the event that the Employer sponsors more than one plan." (*Id*. at ¶ 17, Apx. pg. 13.) Thus, to resolve PONI's claims, one must first review the terms of the ERISA Plans, interpret those provisions, and then determine their application to PONI's claims. In a similar case, the Sixth Circuit held that the plaintiff's breach of contract claim was preempted by ERISA because it "necessarily relie[d] on the existence and interpretation of the . . . employee benefit plans." *Zuniga v. Blue Cross & Blue Shield of Mich.*, 52 F.3d 1395, 1402 (6th Cir. 1995). In *Zuniga*, the Court

reviewed a psychiatrist's claim against the administrator of an employee health care program alleging that the administrators "actions in denying him access to the preferred provider panels were arbitrary and illegal," *id.* at 1397, in violation of state law. In finding the claims preempted, the Court noted that "in order for [the plaintiff] to prevail on his claim . . . the ERISA plans must be read," as the plaintiff's "claim has no basis without these plans." *Id.* at 1402.

Similarly, in *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985), the Court held that ERISA preempted a state common law claim for employment termination in violation of public policy. In *Authier*, the plaintiff alleged that his employment was terminated due to his compliance with ERISA. *Id.* at 798. After acknowledging that the plaintiff's claim was technically predicated upon the Michigan common law cause of action for discharge in contravention of public policy, the Court held that the action nevertheless related to an ERISA plan. *Id.* at 800. Critical to the Court's analysis was the fact that the plaintiff's "action hinge[d] upon his assertion that he was terminated for fulfilling his obligations under ERISA." *Id.* Here, PONI's claims hinge upon the assertion that the top-heavy testing failed to meet the requirements of ERISA and the terms of the ERISA plans.

More recently, this Court found that a plaintiff's state law claim for breach of contract, based on the allegation that his employer significantly altered his duties

and reduced his compensation without cause, was not preempted. *See Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 453 (6th Cir. 2003). Once again, the Court focused on whether the cause of action required an assessment of an ERISA plan. In doing so, the Court found that "[b]ecause [the employer's] conduct may constitute a breach of [the plaintiff's] employment contract *irrespective of the plan*, the breach of contract claim is not preempted." *Id.* (emphasis added). In contrast to the claim in *Marks*, PONI's claim here cannot constitute a breach of contract irrespective of the Plan, because PONI's claims are centered upon National City's compliance with ERISA and the terms of the Savings Plan.

2. PONI may not conceal the true nature of its ERISA-based claim by couching it in state law terms.

State law claims are saved from ERISA preemption only where their "effect on employee benefit plans is merely tenuous, remote or peripheral." *Cromwell*, 944 F.2d at 1276. For example, a state law action peripherally affects a plan where a plaintiff relies on a clause in a plan to support an employment discrimination claim. *See Marks*, 342 F.3d at 452. No matter how PONI frames its state law claims, they plainly relate to an ERISA plan. The claims involve the valuation of a beneficiary's Key Man Life insurance policy held by the ERISA plans, (*see* R.1 Compl. ¶ 25, Apx. pg. 14), the "performance of the Top-Heavy Test for the Savings Plan," (*id.* at ¶ 26, Apx. pg. 14), the calculation of the amount of benefits held by the plan that are payable to key and non-key beneficiaries, (*id.* at ¶¶ 14, 18-

19, Apx. pgs. 12-13), National City's ability to conform the ERISA plans "with the applicable law and requirements," (*id.* at ¶ 29, Apx. pg. 15), the coordination of top-heavy contributions where "the Employer sponsors more than one plan," (*id.* at ¶ 17, Apx. pg. 13), and National City's ability to conform the ERISA plans "with the terms of such documents and industry standards." (*Id.* at ¶ 30, Apx. pg. 15.) Against this backdrop, PONI's contention (Br. at 34) that the "ERISA plans are only peripherally involved" rings hollow. In truth, those Plans and their terms are at the center of today's dispute.

At the same time, this case involves "principal ERISA entities," including "the employer, the plan, the plan fiduciaries," *Firestone Tire,* 810 F.2d at 556 (quotation and citation omitted), National City — a "trustee" and "fiduciary" (R.1 Compl. ¶¶ 21-23, Apx. pgs. 13-14) — and Plan contributions in favor of "the beneficiaries." *Firestone Tire*, 810 F.2d at 556 (quotation and citation omitted). All agree that "[c]ourts are more likely to find that a state law relates to a benefit plan, and is preempted, if it affects relations among these principal ERISA entities," (PONI's Br. at 22). The plain language of PONI's complaint cements the fact that the claims against National City involve ERISA principals, and it confirms that those claims reference and have a strong connection to the ERISA plans.

3. PONI's state law claims mirror their ERISA fiduciary claim.

The lower court dismissed PONI's ERISA fiduciary breach claim, holding that ERISA's remedial scheme did not provide a remedy for the asserted ERISA violation. (R.29 Op. at 8-12, Apx. pgs. 127-31.) PONI's state law claims, it bears noting, are cut from the same ERISA-based cloth as their fiduciary claim. To make out the latter claim, PONI alleged that National City "violated its fiduciary responsibility as a Trustee under Section 404 of ERISA." (R.1 Compl. ¶ 21; *see also id.* at ¶¶ 22-23; Apx. pgs. 13-14) Tellingly, their state law claims incorporate the exact same allegations. (*See id.* at ¶¶ 24 and 28; Apx. pgs. 14-15.)

Indeed, the state law claims mirror PONI's fiduciary breach claim. PONI's ERISA-based fiduciary claim is based upon National City's alleged failure to perform "Top-Heavy testing of the Savings Plan," failure to coordinate that testing with the ESOP, and failure to comply with "the terms of the Plan," the very basis for their contract claim. (*See id.* at ¶¶ 25-27, Apx. pg. 14.) The same is true for the negligent misrepresentation claim, which is based upon the exact same ERISA plan — and involves the exact same parties and damages — that gives rise to PONI's fiduciary claim. (*See id.* at ¶¶ 28-30, Apx. pgs. 14-15.) Against this backdrop, it becomes exceedingly clear that all of PONI's claims question who must ensure the availability of funds for the Plans' non-key beneficiaries in accordance with ERISA's top-heavy rules and the terms of the ERISA Savings

Plan. PONI's state law claims rely on the same factual allegations as those underlying their ERISA fiduciary breach claim, one that all should agree relates to an ERISA plan. *Cf.* 29 U.S.C. § 1002(21)(A) ("a person is a fiduciary with respect to a plan").

PONI may not end-run ERISA preemption by cloaking its ERISA fiduciary claim in state law clothing. Preemption "depends on the conduct to which such [state] law is applied, not on the form or label of the law." *Blakeman v. Mead Containers*, 779 F.2d 1146, 1151 (6th Cir. 1985) (quotation and citation omitted), *abrogated on other grounds by Massachusetts v. Morash*, 49 U.S. 107 (1989). For example, in *Nester v. Allegiance Healthcare Corp.*, 315 F.3d 610 (6th Cir. 2003), the Court found that a former employee's claim to recover transition pension plan benefits, couched as a state law breach of contract claim, was completely preempted by ERISA. *Id.* at 613. Similarly, in another recent case, the Court found that ERISA preempted a plaintiff's state law claims, including breach of contract and misrepresentation, because they essentially restated the plaintiff's ERISA claim that the employer breached its fiduciary duty. *Hardy v. Midland Enters.*, 66 Fed. Appx. 535, 539 2003 WL 2007940, at *3 (6th Cir. April 30, 2003) (unpublished) (attached hereto). In sum, it is the essence of a claim, not the label placed on it, that determines whether it is preempted. *Cromwell*, 944 F.2d at 1276. Plainly, the essence of PONI's action is trustee National City's failure to calculate

the benefits owed to non-key beneficiaries under the ERISA Savings Plan document. These claims may not be pursued through common law theories.

D. PONI's Contrary Arguments Are Unpersuasive and Unsupported.

1. The lower court applied the proper standard for determining whether the state law claims relate to ERISA.

PONI makes much of the three-prong test for determining whether a state law "relates to" an ERISA plan articulated in *Firestone*. (*See* Br. at 17-18.) While no one doubts that *Firestone,* which was decided in 1987, remains good law, a host of Sixth Circuit cases have found state law claims to be preempted by ERISA without reference to *Firestone*. *See, e.g., Peters v. Lincoln Elec. Co.*, 285 F.3d 456 (6th Cir. 2002); *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999); *Zuniga v. Blue Cross & Blue Shield of Mich.*, 52 F.3d 1395 (6th Cir. 1995). The lower court, in any event, did consider the three elements outlined in *Firestone,* finding that "although both the common law of contracts and of negligent misrepresentation are traditionally a subject matter for the state courts, that fact is outweighed at present by the fact that [the] contract at issue is governed by the rules of ERISA, which are exclusively a federal concern." (*See* R.29 Op. at 7, Apx. pg. 126.)

The Court also relied in part on the Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (noting "ERISA's broad pre-emption provision"). While PONI takes issue with the lower court's application of *Ingersoll-Rand*, (Br. at 18-20), contrary to PONI's claim, the lower court did not

create a new test for determining whether a state law claim was related to ERISA. In *Ingersoll-Rand*, the Supreme Court held that a claim over an employer's contributions to an employee pension fund, a claim similar to that asserted here, "'relates to' an ERISA-covered plan within the meaning of § 514(a), and is therefore pre-empted." *Ingersoll-Rand,* 498 U.S. at 140. In finding preemption, the Supreme Court rejected the plaintiff's argument that the "plan is irrelevant to the . . . cause of action because all that is at issue is the" conduct of the defendant as it relates to payments to the plan, a charge also made in PONI's legal papers. That argument "misses the point," because, like here, "there simply is no cause of action if there is no plan." *Id.* at 140; (*see also* R.29 Op. at 8, Apx. pg. 127.) The "existence of a pension plan is a critical factor in establishing liability." *Id*. at 139-40. And "[b]ecause the court's inquiry must be directed to the plan, this judicially created cause of action 'relates to' an ERISA plan." *Id.* at 140. Notably, PONI has not cited a single case that calls into question this language from *Ingersoll-Rand*.

The Sixth Circuit has hewed closely to the holding in *Ingersoll-Rand,* agreeing that state law claims, to avoid preemption, must not rely on the existence of an ERISA plan:

> [T]his claim is much more reminiscent of *Ingersoll-Rand*…, wherein a former employee's claim that his employer wrongfully terminated him in order to avoid having to make payments to an ERISA plan was preempted, because it would require proof of the existence of the ERISA plan and the payments behind the

> employer's improper motive. We are therefore constrained to hold that [the] state law claim is sufficiently 'related to' the subject matter regulated by ERISA to be preempted.

Lion's Volunteer, 195 F.3d at 809; *see also Zuniga,* 52 F.3d at 1402 (applying *Ingersoll-Rand* and finding plaintiff's breach of contract claim preempted because it relied on the existence and interpretation of ERISA plans). The lower court's analysis is far from a new and untested approach. It was a proper application of precedent from the Supreme Court as well as decisions by this Court.

2. The lower court analyzed the ERISA document identified in PONI's complaint.

PONI errs in maintaining (Br. at 20) that the lower court analyzed the "wrong contract" in concluding that PONI's claims were preempted. Against the backdrop of PONI's complaint, one cannot fairly accept PONI's contention that "the contracts at issue for purposes of PONI's breach of contract and negligent representation claims are those relating to the commitment of NCB . . . to perform record keeping services for PONI's retirement plans." (Br. at 21.) The only agreement identified in PONI's complaint is the ERISA Plan document. As PONI makes plain, it established the Savings Plan, (R.1 Compl. ¶ 10, Apx. pg. 11), and later amended the Savings Plan by "utilizing the form of the National City Bank Basic Prototype Plan and Trust/Custodial Account Basic Plan Document #04 and the Non-Standardized Adoption Agreement Prototype Cash or Deferred Profit

Sharing Plan and Trust Custodial/Account sponsored by National City Bank." (*Id.*) These documents along with the earlier versions of the Savings Plan are "collectively referred to as the 'Savings Plan'" in PONI's complaint. (*Id.*) It is this same "Savings Plan [that] contain[s] provisions describing the Top-Heavy rules of Section 416 of the Code, including language attempting to coordinate the Top-Heavy minimum contributions requirements in the event that the Employer sponsors more than one plan." (*Id.* at ¶ 17, Apx. pg. 13.) And by failing "to comply with the applicable . . . terms of the Plan," National City, according to the complaint, is liable to PONI. (*Id.* at ¶ 23, Apx. pg. 14.) This agreement serves as the basis for PONI's ERISA claim as well as its state law claims. Proving this is true, their breach of contract claim alleges that National City "materially breached [the Savings] Plan[s]." (*Id.* at ¶ 25, Apx. pg. 14.) This is precisely why, as the lower court stated, "the contract at issue is governed by the rules of ERISA." (R.29, Op. at 7, Apx. pg. 126.)

PONI's new assertion, that their state law claims arise out of agreements they did not disclose or address in their complaint, does not save their claims. To start, today's assertions directly conflict with PONI's complaint, which PONI drafted and which all must accept as true. *See United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 643 (6th Cir. 2003) (noting that review of a Rule 12(c) motion must be based on the allegations in the complaint). Further, to

the extent there is another agreement related to the Savings Plan, one that PONI never disclosed in its complaint, it is exceedingly difficult to accept PONI's contention that this agreement does not "relate to" ERISA. The lower court recognized that the heart of PONI's claims is the allegation that National City failed to provide service to the ERISA Plan sufficient to ensure that the Plan complied with federal law. Accordingly, to the extent any other agreement actually exists, if it addresses top-heavy testing for the ERISA Plan, then it "relates to" ERISA.

Curiously, the only case PONI cites in support of its contention that "[c]ontracts for the provision of services are independent of the ERISA qualified plan" is a case from an extraterritorial district court. (Br. at 21 (citing *Pension Plan for Employees of Battenfeld Grease & Oil Corp. v. Principal Mut. Life Ins. Co.*, 62 F. Supp. 2d 1055 (W.D.N.Y. 1999).) Even if *Principal Mutual* carried precedential authority in this Circuit, it still would not alter the appropriate analysis here. To be sure, service contracts and ERISA plans *may* be independent, as was the case in *Principal Mutual*. *See* 62 F. Supp. 2d at 1060 ("[T]he breach of contract claim here is entirely independent of the ERISA pension plan. It can stand on its own."). But *Principal Mutual* is a far different case than this one. There, the defendant was a non-trustee insurance company, *see id.* at 1055, not a trustee and fiduciary like National City. Indeed, in *Principal Mutual* the trustee was not even

a party to the action. *See id.* at 1056. Further, the agreements at issue there were contracts for funding the pension plans, *see id.* at 1059 (noting the "claim against Principal aris[ing] under a private contract, and not under the terms of an employee benefit plan") (quotation and citation omitted), not an ERISA Savings Plan, which is at the core of today's case. Lastly, the agreements there "were not formed under any state law mandating this particular method of funding the ERISA pension plans." *Id.* at 1060. Here, on the other hand, the top-heavy testing and non-key employee benefit requirements were mandated by ERISA and other federal provisions.

Notably, *Principal Mutual* distinguished decisions finding preemption where, like here, the merits of the claims were "contingent upon the rights conferred by the ERISA plan." *Id.* at 1060 (contrasting ERISA preemption decisions). Here, of course, the claims *are* contingent upon the rights of non-key employees to collect the appropriate amount of benefits under a plan that is deemed "top-heavy" under federal law. These claims are dependent on the ERISA plan and cannot stand on their own. *Principal Mutual* is nothing more than another in a long line of cases explaining that if the state law claims are independent from ERISA they are not preempted, but if they relate to an ERISA plan, preemption applies. If it is the latter, the claims must be brought under ERISA — or not at all. *See Provident Bank*, 170 F.3d at 615 ("These claims merely attach new state-law

labels to the ERISA claims for breach of fiduciary duty . . . for the apparent purpose of obtaining remedies that Congress has chosen not to make available under ERISA. . . . [S]ubstitute common law claims are preempted.").[1]

3. The relationship at issue is governed by ERISA.

Next, PONI argues (Br. at 22-23) that ERISA does not preempt its state law claims because National City was not functioning as an ERISA principal. Against the backdrop of PONI's complaint, this claim is exceedingly difficult to accept. While PONI now maintains that "NCB and MVP . . . are not fiduciaries," (Br. at 23), their complaint sings a different tune. It alleges that National City "violated its fiduciary responsibility as a Trustee under Section 404 of ERISA," (R.1 Compl. ¶¶ 21-23, Apx. pgs. 13-14.) Equally confusing, while PONI acknowledges (Br. at 23) that "the entity named in the plan instrument as a fiduciary" is an ERISA entity that may sue or be sued only through ERISA, they turn a blind eye to the statements in their own complaint alleging that the Savings Plan created fiduciary responsibilities on the part of National City.

Perhaps recognizing these pleading inconsistencies as well as the mountain of case authority weighing against them, PONI attempts to craft a new standard for

[1] While the Court in *Provident Bank* did note that in some instances claims "against non-ERISA entities" may not be preempted, *id*. at 617, it bears emphasis that the non-ERISA entities in question there included the Diocese of Cleveland, the Archdiocese's bank, and two of the bank's employees. *See Provident Bank,* 170 F.3d at 61 n.2. Those unrelated parties are a far cry from the ERISA-related parties involved here.

ERISA preemption. They maintain that their state law claims are unrelated to, do not reference, and have no connection to ERISA because they are "separate" claims due to the different roles National City purportedly played regarding the ERISA Savings Plan. In bringing its fiduciary claim, however, PONI has already conceded that the alleged wrongdoing relates to ERISA and the Savings Plan and involves ERISA principals. Now that PONI's ERISA fiduciary claim will not supply a remedy, they seek to rewrite those claims by dressing them up in state law clothing. This is just the kind of pleading tactic ERISA aims to resolve. "ERISA was enacted to replace a patchwork scheme of state regulation of employee benefit plans with a uniform set of federal regulations." *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995). Congress's intent in enacting the ERISA statute may not be overcome by clever pleadings. "The Supreme Court has admonished courts to not tamper lightly with ERISA's enforcement scheme." *Pension Fund-Mid Jersey Trucking Indus. Local 701 v. Omni Funding Group*, 731 F. Supp. 161, 177 (D.N.J. 1990) (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 137 (1985)); *see also Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is especially strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for

enforcement."). Plainly, this enforcement scheme does not allow a creative plaintiff to sidestep its preemption clause through imaginative pleadings.

Nor can one accept PONI's contention that National City was not wearing its ERISA trustee/fiduciary hat when it allegedly failed to adhere to the ERISA top-heavy testing requirements. (*See* Br. at 12 ("NCB effectively wore two separate and distinct hats — one in a fiduciary capacity, and one in a non-fiduciary capacity.").) This is not a case where National City allegedly engaged in two different activities, with one allegedly giving rise to ERISA liability and the other allegedly giving rise to state law liability. PONI's claims are all based on the exact same act (or failure to act). In performing that singular act, National City was wearing one hat, its fiduciary hat, as PONI's complaint confirms.

PONI, to be sure, is correct in asserting (Br. at 20) that ERISA plans in some circumstances may assert state law causes of action against non-fiduciaries without having their claims preempted by ERISA. *Accord Provident Bank*, 170 F.3d at 617 ("[T]o the extent that the Plans have asserted state-law claims against non-ERISA entities, those claims are not preempted."). This exception to ERISA preemption, however, has no application here. National City, keep in mind, functioned as an ERISA trustee and fiduciary, making it an ERISA entity. (*See* R.1 Compl. ¶ 23, Apx. pg. 14.) Nor are those claims consistent with the plain terms of the ERISA statute, to say nothing of this Court's holdings. Trustees, in

most all instances, are considered ERISA fiduciaries. *See, e.g.*, 29 U.S.C. § 1102(c)(1) (stating that one may serve "in more than one fiduciary capacity with respect to the plan, (including service both as trustee and administrator)"); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002) (noting that ERISA "'imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries'") (quoting *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988)), *cert. denied*, 123 S. Ct. 2077 (2003). And claims against fiduciaries, it bears emphasis, are preempted by ERISA.

Even when read in the light most favorable to PONI, their complaint does not provide a basis for divorcing the state law claims from the ERISA claims. As an alleged fiduciary, National City's conduct is clearly governed by ERISA. Indeed, "the definition of a fiduciary under ERISA . . . is intended to be broader than the common law definition." *Provident Bank*, 170 F.3d at 613. Thus, while "[a] fiduciary's functions do not include plan adoption, amendment, design or termination," *Abbott v. Pipefitters Local Union No. 522 Hosp., Med., & Life Benefit Plan*, 94 F.3d 236 239 (6th Cir. 1996), that is not the nature of the misconduct that PONI alleges here. Rather, PONI maintains that National City erred in "its fiduciary service obligations" and violated "its fiduciary responsibility" and "the terms of the Plan" by failing to determine the amount of

contributions required for the Plan to make the appropriate level of benefits available to non-key employees. (R.1 Compl. ¶ 23, Apx. pg. 14.) In the end, PONI's state law "claims merely attach new, state-law labels to the ERISA claim[] for breach of fiduciary duty and recovery of benefits, for the apparent purpose of obtaining remedies that Congress has chosen not to make available under ERISA." *Provident Bank*, 170 F.3d at 615.

4. PONI's cases do not change this analysis.

In support of its position that "[c]ourts have consistently held that parties providing ministerial and non-fiduciary services to ERISA qualified plans are not ERISA principals, and may be held liable for state law claims relating to their non-fiduciary functions," (PONI's Br. at 25), PONI cites a series of extraterritorial trial court decisions. Not only are these cases non-binding on this Court, but they also address facts much different than those asserted here. These are not cases where the claims relate to ERISA principals and to key requirements of the ERISA plan and its administration, nor are they claims that involve plan contributions for beneficiaries required by the Plan and federal law.

Many of these cases are simple claims against independent actuaries. *See, e.g., Redall Indus., Inc. v. Wiegand*, 876 F. Supp. 147, 151 (E.D. Mich. 1995) (addressing claims involving actuaries and consultants "without regard to whether they service ERISA employee benefit plans"); *Isaacs v. Group Health, Inc.*, 668 F.

Supp. 306, 312 (S.D.N.Y. 1987) (addressing claims against actuary and computer services provider and noting that "plaintiffs' claims do not 'hinge on' whether [defendant] failed to meet ERISA's obligations"); *Aetna Cas. & Sur. Co v. William Mercer, Inc.*, 173 F.R.D. 235, 237, 238 (N.D. Ill. 1997) (addressing claims against "actuary and consultant" that do "not implicate any Fund provisions" and do not "seek to affect Fund benefits"); *Airparts Co. v. Custom Ben. Servs. of Austin, Inc.*, 28 F.3d 1062, 1064 (10th Cir. 1994) (addressing claims against actuary "hired to advise the plan's trustees" for failure to give advice on Omnibus Budget Act of 1987); *see also Dawson v. Detroit Lumber & Bldg. Ass'n Ret. Plan*, 1995 WL 871171, at *8 (E.D. Mich. June 22, 1995) (unpublished) (ERISA did not preempt third-party claims against law firm for allegations based upon legal advice that did "not effect the relations among the principal ERISA entities"), *aff'd, Sibley Lumber Ctrs., Inc. v. McLeod Admin. Serv, Inc.*, 97 F.3d 1452 (6th Cir. 1996). Actuaries, of course, are not ERISA trustees, nor are they ERISA fiduciaries, and the allegations against them in the cases cited by PONI are different than PONI's allegations here. *Compare Gallagher Corp. v. Mass. Mut. Life Ins. Co.*, 105 F. Supp. 2d 889, 895 (N.D. Ill. 2000) (addressing claims against insurance company for actuarial work and noting that "actuaries are not fiduciaries under ERISA") *with* PONI's Complaint (R.1 Compl. ¶¶ 21-23, Apx. pgs. 13-14 (addressing PONI's breach of fiduciary claim against National City and noting PONI's fiduciary

allegations against National City as "Trustee under Section 404 of ERISA")). In truth, ERISA preempts claims based upon relationships "between plan and trustee." *Bourns, Inc. v. KPMG Peat Marwick*, 876 F. Supp. 1116, 1119 (C.D. Cal. 1994).

Equally important, these cases do not hold, as PONI suggests (Br. at 22-27), that claims against nonfiduciaries escape ERISA preemption. In fact, the opposite is true. Even if National City is not a fiduciary, a conclusion contrary to the allegations in PONI's complaint, the result is the same. Seemingly all "courts of appeals that have considered the question agree that state causes of action asserted against nonfiduciaries are preempted by ERISA." *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 419 (4th Cir. 1993). Because "ERISA may also provide limited relief against . . . nonfiduciary defendants," *Provident Bank*, 170 F.3d at 615, such state law claims are preempted. *Accord Gibson v. Prudential Ins. Co. of Am.*, 915 F.2d 414, 418 (9th Cir. 1990) ("[W]e find that Congress did intend ERISA to preempt claims that relate to an employee benefit plan even if the defendant is a nonfiduciary."); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987) (holding that "state law claims against non-fiduciary plan administrators . . . are preempted" by ERISA); *cf. Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (holding that ERISA does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty).

Not only does ERISA preemption apply regardless of whether the defendant is a fiduciary, it similarly applies regardless of whether the state law claim is brought by beneficiaries, *see Fisher*, 976 F.2d at 296-97, an ERISA plan, *see Provident Bank*, 170 F.3d at 616-17; *Cent. States, SE & SW Areas Pension Fund v. Mahoning Nat'l Bank*, 112 F.3d 252, 256 (6th Cir. 1997) (preempting state-law action brought by an ERISA plan), labor trust funds, *see In re Mich. Carpenters Council Health & Welfare Fund*, 933 F.2d 376, 383 (6th Cir. 1991), a doctor seeking payment for medical services provided, *see Zuniga*, 52 F.3d at 1396-97 (preempting breach of contract claim), or an ERISA sponsor like PONI. At day's end, the claims are measured by whether they relate to an ERISA plan, not by the labels a plaintiff puts on them.

5. PONI seeks to recover plan benefits through its state law claims.

Finally, PONI maintains that its claims are not preempted because it "is not resorting to state law to avail itself of an alternative cause of action to collect ERISA plan benefits." (Br. at 31.) By all accounts PONI *is* seeking benefits owed to non-key employees as a result of the Savings Plan's top-heavy status. "The ESOP and Savings Plan," all agree, "were established to help eligible employees provide for their future security." (R.1 Compl. ¶ 1, Apx. pg. 10.) Due to a lack of top-heavy testing, PONI "made no minimum Top-Heavy contributions as required by law," (*id.* at ¶ 14, Apx. pg. 12), contributions that were payable directly to non-

key employees. Indeed, PONI has described these benefits to include "participant salary deferral contributions, matching contributions, and a discretionary employer contribution." (R.24 PONI's Mem. in Opp. to National City's Rule 12(c) Motion, at 11, Apx. pg. 106.) Through this action, PONI seeks to recover for these "additional plan contributions," (R.1 Compl. ¶ 32, Apx. pg. 15), contributions that the Plan's non-key beneficiaries have a right to receive from the Plan.[2]

For these reasons, it is equally difficult to accept PONI's contention that their "claims do not affect the terms of the plans, the benefits under the plans, or PONI's obligations to the participants and beneficiaries under the plans." (Br. at 13.) As PONI recognizes (Br. at 33), ERISA's preemption "clause was meant to preempt state law claims utilized as an alternative cause of action to collect ERISA plan benefits." Yet that is exactly what they aim to achieve here, using their state law claims to recover contributions to the Savings Plan that are owed to non-key employees as part of their retirement benefits held by the Plan. Confirming that this is true, it "is well-settled that fiduciary liability under ERISA arises in favor of the plan itself, and that plan participants may not seek to recover in an individual

[2] Even if PONI is correct, and their complaint as well as the top-heavy rules strongly suggest they are not, the Supreme Court has made clear that ERISA is not limited solely to actions seeking pension benefits. *See Ingersoll-Rand*, 498 U.S. at 145 ("[I]t is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits."). PONI utilizes this same rationale as the basis for its contention that public policy considerations support a finding that its state law claims are not preempted. (*See* Br. at 33.) The Supreme Court has explicitly rejected this argument. *See Ingersoll-Rand*, 498 U.S. at 145.

capacity." *Tassinare v. Am. Nat'l. Ins. Co*., 32 F.3d 220, 222 (6th Cir. 1994). Here, the claims for alleged lost benefit contributions arise on behalf of the Plan. "[T]he liability of a fiduciary," like National City here, "is to reimburse the plan, not the individual participants," for lost Plan contributions. *Id*. at 223 n.3 (quoting *Tregoning v. Am. Community Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993)).

This case is similar to *Tassinare*, where the Court held that common law claims for lost contributions to the ERISA plan were preempted by ERISA. *See Tassinare,* 32 F.3d at 224-25. In *Tassinare*, a group of employees alleged that the employer "reneged on its promise" to make additional contributions to the benefit plan, benefits that may have been collectable by the plaintiffs. *See id.* at 222. There, like here, the plaintiffs complained about the lack of "matching payments" of "retirement benefits" made to the ERISA plan. *See id.* at 223. There, like here, the matter was brought to the attention of the IRS. *See id.* at 224. And there, like here, the plaintiffs had a right to a remedy, if at all, through "a cause of action for fiduciary breaches," *id*. at 225, and not through "common law claims." *Id.* (holding that common law claims, including claim for breach of contract, were preempted).

The result should be the same here. PONI's claims seek contributions to the Plans that are ultimately payable to non-key participants and their beneficiaries. Those claims must be pursued through ERISA's remedial scheme.

* * * * *

As the lower court recognized, the failure of PONI's ERISA claim coupled with the preemption of its state law claims seemingly leaves PONI without a remedy for their alleged wrong. (*See* R.29 Op. at 11-12, Apx. pg. 130-31 (holding that the fact ERISA may "leave a plaintiff without a remedy in no way undermines a court dismissing the claim").) The absence of a meaningful remedy under ERISA, however, does not independently save potential state-law remedies from ERISA's broad preemption. *See Pilot Life*, 481 U.S. at 54 ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."); *Agrawal v. Paul Revere Life Ins. Co.*, 205 F.3d 297, 302 (6th Cir. 2000) (noting that the absence of a remedy under ERISA does not mean that state-law remedies are preserved); *Provident Bank*, 170 F.3d at 616 (same); *Muse v. Int'l Bus. Machs. Corp.*, 103 F.3d 490, 495 (6th Cir. 1996) (stating that the nature of ERISA preemption is not altered merely because some plaintiffs may be left without a meaningful remedy); *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 943 (6th Cir. 1995) ("That ERISA does not provide the full range of remedies available under state law in no way undermines ERISA preemption."); *Cromwell*, 944 F.2d at 1276 (holding that the fact that plaintiffs may be left without a remedy is not

relevant to a preemption analysis). PONI has only Congress to blame for its apparent lack of a remedy. In this instance, however, there is nothing that Congress has taken away. As explained next, PONI has not alleged an injury that would entitle it to seek relief under ERISA or any other legal theory.

II. PONI'S CLAIMS ALSO FAIL BECAUSE THEY ALLEGE NO COGNIZABLE DAMAGES.

PONI claims they incurred damages as a result of "plan contributions" they made in conjunction with the March 2000 Closing Agreement entered into with the IRS (R.1 Compl. ¶¶ 14, 32, Apx. pgs. 12, 15.) In accordance with the Agreement, PONI made contributions to the combined ERISA plans of $99,676.80, representing top-heavy contributions between 1991 and 1998, and $37,415.37, representing earnings from top-heavy contributions between 1991 and 1998. PONI also agreed to pay $5,000 to the U.S. Treasury.

PONI's top-heavy contributions were necessary regardless of when the testing was done and by whom it was done. *See* 26 U.S.C. § 416 (special rules for top-heavy plans). Late-paid contributions to the plan, had the testing occurred in 1991 and 1998, would have been paid by PONI anyway at the appropriate year-end. PONI was always obligated to make that payment. As a general matter, 26 U.S.C. §§ 401 and 411 make plain that contributions to qualified plans come from "employee[s]" and "employer[s]," not plan administrators or trustees. 26 U.S.C. § 411(a)(1) ("employee contributions") and (a)(2) ("employer contributions"); *see*

also 26 U.S.C. § 401(a)(1) (contributions made by "employees, or employer, or both)"). And 26 U.S.C. § 416, "rules for top-heavy plans," explains that the employer is required to make all necessary contributions to ensure that a plan meets the top-heavy requirements. *See, e.g.*, 26 U.S.C. § 416(c)(1)(A) ("A defined benefit plan meets the requirements of this subsection if the accrued benefit derived from employer contributions. . . ."). Further, the Internal Revenue Manual's provisions on top-heavy plans requires IRS examiners to "[c]heck whether the employer has made a minimum contribution to the non-key employees in a top-heavy defined contribution plan" and to "[m]ake sure minimum contributions for non-key employees are made." Internal Rev. Manual § 4.72.5.3.1.1 (Examination Steps) (July 7, 2001).

PONI's allegations are fully analogous to those made by taxpayers suing their accountants for negligently preparing their tax returns. Like the taxpayer, PONI seeks "damages" for amounts it alone was responsible to pay. For example, in *Thomas v. Cleary*, the Clearys sued Thomas, a C.P.A., and his accounting firm, alleging that Thomas acted negligently in handling the sale of their business. 768 P.2d 1090 (Alaska 1989). As part of their claim for damages, the Clearys requested an amount equal to what they owed in unpaid, corporate taxes. *Id*. at 1091. The Alaska Supreme Court held that the malpractice action was not yet ripe. *See id.* at 1092 n.5; *id*. at 1093 (holding that because the IRS had not sent the

Clearys a notice of deficiency nor imposed a tax assessment against them, they had not suffered the "required injury or harm"). The court further recognized that even if the injury did ripen in the future, the Clearys' damages theory was fatally flawed. The court reasoned that, like here, the plaintiffs sought recovery for amounts they were required to pay anyway at an earlier date:

> The Clearys were, and are, under a legal duty to pay taxes.…[T]he appropriate measure of damages is the difference between what the Clearys would have owed in any event if the tax returns were properly prepared, and what they owe now because of their accountants' negligence, plus incidental damages. The Clearys should not recover as damages all taxes owed upon the corporate liquidation.

Id. at 1092 n.5.

As demonstrated in *Cleary*, and as confirmed by other courts as well as legal commentators, "the additional taxes owed by the taxpayer normally are not an element of recoverable damages, because they just represent what the taxpayer owes the government. They would have also been owed on a correct, timely-filed return." Jacob L. Todres, *Malpractice & The Tax Practitioner: An Analysis of the Areas in Which Malpractice Occurs*, 48 EMORY L.J. 547, 565 (1999) (footnote omitted) (providing an overview of cases concerning accountant malpractice); *see also DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1447 (9th Cir. 1996) ("The plaintiffs first argue that the back taxes are recoverable as out-of-pocket damages. The plaintiffs offer no authority in support of this argument, and we reject it.");

Moonie v. Lynch, 256 Cal. App. 2d 361, 364 (Cal. Ct. App. 1967) (The taxpayer "at all times was liable for the deficiency but the deficiency in itself did not cause injury for which he could recover against plaintiff."); Caroline Rule, *What And When Can a Taxpayer Recover From a Negligent Tax Advisor?*, 92 J. TAX'N 176 (2000) ("In most circumstances where an accountant's negligence leads to an underpayment of tax, the taxpayer is not permitted to recover the tax deficiency itself as damages, because that liability to the government arises not from the accountant's bad advice, but rather from 'the ineluctable requirements of the Internal Revenue Code.'").

The relevant analysis, and the ultimate resolution, should be no different here. PONI seeks to make National City pay for contributions that PONI was already required to make to the combined plans. Because these contributions were required regardless of when or how the top-heavy testing was conducted, PONI has no cognizable damages claim.

Much the same is true for the $37,415.37 paid as earnings on the top-heavy contributions. This amount constituted the expected earnings the $99,676.80 would have yielded had that money been deposited in the ERISA Plan. And because PONI had this money to invest or otherwise use until 2000, PONI should have earned a significant return on that money. Considering the economy's and markets' rapid rise from 1991 to 2000, that return should be equal to—if not greater

than—the $37,415.37 assessed by the IRS. *See, e.g.*, Steve Liesman, *How Much Damage Will a Profit Slowdown Do?*, WALL STREET J., Nov. 8, 2000, at A2 (noting the "stock-market boom of the 1990s"); Jonathan Clements, *Investors Should Prepare for Rain, Too*, WALL STREET J., June 19, 2001, at C1 ("over the 15 years through year-end 2000, stocks gained an average 16% a year"). Thus, PONI suffered no injury by making the payment for earnings, and may have even gained a windfall. *See Stone v. Kirk*, 8 F.3d 1079, 1093 (6th Cir. 1993) ("Neither are the Stones entitled to recover the interest they had to pay on their back taxes, at least insofar as the IRS charged a market rate of interest. The Stones had the use of the tax money, of course, until the money was belatedly turned over to the IRS."); *DCD Programs*, 90 F.3d at 1451 ("We also reject the plaintiffs' argument that interest paid to the IRS may qualify as either out-of-pocket or consequential damages. The interest paid merely compensated the IRS for the…use of money to which [plaintiffs] were not entitled…[and] merely prevented the partners from receiving a windfall."); *Avon Prods., Inc. v. United States*, 588 F.2d 342, 343 (2d Cir. 1978) (discussing whether a taxpayer owed interest on a deficiency in its corporate income tax; "it is a clearly established principle that interest is not a penalty but is intended only to compensate the Government for delay in payment of a tax"); *see also Malpractice & the Tax Practitioner*, 48 EMORY L.J. at 565 (Courts deny taxpayers' recovery of interest on delinquent taxes because "they do

not view it as an element of the damages caused by malpractice.…[S]o long as the plaintiff kept the tax money rightfully due the government, he was receiving a benefit to which he was not entitled, to wit, the time-value of the money — the interest. . . . A recovery of the interest from a malpractice defendant, according to this view, would give the plaintiff a windfall.").

In the lower court, PONI's only response was that it was injured because "it could have taken action that would result in the highest contribution for any key employee being zero." (R.24 Opp. to Rule 12(c) Mot. at 11, Apx. pg. 106.) This explanation fails for at least four reasons. *First*, conspicuously absent from PONI's complaint is any allegation that it would have changed its course of action had the top-heavy testing occurred at the end of each year. Although the allegations actually included in the complaint must be interpreted most favorably to PONI, the complaint is silent on this point. *Cf. Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906, 907 (6th Cir. 2002) ("if allowed to go forward with his new claim, [plaintiff] would have to allege additional facts . . . . [He] submitted none of those facts"; affirming judgment for defendant); *A.S. Abell Co. v. Baltimore Typographical Union No. 12*, 338 F.2d 190, 193 (4th Cir. 1964) ("On a motion for judgment on the pleadings made pursuant to Rule 12(c), only the pleadings are considered, and thus the District Court, in considering only the complaint and answer . . . , properly observed the scope of the motion before it.").

Second, neither PONI's complaint nor its opposition memorandum offered any explanation as to what "action" they could have taken to make the contributions zero, and whether this hypothetical "action" is consistent with ERISA's comprehensive provisions. Such speculative damages cannot form the basis of a viable claim. *See, e.g., Coal Res., Inc. v. Gulf & W. Indus., Inc.*, 954 F.2d 1263, 1266 (6th Cir. 1992) ("Damages which are remote or speculative are not permitted."); *Province v. Cleveland Press Pub. Co.*, 787 F.2d 1047, 1053 (6th Cir. 1986) (finding that where it was unclear that alternative action by the employer would have altered the alleged losses to plaintiffs' employees, such injuries were "indirect and speculative").

Third, as explained in Miami Valley's Joinder Motion, filed September 26, 2002, even after PONI learned in 1997 that their Plans were top-heavy, PONI continued to keep the Plans top-heavy, in favor of their key employees, and continued to make annual top-heavy contributions. (*See* R.17 Joinder at 2, Apx. pg. 44 (noting that PONI "has elected to continue both Plans in effect for the four Plan Years (i.e. the 1998, 1999, 2000, and 2001 Plan Years) since the [top-heavy] problem was discovered and corrected" and has kept the plans top-heavy). PONI has never answered this unvarnished and ultimately fatal truth.

Fourth, PONI's reasoning fails because it is analogous to taxpayers suggesting they would have earned less, made more charitable contributions or

purchased a bigger house, thereby decreasing their tax liability, had they realized the liability was higher than anticipated. PONI offers no case in the ERISA context (or any other context) that recognizes a viable cause of action based upon a party's allegation that it would have changed its tax-related habits had it learned of its tax liability earlier. *See, e.g., DCD Programs*, 90 F.3d at 1447 (9th Cir. 1996) (noting that "[l]oss of expected tax benefits do not qualify as out-of-pocket loss") (quoting 2 T. Hazen, *The Law of Securities Regulation,* § 13.7, at 115 (2d ed. 1990)); *Freschi v. Grand Coal Venture,* 767 F.2d 1041, 1051 (2d Cir. 1985) (holding that "any award in compensation for hoped-for tax savings would be an impermissible award of damages arising from an expectation interest") *judgment vacated by* 478 U.S. 1015, *and amended by* 806 F.2d 17 (2d Cir. 1986). All told, it is exceedingly clear that PONI's claims seek "damages," *i.e.*, late-paid top-heavy contributions, that only PONI was obligated to make. In this light, PONI suffered no injury (and possibly even gained a windfall) by making this admittedly late payment. Only PONI, then, should bear the expense of making payments it alone was obligated to make.

Accordingly, even if PONI's claims are not preempted by ERISA, the decision in favor of National City should be affirmed on the alternate ground that PONI has failed to plead any cognizable theory of damages.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed.

Dated: December 18, 2003 Respectfully submitted,

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