CASE NO: 15-20282

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RALPH WHITLEY, Individually and on behalf of others similarly situated, FRANKIE RAMIREZ; DAVID HUMPHRIES, CHARIS MOULE; EDWARD F. MINEMAN; SYED ARSHADULLAH; JERRY T. MCGUIRE; MAUREEN S. RIELY; THOMAS P. SOESMAN,

Plaintiffs-Appellees,

v.

BP, P.L.C.; ANTHONY HAYWARD; SAVINGS PLAN INVESTMENT OVERSIGHT COMMITTEE; RICHARD J. DORAZIL; COREY CORRENTI; MARVIN DAMSMA; JAMES DUPREE; PATRICK GOWER; JEANNE M. JOHNS; PATRICIA H. MILLER; STEPHEN J. RINEY; BRIAN D. SMITH; LORD JOHN BROWNE; STEPHANIE C. MOORE; BP CORPORATION NORTH AMERICA, INC.; BP AMERICA, INC.; LAMAR MCKAY; GREGORY T. WILLIAMSON; NEIL SHAW; THOMAS L. TAYLOR; BP CORPORATION NORTH AMERICA, INC.'S BOARD OF DIRECTORS; ROBERT A. MALONE,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
CASE NO. 4:10-CV-4214

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AMERICAN BENEFITS COUNCIL URGING REVERSAL

(Counsel listed on inside cover)

H. Douglas Hinson
Emily S. Costin
ALSTON & BIRD LLP
The Atlantic Building
950 F St., NW
Washington, D.C.
20004-1404
(202) 239-3300

Janet M. Jacobson
American Benefits Counsel
1501 M Street, NW
Washington, D.C. 20005
(202) 289-6700

Counsel for American Benefits Council

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the American Benefits Council (the "Council") respectfully requests leave of the Court to file the accompanying brief of *amicus curiae* in support of Defendants-Appellants and urging reversal of the District Court's order granting in part Plaintiffs-Appellees' motion for leave to file a Consolidated Amended Complaint (the "CAC"). Both Plaintiffs-Appellees and Defendants-Appellants consent to the filing of this *amicus curiae* brief.

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Council frequently participates as *amicus curiae* in cases with the potential to significantly affect the design and administration of employee benefit plans under the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"). Many of the Council's members offer their employees the opportunity to invest in stock funds similar to the BP Stock Fund at issue here. Both the companies that design those plans and the fiduciaries who administer them have significant interests in the standard by which their actions are reviewed.

This is a case of great significance for employers and retirement plan sponsors who – as they are expressly encouraged to do by Federal law – include company stock as an investment option in their employer-sponsored retirement plans. The use of company stock in retirement plans has been threatened by lawsuits that are generally filed on an automatic basis after a decline in the price of the company's stock, typically alleging that the offering of company stock as an investment option was imprudent. Without a substantial protection from such lawsuits, fiduciaries would be exposed to liability based entirely upon impermissible hindsight, and plan sponsors will inevitably discontinue offering employer stock in their retirement plans as a result. For this reason, it is critical that the courts clearly articulate standards that appropriately weed out meritless claims.

In this appeal, this Court will be only the second Circuit Court of Appeal to interpret and apply the pleading standards for such cases articulated by the United States Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459

(2014).[1] If this Court adopts Plaintiffs-Appellees' interpretation of the *Dudenhoeffer* pleading standards in employer plan "stock-drop" suits, plan sponsors are likely to discontinue offering company stock as an investment option, as their risk of ERISA liability, or the costs of defending claims, would be too great. This is true despite clear congressional support for including employer stock funds in retirement plans. Accordingly, the Council seeks leave to file this brief to aid this Court in its understanding of the ERISA fiduciary duties at issue, and the deleterious impact that affirming the District Court's order could have on retirement plans featuring employer stock.

Dated: September 2, 2015 Respectfully submitted,

s/ H. Douglas Hinson
H. Douglas Hinson, Esq.
Emily Seymour Costin, Esq.
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
(202) 239-3300

Janet M. Jacobson
American Benefits Counsel
1501 M Street, NW
Washington, D.C. 20005
(202) 289-6700

Counsel for American Benefits Council

[1] The Ninth Circuit is the only other Circuit Court of Appeal interpreting *Dudenhoeffer*. *See Harris v. Amgen, Inc.*, 788 F.3d 916 (9th Cir. 2015).

CERTIFICATE OF SERVICE

I certify that, on September 2, 2015, I filed a true and correct copy of the foregoing Motion for Leave to file Brief of *Amicus Curiae* American Benefits Council with the Clerk of the United States Court of Appeals for the Fifth Circuit via the CM/ECF system. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all Filing Users listed below.

Ronald S. Kravitz
SHEPHERD FINKELMAN MILLER & SHAH LLP
One California Street, Suite 900
San Francisco, CA 94111

Attorney for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman,
and Interim Co-Lead Counsel

Thomas Robert Ajamie
John Withers Clay
AJAMIE LLP
711 Louisiana, Suite 2150
Houston, TX 77002

Attorneys for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman,
and Interim Co-Lead Counsel

Stephen J. Fearon, Jr.
SQUITIERI & FEARON LLP
32 E. 57th Street, 12th Floor
New York, New York 10022

Attorney for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman

Lori G. Feldman
Arvind Khurana
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119

Attorneys for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman
and Interim Co-Lead Counsel

Thomas J. McKenna
GAINEY MCKENNA & EGLESTON
440 Park Avenue, 5th Floor
New York, New York 10016

Attorney for Plaintiffs-Appellees Ralph Whitley
and Thomas Soesman

Richard C. Pepperman, II
Marc De Leeuw
M. David Possick
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Tel: (212) 558-4000
Fax: (212) 558-3588

Paul J. Ondrasik, Jr.
Morgan D. Hodgson
Eric G. Serron
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Tel: (202) 429-3000
Fax: (202) 429-3902

Attorneys for Defendants-Appellants BP Corp. North America Inc., BP p.l.c., BP America Inc., BP North America's Board of Directors, The Savings Plan Investment Oversight Committee, Lord John Browne, Corey Correnti, Marvin L. Damsma, Richard Dorazil, James Dupree, Patrick Gower, Anthony Hayward, Jeanne M. Johns, Robert A. Malone, Lamar McKay, Patricia H. Miller, Stephanie C. Moore, Stephen J. Riney, Brian D. Smith, Neil Shaw, Thomas L. Taylor and Gregory T. Williamson

s/ H. Douglas Hinson
H. Douglas Hinson
Alston & Bird, LLP

Counsel for American Benefits Council

Dated: September 2, 2015

CASE NO: 15-20282

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RALPH WHITLEY, Individually and on behalf of others similarly situated, FRANKIE RAMIREZ; DAVID HUMPHRIES, CHARIS MOULE; EDWARD F. MINEMAN; SYED ARSHADULLAH; JERRY T. MCGUIRE; MAUREEN S. RIELY; THOMAS P. SOESMAN,

Plaintiffs-Appellees,

v.

BP, P.L.C.; ANTHONY HAYWARD; SAVINGS PLAN INVESTMENT OVERSIGHT COMMITTEE; RICHARD J. DORAZIL; COREY CORRENTI; MARVIN DAMSMA; JAMES DUPREE; PATRICK GOWER; JEANNE M. JOHNS; PATRICIA H. MILLER; STEPHEN J. RINEY; BRIAN D. SMITH; LORD JOHN BROWNE; STEPHANIE C. MOORE; BP CORPORATION NORTH AMERICA, INC.; BP AMERICA, INC.; LAMAR MCKAY; GREGORY T. WILLIAMSON; NEIL SHAW; THOMAS L. TAYLOR; BP CORPORATION NORTH AMERICA, INC.'S BOARD OF DIRECTORS; ROBERT A. MALONE,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
CASE NO. 4:10-CV-4214

BRIEF *AMICUS CURIAE* OF AMERICAN BENEFITS COUNCIL URGING REVERSAL

(Counsel listed on inside cover)

H. Douglas Hinson
Emily S. Costin
ALSTON & BIRD LLP
The Atlantic Building
950 F St., NW
Washington, D.C.
20004-1404
(202) 239-3300

Janet M. Jacobson
American Benefits Counsel
1501 M Street, NW
Washington, D.C. 20005
(202) 289-6700

Counsel for American Benefits Council

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

ARGUMENT 3

I. Congressional Policy Strongly Favors The Offering Of Employer Stock Funds, Which Provide Many Public And Private Benefits 3

II. Employer Plan "Stock-Drop" Lawsuits Discourage The Use Of Employer Stock Funds In Retirement Plans, Contrary To Congressional Intent 7

III. The Supreme Court Adopted A "Plausibility" Pleading Standard In Order To Limit Employer Plan "Stock-Drop" Suits 11

IV. Plaintiffs' Claims Fail To Satisfy Either Requirement Of The *Dudenhoeffer* Plausibility Pleading Standard 13

A. Plaintiffs' Claims Are Not Plausible Because They Are Inconsistent With The Federal Securities Laws...14

B. Plaintiffs' Claims Are Not Plausible Because They Would Require/Encourage Actions That Many Fiduciaries Would Conclude Would Do "More Harm Than Good." 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Baker v. Kinsley,
387 F.3d 649 (7th Cir. 2004) 18

Black & Decker Disability Plan v. Nord,
528 U.S. 822 (2003) 12

Bunch v. W.R. Grace & Co.,
555 F.3d 1 (1st Cir. 2009) 23

Camera v. Dell Inc.,
No. A-13-CA-876-SS, 2014 WL 2767359 (W.D. Tex. June 17, 2014) 17

Canale v. Yegen,
782 F. Supp. 963 (D.N.J. 1992) 7

DeBruyne v. Equitable Life Assur. Soc. of U.S.,
920 F.2d 457 (7th Cir. 1990) 23

DiFelice v. U.S. Airways, Inc.,
497 F.3d 410 (4th Cir. 2007) 22

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) 3, 4, 5, 6

Eaves v. Penn,
587 F.2d 453 (10th Cir. 1978) 7

Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007) 9, 19

Evans v. Akers,
534 F.3d 65 (1st Cir. 2008) 8

Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014) ....*passim*

Fink v. Nat'l Sav. & Trust Co.,
772 F.2d 951 (D.C. Cir. 1985)..7

Grindstaff v. Green,
133 F.3d 416 (6th Cir. 1998) 6

Harris v. Amgen, Inc.,
788 F.3d 916 (9th Cir. 2015) ....*passim*

In re Citigroup ERISA Litig.,
662 F. 3d 128 (2d Cir. 2011) *cert. denied,* 133 S. Ct. 475 (2012)......9, 10, 19, 22

In re Lehman Bros. Sec. & ERISA Litig.,
No. 09–MD–2017 (LAK), 2015 WL 4139978 (S.D.N.Y. July 10, 2015) 14

In re R.H. Donnelley Corp. ERISA Litig.,
No. 09 C 7571, 2011 WL 86623 (N.D. Ill. Jan. 10, 2011) 21

Kirschbaum v. Reliant Energy, Inc.,
526 F.3d 243 (5th Cir. 2008) 8, 9, 12, 15, 24

Kopp v. Klein,
722 F.3d 327 (5th Cir. 2013) 9, 19, 22

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995) 9

Lanfear v. Home Depot, Inc.,
679 F.3d 1267 (11th Cir. 2012) 9, 10, 17, 19

Lockheed Corp. v. Spink,
517 U.S. 882 (1996)..6

Martin v. Feilen,
965 F.2d 660 (8th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993) 4

Moench v. Robertson,
62 F.3d 553 (3d Cir. 1995) 7, 9, 10, 11

Quan v. Computer Sciences Corp.,
623 F.3d 870 (9th Cir. 2010) 4, 5, 9, 23

Rogers v. Baxter Int'l Inc.,
710 F. Supp. 2d 722 (N.D. Ill. 2010) 17

Roth v. Sawyer-Cleator Lumber Co.,
16 F.3d 915 (8th Cir. 1994) 7, 23

Tuchman v. DSC Commc'ns Corp.,
14 F.3d 1061 (5th Cir. 1994) 21

Varity Corp. v. Howe,
516 U.S. 489 (1996) 11

White v. Marshall & Ilsley Corp.,
714 F.3d 980 (7th Cir. 2013) 8, 9, 10

Wright v. Medtronic, Inc.,
No. 09-CV-0443 PJS/AJB, 2011 WL 31501 (D. Minn. Jan. 5, 2011) 16

Wright v. Oregon Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004) 10

RULES

Fed. R. App. Proc. 29 2

Fed. R. Civ. P. 12(b)(6) 11

STATUTES

15 U.S.C. §§ 78m, 78o(d) 14

29 U.S.C. § 1021 20

29 U.S.C. § 1104 .... 4, 5, 7, 22

29 U.S.C. § 1106 5

29 U.S.C. § 1108 5

29 U.S.C. § 1107 .... 3, 5

INTEREST OF AMICUS CURIAE

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Council frequently participates as *amicus curiae* in cases with the potential to significantly affect the design and administration of employee benefit plans under the Employee Retirement Income Security Act of 1974, as amended, ("ERISA"). Many of the Council's members offer their employees the opportunity to invest in stock funds similar to the BP Stock Fund at issue here. Both the companies that design those plans and the fiduciaries who administer them have significant interests in the standard by which their actions are reviewed.

This case is important because this Court will be only the second Circuit Court of Appeal to interpret and apply the pleading standards articulated by the United States Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct.

2459 (2014).[1] If this Court adopts Plaintiffs-Appellees' interpretation of the *Dudenhoeffer* pleading standards in employer plan "stock-drop" suits, plan sponsors are more likely to discontinue offering company stock as an investment option, as their risk of ERISA liability, or the costs of defending claims, would be too great. This is true despite clear congressional support for including employer stock funds in retirement plans. Accordingly, the Council files this brief to aid this Court in its understanding of the ERISA fiduciary duties at issue, and the deleterious impact that affirming the District Court's order could have on retirement plans featuring employer stock.

Pursuant to Fed. R. App. Proc. 29(a), the Council has filed a motion seeking leave of court to file this brief. Both Plaintiffs-Appellees and Defendants-Appellants consent to the filing of this *amicus curiae* brief.[2]

[1] To date, the Ninth Circuit is the only other Circuit Court of Appeal interpreting *Dudenhoeffer*. *See Harris v. Amgen, Inc.*, 788 F.3d 916 (9th Cir. 2015).

[2] No counsel for any party authored this brief in whole or in part, and no person or entity other than the Council and its members made a monetary contribution to its preparation or submission. *See* Fed. R. App. Proc. 29(c)(5).

ARGUMENT

I. Congressional Policy Strongly Favors The Offering Of Employer Stock Funds, Which Provide Many Public And Private Benefits

Employer stock funds[3] are fundamentally different from other types of investment funds offered in conjunction with 401(k) and other employee retirement plans. By definition, employer stock funds invest primarily in a single stock, whereas the typical investment fund is diversified and tailored to a particular risk profile. Consistent with their structure and composition, employer stock funds also serve different purposes. Whereas typical investment funds are offered and maintained solely to increase or preserve a participant's retirement savings, employer stock funds are also designed to provide employees with the opportunity to participate in the ownership of their employers. *See, e.g., Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (describing employer stock funds as a "device for expanding the national capital base among employees – an effective merger of the roles of capitalist and

[3] Congress often refers to employee stock ownership plans ("ESOPs"), which are employee benefit plans that invest primarily in employer stock. Eligible individual account plans ("EIAPs") include both ESOPs and 401(k) plans, the latter of which may offer ESOP or non-ESOP stock funds as investment options. *See* 29 U.S.C. § 1107(d)(3)(A)(ii) (defining EIAPs). The BP Plans at issue here offer employees the option to invest in one or more of a variety of funds, including a non-ESOP company stock fund composed primarily of company stock. We refer herein to non-ESOP company stock funds, as well as ESOP stock funds, as "employer stock funds."

worker."); *Martin v. Feilen*, 965 F.2d 660, 664 (8th Cir. 1992) ("Congress expressly intended that the ESOP would be both an employee retirement benefit plan and a 'technique of corporate finance' that would encourage employee ownership."), *cert. denied*, 506 U.S. 1054 (1993). In 401(k) plans where the employer stock fund is just one of several investment alternatives – such as the BP Plans at issue here – participants may choose to invest any portion of their plan accounts in the employer stock fund, while leaving the remainder for more conventional retirement saving.

Congress has repeatedly expressed its intent to "encourage" the formation and sponsorship of employer stock funds "by passing legislation granting such plans favorable treatment." *Donovan*, 716 F.2d at 1466. Perhaps the clearest expressions of this intent are ERISA's exemptions for investments in employer stock. *See Quan v. Computer Sciences Corp.*, 623 F.3d 870, 881 (9th Cir. 2010) ("Congress has granted favored status to [employer stock funds] by exempting them from certain ERISA requirements."). Specifically, while plan fiduciaries normally must diversify plan investments to minimize the risk of large losses, *see* 29 U.S.C. § 1104(a)(1)(C), Congress carved out an exception to this diversification requirement, and the prudence requirement (*see* 29 U.S.C. § 1104(a)(1)(B)) to the extent it requires diversification, for an EIAP investment in employer stock (such as the BP Stock Fund). 29 U.S.C. § 1104(a)(2).[4]

Indeed, Congress has explicitly stated its concern that "courts should refrain from erecting barriers" that would interfere with the "goal" of promoting employee stock ownership through ERISA plans:

> Congress is deeply concerned that the objectives sought by [the laws encouraging employee stock ownership plans] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590 (1976) (quoted in *Donovan*, 716 F.2d at 1466 n. 24); *see also Quan*, 623 F.3d at 881 (noting Congress has "expressed concern that regulations and rulings which treat employee stock ownership plans as conventional retirement plans . . . block the

[4] In addition, EIAPs are exempt from the ordinary ten-percent cap on a retirement plan's holding of employer securities. 29 U.S.C. § 1107(b)(1). Congress also adopted several tax provisions that specifically encourage employee ownership of employer stock through ERISA plans. *See* I.R.C. §§ 404(a)(9) (special tax deductions for plan sponsors); 404(k) (special tax deductions for plan sponsors); 415(c)(6) (favorable treatment for certain annual additions to participants' accounts); 1042 (income tax deferral for sellers of stock to ESOPs). Further, ERISA's "per se" prohibitions against certain prohibited transactions between a plan and a party-in-interest do not apply to the acquisition or sale by an EIAP of qualifying employer securities. 29 U.S.C. §§ 1106, 1108(e)(3)(A).

establishment and success of these plans"); *Grindstaff v. Green*, 133 F.3d 416, 421-22 (6th Cir. 1998) (citing Tax Reform Act and *Donovan*).

In light of Congress' intent that the ESOP be both an employee retirement benefit plan subject to most of ERISA's requirements and a technique of corporate finance, this Circuit has explained a court's task in interpreting and applying ERISA's provisions in employer stock plans:

> Congress has repeatedly expressed its intent to encourage the formation of [employer stock funds] by passing legislation granting such plans favorable treatment, and has warned against judicial and administrative action that would thwart that goal. Competing with Congress' expressed policy to foster the formation of [employer stock funds] is the policy expressed in equally forceful terms of ERISA: that of safeguarding the interests of participants in employee benefit plans by vigorously enforcing standards of fiduciary responsibility . . . [The court's] task in interpreting the statute is to balance these concerns ***so that competent fiduciaries will not be afraid to serve***, but without giving unscrupulous ones a license to steal.

Donovan, 716 F.2d at 1466 (emphasis added)(footnotes omitted).[5]

[5] Significantly, the employer-sponsored retirement plan system is a *voluntary* system. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefit plans . . . [n]or does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.") Failure to protect ERISA plan fiduciaries may very well discourage employers from choosing to sponsor an employee retirement plan at all.

II. Employer Plan “Stock-Drop” Lawsuits Discourage The Use Of Employer Stock Funds In Retirement Plans, Contrary To Congressional Intent

Employer plan “stock-drop” lawsuits – like the one at issue here – have been around for decades, long before the creation of the so-called “*Moench* presumption.”[6] Often in the wake of an unpredictable event and subsequent decline in stock price, participants claim – in hindsight – that the plan fiduciaries “should have” known that the bad event would occur and the stock price would decline as a result and, therefore, “should have” removed the employer stock from the plan and/or halted further purchases of employer stock. Participants typically claim the failure to remove the stock or freeze future purchases before the event at issue was a violation of both the fiduciary duty of prudence and the fiduciary duty of loyalty. 29 U.S.C. § 1104(a)(1)(A) and (B). In these lawsuits, participants claim these duties of prudence and loyalty trump the competing duty to adhere to plan documents (29 U.S.C. § 1104(a)(1)(D)), requiring a fiduciary to disobey the clear mandates of a plan and sell or halt the purchase of the (allegedly imprudent) employer stock.

[6] *See, e.g., Fink v. Nat’l Sav. & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985); *Canale v. Yegen*, 782 F. Supp. 963 (D.N.J. 1992); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915 (8th Cir. 1994); *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

"With inevitable fluctuations in the stock market, ERISA's simultaneous demands to comply with plan documents and to exercise prudence in choosing investment options for plan participants can place fiduciaries on a razor's edge." *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 990 (7th Cir. 2013). In the Supreme Court's words, when a fiduciary fears an employer's stock is overvalued, he is between a "rock and a hard place: If he keeps investing and the stock goes down he may be sued for acting imprudently . . . but if he stops investing and the stock goes up he may be sued for disobeying the plan documents." *Dudenhoeffer*, 134 S. Ct. at 2470; *see also Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008) (ERISA fiduciaries "cannot be placed in the untenable position of having to predict the future of the company stock's performance," because in such a case, "he could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded."); *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008) (describing two lawsuits challenging the decisions of a plan's fiduciaries with "diametrically opposed theor[ies] of liability": one arguing that the fiduciaries acted imprudently by continuing to invest in company stock, and the other contending that they acted imprudently by divesting "despite the company's solid potential to emerge from bankruptcy with substantial value for shareholders").

Attempting to strike the proper balance between these "equal duties to invest prudently and not to violate [ERISA]," the Third Circuit adopted an "abuse of discretion standard" of review for fiduciaries of plans that invest in employer stock. *Kirschbaum,* 526 F.3d at 254 (citing *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995). In *Moench*, the Third Circuit concluded that fiduciaries are entitled to a "presumption" that carrying out the mandatory terms of the plan (in that case, to invest in the employer's securities) is prudent. *Id.* at 254. The "*Moench* presumption" was subsequently adopted by the Fifth Circuit,[7] and every other Circuit Court of Appeal to consider the issue.[8] Further, the vast majority of the Circuit Courts of Appeal applied the *Moench* presumption at the pleadings stage in order to weed out meritless lawsuits at the outset and obviate the need for costly discovery. *See Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007) (finding *Moench* presumption is appropriately applied at pleading stage; there is "no reason to allow [a] case to proceed to discovery when, even if the allegations

[7] *Kirschbaum*, 526 F.3d at 254; *Kopp v. Klein*, 722 F.3d 327, 336-38 (5th Cir. 2013).

[8] *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Quan*, 623 F.3d at 881-82; *In re Citigroup ERISA Litig*., 662 F. 3d 128, 138-39 (2d Cir. 2011) *cert. denied,* 133 S. Ct. 475 (2012); *Lanfear v. Home Depot, Inc.,* 679 F.3d 1267, 1279 (11th Cir. 2012); *White*, 714 F.3d at 987-89.

are proven true, [the plaintiff] cannot establish that defendants abused their discretion”).[9]

A robust pleading hurdle is necessary to protect fiduciaries and encourage investment in employer stock. *See White*, 714 F.3d at 990 (“fiduciaries who invest in employer stock, or who allow employees to choose to invest in it, in compliance with the terms of the plan need *substantial protection* from liability for doing so.”) (emphasis added). Without a “substantial protection” from such lawsuits the duty of prudence would leave fiduciaries exposed to liability based entirely upon impermissible hindsight, and plan sponsors will inevitably discontinue offering employer stock in their retirement plans as a result. *Id.* at 987 (“Such a high exposure to litigation risks in either direction could discourage employers from offering ESOPs, which are favored by Congress, or even from offering employee

[9] *See also Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1098 (9th Cir. 2004) (“Plaintiffs’ alleged facts effectively preclude a claim under *Moench*, eliminating the need for further discovery.”); *Lanfear*, 679 F.3d at 1281 (“The *Moench* standard of review of fiduciary action is just that, a standard of review; it is not an evidentiary presumption. It applies at the motion to dismiss stage as well as thereafter.”); *Citigroup*, 662 F.3d at 139 (“The ‘presumption’ is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary.”); *White,* 714 F.3d at 991 (holding that a claim against fiduciaries alleging a violation of the duty of prudence “may be dismissed at the pleading stage if the plaintiffs do not make allegations sufficient to overcome the presumption of prudence.”).

retirement savings plans altogether.") citing *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

III. **The Supreme Court Adopted A "Plausibility" Pleading Standard In Order To Limit Employer Plan "Stock-Drop" Suits**

In 2014, a unanimous Supreme Court replaced the *Moench* presumption with a new "plausibility" standard. *Dudenhoeffer*, 134 S. Ct. at 2470-73. The Supreme Court determined that the *Moench* presumption was not the "appropriate way to weed out meritless lawsuits." *Id.* at 2470. However, recognizing the need for a rule that would "readily divide the plausible sheep from the meritless goats," the Supreme Court crafted new and substantial requirements of what plaintiffs must allege in order to state a plausible claim and survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Id.* at 2470-71.

The Supreme Court's new "plausibility" standard establishes two hurdles for employer plan stock-drop suits claiming that ERISA fiduciaries acted imprudently by failing to act on the basis of *non-public* information. Specifically, the Supreme Court held that a plaintiff must plausibly allege an "alternative action" that the fiduciary could have taken that: (1) would have been "consistent with the securities laws," and (2) that a prudent fiduciary in the same circumstances "would not have viewed as more likely to harm the fund than to help it." *Id.* at 2472.

First, the Supreme Court made clear that ERISA does not require an ESOP fiduciary to "break the law." *Id.* As every Court of Appeals to address the question has held, the Supreme Court affirmed that ERISA's duty of prudence simply does not, and cannot, require an ESOP fiduciary to perform an action – such as divesting the fund's holdings of the employer's stock on the basis of inside information – that would violate federal securities laws. *Id.* at 2472-73 (citing *Kirschbaum*, 526 F.3d at 256). In this regard, where a complaint faults fiduciaries for failing to decide, on the basis of inside information, to refrain from making additional stock purchases or for "failing to disclose that information to the public," the Supreme Court instructed lower courts to "consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws *or with the objectives of those laws*." *Id.* at 2473 (emphasis added) (citing *Black & Decker Disability Plan v. Nord*, 528 U.S. 822, 831 (2003) ("Although Congress 'expected' courts would develop 'a federal common law of rights and obligations under ERISA-regulated plans,' the scope of permissible judicial innovation is narrower in areas where other federal actors [like the SEC] are engaged.")).

Second, the Supreme Court instructed lower courts to "consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could not have concluded* that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.* (emphasis added)

IV. **Plaintiffs' Claims Fail To Satisfy Either Requirement Of The *Dudenhoeffer* Plausibility Pleading Standard**

Count I of Plaintiff's proposed Consolidated Amended Complaint ("CAC") focuses on the Deepwater Horizon event and the subsequent, short-term decline in BP's stock price. Plaintiffs assert that Defendants breached their ERISA fiduciary duties by continuing to hold, offer and acquire BP stock for the BP Stock Fund from January 16, 2007 – a date more than three years before the Deepwater Horizon event – and ending on June 24, 2010, a date two months after the event coincident with the low point in BP's stock price. *See* CAC ¶¶ 2, 4, 5. Plaintiffs allege Defendants knew or should have known that BP stock was an imprudent investment during this time frame because of inside information (allegedly known to four of the individual defendants) of BP's alleged systemic disregard of safety, that supposedly culminated in the Deepwater Horizon event. CAC ¶¶ 4, 22. Based on such inside information, Plaintiffs contend that Defendants should have divested the Plans' holdings of BP stock or undertaken some alternative actions short of divestment – most notably, halting future purchases or disclosing the inside information – to protect against further Plan purchases of BP stock at allegedly inflated values. CAC ¶¶ 317, 334, 340-351, 365-66.[10]

A. **Plaintiffs' Claims Are Not Plausible Because They Are Inconsistent With The Federal Securities Laws.**

1. The Federal Securities Laws Do Not Require Or Contemplate ERISA Fiduciaries Making Public Disclosures To The Market.

As the Supreme Court noted in *Dudenhoeffer*, the securities laws are "complex" and govern both "insider trading" and "corporate disclosure" obligations. *Dudenhoeffer*, 134 S. Ct. at 2473. The securities laws are also comprehensive, explicitly setting forth the "who, what, when and how" public disclosures should, and must, be made. *See, e.g.*, Securities Exchange Act of 1934 §§ 13, 15(d) (requiring the filing of periodic documents, reports and information by securities issuers).[11] Indeed, there is a specific regulation designed to ensure

[10] The lawsuit was brought despite the fact that BP engaged an independent fiduciary to manage the BP Stock Fund. The independent fiduciary can unilaterally stop trading BP stock or liquidate the BP Stock Fund at any time.

[11] *See also Amgen*, 788 F.3d at 927 (Kozinski, J., dissenting) ("The securities laws do not require continuous disclosure of all information that may bear on a stock price. Congress specifically rejected that route because of the enormous transaction costs and inefficiencies such disclosures would create. Instead, it enacted a comprehensive and tessellated statutory scheme for corporate disclosure that imposes obligations on *certain* corporate officers to reveal information at *specific* times. *See, e.g.*, 15 U.S.C. §§ 78m, 78o(d)."); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09–MD–2017 (LAK), 2015 WL 4139978, at *16 (S.D.N.Y. July 10, 2015) (rejecting plaintiffs' interpretation of *Dudenhoeffer* because it would create a "ceaseless conflict

(footnote continued)

that public company disclosures are made to the market as a whole, and not made privately to some individuals and not others. 17 C.F.R. §§ 243.100-243.103 ("Regulation FD").[12] Further, such laws mandate disclosures be made by specified officers and directors of such companies – who do so acting in their corporate roles. *See, e.g., Kirschbaum*, 526 F.3d at 257 ("When it incorporated its SEC filings into the Forms S–8 and 10a Prospectus, REI was discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary.").

The securities laws simply do not require ERISA fiduciaries to make such disclosures, or even contemplate that any individuals other than those corporate officers specifically identified in the securities disclosure laws will make public disclosures upon which the market can rely.

between duties of officers, directors and other company employees, which run to the company and its shareholders, and the duties of ERISA plan fiduciaries, which run to plan beneficiaries," whereby "plan fiduciaries who disagree with company officers over the disclosure obligations of the securities laws, and who might indeed 'be egregiously wrong' in their assessments, could shield themselves from ERISA liability only 'by disclosing any *arguable* violation . . . even when [such a] course of action would have disastrous consequences for the share price") (footnotes omitted).

[12] Regulation FD prevents Plaintiffs from asserting a claim based on failure to disclose the alleged inside information to the independent fiduciary, which would have given the Plan an unfair advantage over other public shareholders.

2. A Judicially-Created ERISA Fiduciary Disclosure Requirement Would Conflict With The Federal Securities Laws and Their Objectives.

Given the comprehensive nature of the securities laws and regulations, the existence of the Securities and Exchange Commission ("SEC"), and over 80 years of jurisprudence established under such laws and regulations about "who, what, when and how" disclosures about public companies must be made, it would be inappropriate for ERISA to impose a new, separate, additional affirmative "duty to disclose." The securities laws protect ERISA plans and their participants just like every other shareholder, and they can and should be trusted to do so without the help of a judicially-crafted duty of disclosure under ERISA's general fiduciary duties.[13] If inside information about a publicly-traded company is sufficiently "material" to arguably require a plan's fiduciaries to disclose such information to the public, the securities laws already require disclosure of that information, and there are specific rules already established about "who, what, when and how" such disclosures must be made. Any obligation on ERISA fiduciaries to make separate

[13] *See Wright v. Medtronic, Inc.*, No. 09-CV-0443 PJS/AJB, 2011 WL 31501, at *7 (D. Minn. Jan. 5, 2011) ("The Court therefore concludes that ERISA does not impose an affirmative duty on a corporate insider who acts as a fiduciary of a defined-contribution plan to disclose to plan participants nonpublic (i.e., 'inside') information about the corporation that might affect the value of the corporation's stock. Instead, employee-investors who believe that material information has been unlawfully withheld must, like every other member of the investing public, seek redress under the securities laws.").

or competing public disclosures would necessarily conflict with the "complex" disclosure obligations under the securities laws and/or the "objectives of those laws," which is precisely what the Supreme Court instructed lower courts to avoid. *Dudenhoeffer*, 134 S. Ct. at 2473.

The potential harm and disruption of requiring ERISA fiduciaries to make public disclosures about employer securities is enormous. Any duty of disclosure that did not match *exactly* and *precisely* the duties imposed by the specific regulations and jurisprudence of the securities laws would necessarily conflict with and disrupt the carefully crafted and well-known disclosure obligations that already exist. Moreover, the public policy behind any ERISA duty would presumably match the public policy behind the securities laws, as there is no reasoned basis for ERISA plan participants to receive more, different or better information about public company investments than the market as a whole. *See Lanfear*, 679 F.3d at 1286 ("The only way selective disclosure could benefit them would be if it gave participants an advantage in the market over non-participants, and they are not entitled to that advantage."); *see also Camera v. Dell Inc.*, No. A-13-CA-876-SS, 2014 WL 2767359, at *5 (W.D. Tex. June 17, 2014) (rejecting accusations faulting plan fiduciaries "for not using their superior knowledge of Dell's internal plans to help the plan participants take unfair advantage of the market"); *Rogers v. Baxter Int'l Inc.*, 710 F. Supp. 2d 722, 732-33 (N.D. Ill. 2010)

("The Seventh Circuit has twice noted, including on interlocutory appeal in this case, the potential insider trading issues posed by disclosure only to plan participants. Rogers does not explain how defendants could have disclosed material facts to Plan participants, but not to the public as a whole, without violating the insider trading prohibitions in federal securities laws.") (internal citations omitted).

Any duty to disclose under ERISA that is entirely consistent with the federal securities laws would be, by definition, superfluous and unnecessary. If Congress had intended to impose a duplicative disclosure obligation about public companies when it fashioned ERISA's fiduciary duty provisions, presumably it would have made such a significant duty clear. Any imposition of a separate disclosure obligation based on the general fiduciary duties of prudence or loyalty under ERISA with regard to public company disclosures would be an obvious and significant intrusion into the SEC's jurisdiction. *Baker v. Kinsley*, 387 F.3d 649, 662 (7th Cir. 2004) (noting that "if we were to create a new fiduciary duty [to disclose non-public information], as plaintiffs request, we run the risk of disturbing the carefully delineated corporate disclosure laws.").

Indeed, this Court has already held that there can "be no duty to disclose non-public information for the benefit of [ERISA] plan shareholders as this would violate securities laws." *Kopp*, 722 F.3d at 342. Other Circuits are in accord.[14] It is for this very reason, and based on this same authority, that the District Court rejected Plaintiffs' "disclosure" claims. *See* ECF No. 179, Am. Mem. & Order, at pp. 5-13.

3. Plaintiffs Seek To Impose A Higher Duty Of Disclosure On ERISA Fiduciaries Than The Federal Securities Laws Require.

As noted above, the gravamen of Plaintiff's Proposed Count I is that the Plans' fiduciaries should have stopped purchases of BP stock *three years before* the Deepwater Horizon event and should have revealed to the market that BP was not complying with a plan regarding BP's safety procedures. In analyzing Plaintiff's Proposed Count I, this Court must adhere to the Supreme Court's directive in *Dudenhoeffer* – to carefully consider how ERISA-based obligations may conflict with disclosure requirements under the securities laws. In so holding, the Supreme Court was "not only concerned that fiduciaries would be forced to violate securities laws to comply with ERISA, it was also worried that ERISA-based obligations would be *broader* than the disclosure requirements under the

[14] *See Lanfear*, 679 F.3d at 1284 ("ERISA does not explicitly impose a duty to provide participants with non-public information affecting the value of the company's stock"); *In re Citigroup ERISA Litig.*, 662 F.3d at 143 ("We decline to broaden the application of these cases to create a duty to provide participants with nonpublic information pertaining to specific investment options."); *Edgar,* 503 F.3d at 350 (plan fiduciaries do "not have a duty to 'give investment advice' or 'to opine on' the stock's condition."); *but see generally Amgen*, 788 F.3d 916.

securities laws and would, therefore, interfere with the compromise Congress struck when enacting those laws." *Amgen*, 788 F.3d at 926-27 (Kozinski, J., dissenting) (citing *Dudenhoeffer*, 134 S. Ct. 2473). Here, Plaintiffs claim the Plans' fiduciaries should have "halted" purchases of BP stock. CAC ¶¶ 317, 334, 340-351, 365-66. Doing so would impose a "black-out period" with regard to employer stock in the Plan. 29 U.S.C. § 1021(i); 29 C.F.R. § 2520.101-3. Imposition of a "black-out period" on employer stock in an ERISA plan *necessarily* requires an SEC Form 8K (i.e., immediate) disclosure.[15] Thus, Plaintiffs are necessarily claiming the Plans' fiduciaries should have halted purchases of company stock and told the market about safety risks. In addition to the harm such a disclosure would do to the Plans as whole (*see* p. 24, *infra*), these disclosures were not required under the securities laws.

There is no allegation in this case – or in the companion securities class action – that any of the Defendants violated the securities laws by failing to disclose alleged noncompliance with safety measures more than three years before the Deepwater Horizon event.[16] Yet, Plaintiffs are attempting to hold Defendants

[15] A Form 8-K must be filed for the "Temporary Suspension of Trading Under Registrant's Employee Benefit Plans. *See* Item 5.04, SEC Form 8-K, *available at* https://www.sec.gov/about/forms/form8-k.pdf.

[16] *In re: BP P.L.C. Securities Litigation*, MDL No. 10-MD-2185 (S.D. Tex.). Plaintiffs in the securities class action claim that BP's SEC filings contained specified affirmative misrepresentations. Such allegations are different from

(footnote continued)

liable under ERISA for failing to do precisely what the securities laws do *not* require of them: immediately disclose inside information without any regard for whether it is "material" and required to be disclosed under the securities laws.

Furthermore, it is well-established that in order to hold any individual liable under the securities laws, a plaintiff must allege (and prove) *scienter*.[17] Plaintiffs have not alleged any scienter or "intent" to defraud, but instead seek to impose a *negligence* standard upon ERISA fiduciaries – a standard that Congress did not impose under the securities laws. Because Plaintiffs seek to hold ERISA fiduciaries to a different standard than the securities laws, by definition, it is an expansion of the securities laws that must be left to Congress. *See, e.g., In re R.H. Donnelley Corp. ERISA Litig.*, No. 09 C 7571, 2011 WL 86623, at *5 (N.D. Ill. Jan. 10, 2011) ("The decision to require plan fiduciaries to disclose to participants information that can lawfully be kept from the public at large should be left to Congress, particularly when there are no well-pleaded allegations of intent to deceive the plan participants."). Certainly, the notion that ERISA fiduciaries could be found liable under ERISA for failing to take action and make disclosures about

the omission theory at issue in the Proposed Count I asserted by the Plaintiffs in this ERISA case. *See* ECF No. 179, Am. Mem. & Order, at p. 6.

[17] *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) ("Scienter is a crucial element of [a] securities fraud claim[] . . . Scienter must be shown because not every misstatement or omission in a corporation's disclosures gives rise to a Rule 10b–5 claim.").

a public company, when the securities laws would not impose such liability under the same alleged circumstances, is in conflict with the carefully crafted and well-developed securities laws that are specifically designed for such situations.

B. **Plaintiffs' Claims Are Not Plausible Because They Would Require/Encourage Actions That Many Fiduciaries Would Conclude Would Do "More Harm Than Good."**

The Supreme Court held in *Dudenhoeffer* that an ERISA plan fiduciary is only liable for the misconduct alleged if no reasonable fiduciary in his position could conclude that withdrawing from the employer stock fund or disclosing information "would do more harm than good to the fund." *Dudenhoeffer*, 134 S. Ct. at 2473. Significantly, however, a fiduciary's actions may only be judged based on "'the circumstances . . . prevailing' at the time the fiduciary acts." *Id.* at 2471 (citing 29 U.S.C. § 1104(a)(1)). It is well-established in this Circuit – and every other Circuit Court of Appeal – that fiduciaries' decisions are not to be judged with the benefit of "hindsight," but only from the "facts known to them at the time." *Kopp*, 722 F.3d at 341.[18] Accordingly, this Court must analyze and

[18] *See also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007) ("[W]hether a fiduciary's actions are prudent cannot be measured in hindsight, whether his hindsight would accrue to the fiduciary's detriment or benefit."); *In re Citigroup ERISA Litig.*, 662 F.3d at 140 ("We judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not 'from the vantage point of hindsight.' . . . We cannot rely, after the fact, on the magnitude of the decrease in the employer's stock price; rather, we must consider the extent to
(footnote continued)

consider the plausibility of Plaintiffs' claims ***assuming the Deepwater Horizon event never happened.***

Only impermissible hindsight supports Plaintiffs' notion that disclosure of an alleged failure to comply with safety measures three years before the Deepwater Horizon event would have been "good" for the BP Stock Fund as whole. With their Proposed Count I, Plaintiffs allege Defendants breached their ERISA fiduciary duties by continuing to hold, offer and acquire BP stock for the BP Stock Fund starting on January 16, 2007. *See* CAC ¶¶ 2, 4, 5. At that time, no Deepwater Horizon event had actually occurred, and no one knew (or could have known with any reasonable degree of certainty) that the Deepwater Horizon event would occur. Rather, Plaintiffs simply allege that – at that point in time in January

which plan fiduciaries at a given point in time reasonably could have predicted the outcome that followed.") (internal citations omitted); *Quan*, 623 F.3d at 884-85 ("Moreover, the Participants' argument against considering whether the fiduciary might also be sued for divesting improperly relies on the hindsight conclusion that the fiduciary acted imprudently by holding the company stock in the first place."); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) ("'[W]hether a fiduciary's actions are prudent cannot be measured in hindsight....' The 'test [is] how the fiduciary acted viewed from the perspective of the time of the challenged decision rather than from the vantage point of hindsight.'") (citations omitted); *Roth*, 16 F.3d at 918 ("Thus, the prudent person standard is not concerned with results; rather, it is a test of how the fiduciary acted viewed 'from the perspective of the 'time of the [challenged] decision' rather than from the 'vantage point of hindsight.''") (citations omitted); *DeBruyne v. Equitable Life Assur. Soc. of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) ("The fiduciary duty of care," as the district court so cogently stated it, 'requires prudence, not prescience.'") (citation omitted).

2007 – certain of the individual Defendants possessed certain information to suggest that BP was not compliant with certain safety measures. *See, e.g.*, CAC ¶¶ 5, 6.

Yet, even assuming some individuals indeed *believed* safety measures were not being followed, this does not mean that such safety measures were not *actually* being followed or that public disclosure of these "beliefs" would have been good for the Plans' participants who were invested in BP stock. Consistent with the allegations in the CAC, others at BP may very well have believed or had knowledge that BP was, in fact, compliant with the safety measures at issue or, if not, may have had or developed a plan of action to ensure such compliance. What Plaintiffs have alleged is nothing more than a difference of opinion or at worst, a failure of management in operating the business, which is a common occurrence in the life of most corporations. If this Court finds Plaintiffs' claims here plausible, an ERISA fiduciary – *e.g.*, a mid-level employee with perhaps imperfect information about the company's overall situation, but who has a different opinion from others in the organization – would be legally compelled to make a public disclosure to the market and/or put a halt on stock purchases, even when doing so could have disastrous consequences on the stock price. *Kirschbaum*, 526 F.3d at 256 ("from a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price.”).[19] This is exactly what the Supreme Court contemplated when it used the phrase: “do more harm than good.”[20]

In order for the Supreme Court’s “more harm than good” test to have any meaning at all, “the Supreme Court must have contemplated situations where a fiduciary could permissibly balance the long and short run effects of withdrawal on the share price, or account for the fact that a badly timed withdrawal could cause the stock value to drop below its efficient-market level.” *Amgen*, 788 F.3d at 926 (Kozinski, J., dissenting). If this Court were to bless a complaint that does nothing

[19] Indeed, withdrawal of a fund as an investment option without further explanation is the “worst type of disclosure” because it “signals that something may be deeply wrong inside a company but doesn’t provide the market with information to gauge the stock’s true value.” *Amgen*, 788 F.3d at 925-26 (Kozinski, J., dissenting).

[20] This is not to say that ERISA fiduciaries who believe they are in possession of undisclosed, material information about the company lack any recourse. But, determining that there is, in fact, information known to the fiduciary that should be disclosed under the securities laws would require a level of securities knowledge and expertise that most ERISA plan fiduciaries do not have. Indeed, if a fiduciary thinks this might be the case, the first step would be to ascertain whether there is, in fact, an obligation under the securities laws to disclose such information, and whether, in fact, no such disclosure has occurred. This would require obtaining the advice of securities counsel, cooperation and assistance from the individuals responsible for such disclosures within the company, and a complete knowledge of the information already disclosed by the company. If, having completed this analysis, the fiduciary believes disclosure is indeed required by the securities laws and intentionally withheld by those responsible for such disclosures under the securities laws, he or she could request/demand that the company comply with the securities laws, and in extreme cases, contemplate other courses of action.

more than allege the hypothetical capability of withdrawing the fund, without a single allegation regarding the probable effects of that withdrawal – like the Proposed Count I at issue here – it would mean that a fiduciary could *never* be safe from a lawsuit if he fails to freeze the fund based on the reasonable belief that it will do more harm than good to the fund by causing a drop in the stock price. *Id.* In essence, it would render that crucial language in *Dudenhoeffer* utterly without meaning. *Id.*

CONCLUSION

In sum, this Court should find implausible, and not permit, claims that would necessarily require ERISA fiduciaries to disclose inside information, and/or halt trading coupled with disclosure of the reasons for same, in the absence of allegations of intentional, fraudulent failures to disclose in violation of the securities laws on the part of a public company's officers and directors. The Proposed Count I at issue here does not include such allegations and, therefore, it should be deemed implausible under the new pleading standard imposed by the Supreme Court in *Dudenhoeffer*. For the foregoing reasons, the American Benefits Council respectfully urges the Court to reverse the District Court's order granting in part Plaintiffs-Appellees' motion for leave to file its Consolidated Amended Complaint.

Dated: September 2, 2015 Respectfully submitted,

s/ H. Douglas Hinson
H. Douglas Hinson, Esq.
Emily Seymour Costin, Esq.
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
(202) 239-3300

Janet M. Jacobson
American Benefits Counsel
1501 M Street, NW
Washington, D.C. 20005
(202) 289-6700

Counsel for American Benefits Council

CERTIFICATE OF SERVICE

I certify that, on September 2, 2015, I filed a true and correct copy of the foregoing Brief of Amicus Curiae with the Clerk of the United States Court of Appeals for the Fifth Circuit via the CM/ECF system. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all Filing Users listed below.

Ronald S. Kravitz
SHEPHERD FINKELMAN MILLER & SHAH LLP
One California Street, Suite 900
San Francisco, CA 94111

Attorney for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman,
and Interim Co-Lead Counsel

Thomas Robert Ajamie
John Withers Clay
AJAMIE LLP
711 Louisiana, Suite 2150
Houston, TX 77002

Attorneys for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman,
and Interim Co-Lead Counsel

Stephen J. Fearon, Jr.
SQUITIERI & FEARON LLP
32 E. 57th Street, 12th Floor
New York, New York 10022

Attorney for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman

Lori G. Feldman
Arvind Khurana
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119

Attorneys for Plaintiffs-Appellees Ralph Whitley,
Frankie Ramirez, David Humphries, Charis Moule,
Edward F. Mineman, Syed Arshadullah,
Jerry T. McGuire, Maureen S. Riely, Thomas P. Soesman
and Interim Co-Lead Counsel

Thomas J. McKenna
GAINEY MCKENNA & EGLESTON
440 Park Avenue, 5th Floor
New York, New York 10016

Attorney for Plaintiffs-Appellees Ralph Whitley
and Thomas Soesman

Richard C. Pepperman, II
Marc De Leeuw
M. David Possick
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Tel: (212) 558-4000
Fax: (212) 558-3588

Paul J. Ondrasik, Jr.
Morgan D. Hodgson
Eric G. Serron
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Tel: (202) 429-3000
Fax: (202) 429-3902

Attorneys for Defendants-Appellants BP Corp. North America Inc., BP p.l.c., BP America Inc., BP North America's Board of Directors, The Savings Plan Investment Oversight Committee, Lord John Browne, Corey Correnti, Marvin L. Damsma, Richard Dorazil, James Dupree, Patrick Gower, Anthony Hayward, Jeanne M. Johns, Robert A. Malone, Lamar McKay, Patricia H. Miller, Stephanie C. Moore, Stephen J. Riney, Brian D. Smith, Neil Shaw, Thomas L. Taylor and Gregory T. Williamson

s/ H. Douglas Hinson
H. Douglas Hinson
Alston & Bird, LLP

Counsel for American Benefits Council

Dated: September 2, 2015

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,584 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

s/ H. Douglas Hinson
H. Douglas Hinson
Alston & Bird, LLP

Counsel for American Benefits Council

Dated: September 2, 2015