No. 18-1165

IN THE
# Supreme Court of the United States

RETIREMENT PLANS COMMITTEE OF IBM, *et al.*,

*Petitioners,*

*v.*

LARRY W. JANDER, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# BRIEF OF *AMICI CURIAE* AMERICAN BENEFITS COUNCIL AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF PETITIONERS


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## INTEREST OF AMICI CURIAE[1]

The American Benefits Council (the "Council") is a national non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. Its approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually every American who participates in employer-sponsored benefit programs. The Council frequently participates as amicus curiae in cases with the potential to affect the design and administration of employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA").

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing nearly 100 of the nation's largest employers that sponsor employee benefit plans for their active and retired workers and their families. ERIC is the only national association that advocates exclusively for large employer plan sponsors on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC member

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their members made a monetary contribution intended to fund its preparation or submission. All parties have provided written consent for amici to file this brief.

companies are leaders in every sector of the economy. As the voice of large employer plan sponsors on public policies impacting their ability to sponsor benefit plans for their nationwide workforce, ERIC participates as amicus curiae in cases that have the potential for far-reaching effects on employee benefit plan design or administration and initiates litigation to protect ERISA preemption against state mandates.

Many of the Council and ERIC's (collectively, "Amici") members offer their employees the opportunity to invest in employer stock funds like the one at issue in this case. Both the companies that design plans offering such funds and the fiduciaries who administer those plans have a significant interest in the standard by which their actions are reviewed. If the decision below is affirmed, plan sponsors are likely to discontinue offering employer stock funds because their risk of ERISA liability and the costs of defending claims would be too great in the event of an ordinary downturn in the stock market. Accordingly, Amici submit this brief to aid the Court in its understanding of the issues presented and the deleterious impact that affirming the decision below would have on retirement plans that offer employer stock as an investment option.

## SUMMARY OF ARGUMENT

**I.** Employer stock funds, also known as employee stock ownership plans ("ESOPs"),[2] are popular among

[2] This brief refers to funds investing in employer stock as "ESOPs." ESOPs 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

employers and employees alike because they allow employees to share in the ownership and financial success of the company for which they work. Productivity, employee satisfaction, and profitability all tend to rise when employees own a stake in their employer. Companies that offer ESOPs also show greater resiliency in economic downturns.

In light of these benefits, Congress has enacted several laws to encourage companies to offer ESOPs as part of their ERISA retirement plans. For example, Congress has exempted companies that offer ESOPs from ERISA's diversification rules. It also has enacted tax breaks to incentivize companies to offer ESOPs and employees to participate in them. And Congress has expressly warned the courts against issuing rulings that would make it difficult for employers to offer ESOPs to their employees. In *Fifth Third Bancorp v. Dudenhoeffer*, this Court recognized that "meritless, economically burdensome lawsuits" threaten to defeat Congress's goal "to encourage the creation of ESOPs." 573 U.S. 409, 424–25 (2014).

**II.** This Court has repeatedly held that a claim must be dismissed at the pleading stage if it fails to allege a plausible right to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court below ignored that directive by allowing a meritless breach-of-fiduciary-duty claim against an ESOP fiduciary to proceed to

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which may offer ESOP and non-ESOP funds as investment options. *See* 29 U.S.C. § 1107(d)(3)(A)(ii) (defining EIAPs). Petitioners' 401(k) plan offers employees the option to invest in a variety of funds, including an ESOP.

discovery based on generic allegations that the fiduciary should have disclosed negative, non-public information about the company to plan participants to prevent them from investing in supposedly inflated company stock.

In *Dudenhoeffer*, this Court explained that disclosure of negative, non-public company information by a fiduciary can often cause more harm to a plan than good. Accordingly, the Court held that to plead a plausible claim that an ESOP fiduciary acted imprudently by failing to disclose negative, non-public company information, a plaintiff must allege facts showing that (1) disclosure would have been consistent with the securities laws, and (2) a prudent fiduciary could not have concluded that disclosure would cause more harm than good. *Id.* at 428–30. If the facts are such that a prudent fiduciary could have concluded that disclosure would on balance harm the plan, a claim that it was imprudent not to disclose is not plausible. *Id.* at 429–30.

The decision below cannot be reconciled with *Dudenhoeffer*. The court of appeals held that the plaintiff had sufficiently alleged that an ESOP fiduciary acted imprudently by not disclosing negative, non-public company information based on five allegations. But each of those five allegations can be made in every stock-drop case, and, indeed, they have been alleged in many other cases. By sustaining an imprudence claim based on these five generic allegations, the decision below would make it exponentially easier for plaintiffs to survive a motion to dismiss and proceed into costly discovery when bringing baseless imprudence claims against ESOP fiduciaries. That, in turn, would deter companies from offering ESOPs because ESOP fiduciaries, who are typically corporate officers, would always be vulnerable to claims that they acted imprudently whenever the company's stock price declines and the fiduciary possessed non-public information about the company that it did not disclose.

**III.** The decision below likewise cannot be reconciled with this Court's decision in *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). There, the Court recognized that ERISA fiduciaries often additionally serve as corporate officers. The Court held that it was proper for an ERISA fiduciary to hold those dual roles as long as it disregards its corporate role when making decisions in its fiduciary capacity and disregards its fiduciary role when making decisions for the corporation. *Id.*

The decision below makes hash of *Pegram*'s "two hats" doctrine by holding that the complaint plausibly alleged that disclosures could have been included in quarterly SEC filings because the fiduciary also was a corporate officer who could make disclosures through normal corporate channels. Pet.App.16a. In so ruling, the court below conflated the dual roles of the defendant fiduciaries and imposed securities law disclosure obligations on an ESOP fiduciary who also serves as a corporate officer. Compelling ERISA plan fiduciaries to disclose non-public company information learned in their corporate capacity would upset the carefully balanced disclosure obligations established by Congress in the securities laws. The upshot is that if the decision below is affirmed, companies offering ESOPs will be unable to employ corporate officers as plan fiduciaries because it would be considerably easier to assert an imprudence claim against an ESOP fiduciary who also serves as a corporate officer. If companies are forced to hire third parties to replace executives as fiduciaries of plans offering ESOPs, plan administration costs would increase significantly, which would cause plan sponsors to eliminate ESOPs as an investment option.

## ARGUMENT

### I. ESOPs Offer Unique Benefits and Are Favored by Congress.

ESOPs are fundamentally different from other types of investment funds offered in conjunction with 401(k) and other employee retirement plans. By definition, ESOPs invest primarily in a single stock, whereas the typical investment fund is diversified and tailored to a particular risk profile. *See Dudenhoeffer*, 573 U.S. at 416. ESOPs also serve different purposes. Whereas typical investment funds are intended solely to increase or preserve a participant's retirement savings, ESOPs are additionally designed to provide employees with the opportunity to participate in the ownership of their employers. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976) (explaining that Congress sees ESOPs as a way "of bringing about stock ownership by all corporate employees" (quotation marks omitted)).

ESOPs offer several unique benefits to employers. For instance, they provide an affordable means of raising capital. *See* 119 Cong. Rec. 40,754 (Dec. 11, 1973) (statement of Sen. Russell Long, Chair of

Senate Finance Committee when ERISA was enacted) (observing that employee ownership plans "provide low-cost capital for the employer"). Employers that offer their employees the opportunity to own company stock also tend to experience increases in productivity, sales, and hiring. A meta-analysis of studies covering samples from nearly 60,000 businesses shows a statistically significant positive correlation between employee ownership and company performance. *See* Douglas Kruse, *Does Employee Ownership Improve Performance?*, IZA World of Labor (2016) ("Kruse")[3]; *see also* Steven F. Freeman, *Effects of ESOP Adoption and Employee Ownership: Thirty Years of Research and Experience* 11–13, 23 (Univ. of Penn. Organizational Dynamics Working Papers, Paper No. 07-01, 2007) ("Freeman") (finding that, "on average[,] in all the performance categories, ESOP companies do better per year than non-ESOP companies").[4]

At the same time, ESOPs offer several advantages to employees. Beyond the obvious benefit of sharing in the profitability of the employer, studies show that employees who participate in ESOPs generally report feeling more committed to their employer and more satisfied with their work. *See, e.g.*, Freeman, *supra*, at 6–10; Kruse, *supra*, at 6; *Enron and Beyond: Enhancing Worker Retirement Security: Hearing Before the H. Subcomm. on Employer-Employee Relations,* 107th Cong. Rec. 107–44 (2002) (statement

[3] *Available at* https://wol.iza.org/articles/does-employee-ownership-improve-performance/long.

[4] *Available at* https://repository.upenn.edu/cgi/viewcontent.cgi?article=1001&context=od_working_papers.

of Douglas Kruse, Professor, Rutgers Univ.); Fidan Kurtulus & Douglas Kruse*, An Empirical Analysis of the Relationship between Employee Ownership and Employment Stability in the US: 1999–2011*, 56 British J. of Indus. Rel. 246, 246 (2018) ("Kurtulus & Kruse"). Moreover, employers that offer ESOPs on average contribute 75% more to their ESOPs than other companies contributed to their non-ESOP plans. Nat'l Ctr. for Employee Ownership, *ESOPs as Retirement Benefits*, 3, 5 (Sept. 20, 2010).[5] Relatedly, ESOP participants on average have 20% more retirement assets than participants in non-ESOP defined contribution plans, and far less comes from the employee's pocket. *Id.* at 5.

Employee ownership also promotes macroeconomic stability because publicly traded U.S. companies with employee ownership funds are almost 20% more likely to survive over a twelve-year period than comparable companies without employee ownership options. Kruse, *supra*, at 5; Kurtulus & Kruse, *supra*, at 263. Furthermore, ESOPs may "curb unemployment during recessions." Kurtulus & Kruse, *supra*, at 263. Research shows that companies offering ESOPs tend to cut fewer jobs when faced with negative company performance or an economic downturn. *See id.* at 255–58; *see also* Kruse, *supra*, at 5. That resiliency could be traced to the fact that employees who participate in ESOPs are more satisfied and thus more willing to adjust to meet the needs of the company during difficult periods. Kurtulus & Kruse, *supra*, at 246–47.

[5] *Available at* https://www.nceo.org/assets/pdf/articles/ESOPs-as-Retirement-Benefits.pdf.

Because of the many benefits they provide, ESOPs are popular among both employers and employees. Since their introduction in the 1970s, ESOPs have become available on the menu of investment options in self-directed ERISA retirement plans. Over 6,000 American companies offer some form of an ESOP, and more than 10 million workers—or as much as 8.7% of the total private-sector workforce in the United States—participate in an ESOP. Kurtulus & Kruse, *supra*, at 246; Nat'l Ctr. for Employee Ownership, *Employee Ownership by the Numbers* (July 2019).[6]

Noting the many benefits that employee ownership bestows on employers and employees, Congress has expressly stated its intent to encourage employers to sponsor ESOPs:

> Intent of Congress Concerning Employee Stock Ownership Plans—The Congress, in a series of laws . . . has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976).

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[6] *Available at* https://www.nceo.org/articles/employee-ownership-by-the-numbers.

Consistent with its favorable view of ESOPs, Congress has enacted numerous laws to encourage their creation. *See* Cong. Res. Serv., R.S. 21526, *Employee Stock Ownership Plans (ESOPs) Legislative History* (May 20, 2003).[7] For example, Congress has exempted employer stock funds from ERISA's diversification requirements—which would normally limit the percentage of a plan's assets that a fiduciary could invest in any single security—as well as from prohibited transaction rules that would similarly limit plan ownership of employer stock. *See* 29 U.S.C. § 1104(a)(2); *id.* § 1107(b)(1).

Congress also has granted significant tax advantages to companies that offer ESOPs to their employees. For example, a company can deduct certain contributions that it makes to an ESOP, *see* 26 U.S.C. § 404(a)(9), as well as certain dividends paid to ESOP participants, *see* 26 U.S.C. § 404(k). Moreover, owners of closely-held corporations can defer taxation on capital gains from certain stock sold to an ESOP. *See* 26 U.S.C. § 1042.

Furthermore, Congress has incentivized employees to participate in ESOPs. For instance, the Internal Revenue Code provides special benefits to employees who participate in ESOPs, such as deferred tax on net unrealized appreciation, 26 U.S.C. § 402(e)(4), and an exception from the penalty for early distributions for dividends of employer stock funds, 26 U.S.C. § 72(t)(2)(A)(vi); *see also* Kruse, *supra*, at 10 (describing additional tax incentives).

[7] *Available at* https://www.everycrsreport.com/.

In accord with its policy of promoting ESOPs, Congress has warned the courts and administrative agencies against issuing "regulations and rulings which treat employee stock ownership plans as conventional retirement plans," lest they be regulated out of existence. Tax Reform Act § 803(h); *see also* 132 Cong. Rec. S7934-01, 1986 WL 776250 (June 19, 1986) (statement of Sen. Russell Long) ("ERISA['s] fiduciary rules . . . should not be interpreted to thwart the congressional policy—which in this legislation is restated as the national policy—of encouraging the use of ESOPs as an ownership-broadening technique of corporate finance.").

The decision below is precisely what Congress feared when it cautioned courts not to interpret ERISA's fiduciary rules in a manner that makes it difficult or impossible for companies to maintain ESOPs. As explained below, the court of appeals sustained a claim that plan fiduciaries acted imprudently by failing to disclose non-public information about an ESOP even though the claim was based on generalized allegations that could be asserted in nearly every stock-drop case. If the allegations below are sufficient to raise a plausible imprudence claim against an ESOP fiduciary, every plan offering participants an opportunity to invest in company stock would be at risk in the event of an ordinary downturn in the company's stock price. Employers would thereby be discouraged from offering company stock as an investment option for fear that it would lead to litigation and costly discovery. To allow employers to continue to offer their employees the opportunity to share in their financial success, the Court must ensure that meritless claims against ESOP fiduciaries based on generic allegations are weeded out at the motion-to-dismiss phase, as further explained below.

## II. The Decision Below Exposes ESOP Fiduciaries to Liability for Meritless Stock-Drop Suits.

The Court below permitted a breach-of-the-duty-of-prudence claim to proceed to discovery based on generalized allegations that plan fiduciaries should have disclosed certain alleged negative, non-public information about IBM to prevent employees from investing in company stock. Such allegations do not raise a plausible imprudence claim because, under the circumstances, a reasonable fiduciary could easily have concluded that disclosing the information would cause more harm than good to the plan. If the generalized allegations asserted in the complaint below are sufficient to plead a plausible imprudence claim, nearly all, if not all, stock-drop claims will proceed into discovery, forcing plan fiduciaries to choose between costly litigation or eliminating ESOPs from their menu of investment options.

### A. A Claim that a Plan Fiduciary Acted Imprudently by Not Disclosing Negative, Non-Public Company Information Is Not Plausible if a Prudent Fiduciary Could Have Concluded that Disclosure Would Cause More Harm than Good.

It is bedrock law that to survive a motion to dismiss, a plaintiff must allege facts sufficient to make his claim for relief plausible. *Iqbal*, 556 U.S. at 679; *Twombly*, 550 U.S. at 570. As this Court has explained, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Allegations that permit a court to infer only the "mere possibility" of liability, or allegations that are merely consistent with liability, are insufficient to state a plausible claim for relief. *Iqbal*, 556 U.S. at 679; *Twombly*, 550 U.S. at 557. This Court has emphasized the importance of weeding out meritless claims early in the litigation process, before subjecting a defendant to the burdens and costs of discovery, the threat of which often "push[es] cost-conscious defendants to settle even anemic claims." *Twombly*, 550 U.S. at 559; *see also Iqbal*, 556 U.S. at 684–86.

In *Dudenhoeffer*, the Court explained how the plausibility pleading standard applies in the context of ERISA stock-drop claims like the one here. The Court recognized that a fiduciary's decision concerning whether to continue to offer company stock in an ERISA plan is a difficult one. ESOP fiduciaries are typically caught between a "rock and a hard place" when deciding whether to halt investment in a company stock fund, or eliminate it altogether when the stock price is dropping because they risk liability for acting too soon if the stock price ultimately rebounds, but also face liability for waiting too long to act when the stock price continues to fall. *Dudenhoeffer*, 573 U.S. at 424.

Bearing these concerns in mind, *id.* at 425, the Court held that a claim alleging that an insider fiduciary breached its fiduciary duty by failing to act on non-public information to prevent losses in an allegedly overvalued ESOP is plausible only if the complaint alleges an alternative action that the fiduciary could have taken that would have been consistent with the objectives of the securities laws and that a prudent fiduciary in the same circumstances could not have concluded would cause more harm than good to the plan. *Id.* at 429–30; *see also Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016). That standard recognizes that a fiduciary's decision to disclose negative, non-public information outside normal corporate channels of communication is fraught with peril. For example, such a disclosure could have collateral effects on plan participants already invested in company stock by suggesting that the problems at the company are worse than they actually are, thereby depressing the stock price for those participants. *See, e.g.*, *Martone v. Robb*, 902 F.3d 519, 526–27 (5th Cir. 2018); *Laffen v. Hewlett-Packard Co.*, 721 F. App'x 642, 644 (9th Cir. 2018); *Graham v. Fearon*, 721 F. App'x 429, 435–37 (6th Cir 2018); *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 864 (6th Cir. 2017); *Whitley v. BP p.l.c.*, 838 F.3d 523, 529 (5th Cir. 2016). Because the question of whether disclosure would ultimately be good for the plan typically has no easy answer, the Court held that it is implausible to allege that a decision not to disclose was imprudent unless the circumstances are such that no prudent fiduciary could have concluded that disclosure was a bad idea.

The court below suggested that it is an open question whether the plausibility standard depends on whether a prudent fiduciary "could not have" thought that disclosure could cause more harm than good, or "would not have" so thought. Pet.App.11a. But this Court confirmed in *Amgen* that "could not" is the correct articulation of the standard. 136 S. Ct. at 760. The other Circuits have universally applied the "could not have" formulation of the standard. *O'Day v. Chatila*, No. 18-cv-2621, 2019 WL 2404660, at *1 (2d Cir. June 7, 2019) (summary order); *Singh v. RadioShack Corp.*, 882 F.3d 137, 148 (5th Cir. 2018); *Martone*, 902 F.3d at 525; *Laffen*, 721 F. App'x at 644–45; *Graham*, 721 F. App'x at 435; *Saumer*, 853 F.3d at 864; *Loeza v. John Does 1–10*, 659 F. App'x 44, 46 (2d Cir. 2016) (summary order); *Whitley,* 838 F.3d at 529; *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016).

The difference between "could not" and "would not" is not mere semantics. Rather, the language choice affects what a plaintiff must plead to state a plausible claim. The decision below explains that the "would not" standard "ask[s] what an *average* prudent fiduciary might have thought," whereas the "could not" formulation asks "whether *any prudent* fiduciary could have considered the action to be more harmful than helpful." Pet.App.11a (emphasis in original). Adoption of the more stringent "could not" formulation aligns with the plausibility pleading standard because, as explained in *Iqbal*, allegations that permit a court to infer only the "mere possibility" that a defendant committed a fiduciary breach are insufficient. 556 U.S. at 679. Were the "would not" standard applied, courts would consider what an average prudent fiduciary *might or might not have done* under the same set of facts. Said another way, courts would be asked to "infer the mere possibility" of wrongdoing, which "would turn the filter of *Dudenhoeffer* into a tap." *In re BP p.l.c. Sec. Litig.*, No. 10-4214, 2015 WL 1781727, at *17 (S.D. Tex. Mar. 4, 2015). Conversely, if a plaintiff is required to establish that no reasonable fiduciary "could" have thought that disclosure would cause more harm than good, its claim that the defendant fiduciary acted imprudently by not disclosing would be plausible.

In all events, the decision below should be reversed under either the "could not have" or "would not have" formulation. As explained further below, the allegations in this case do not satisfy the plausibility standard because an average prudent fiduciary, indeed any prudent fiduciary, could have concluded that, under the circumstances, early disclosure had the potential to cause more harm than good to the IBM plan.

### B. The Decision Below Weakens *Dudenhoeffer*'s Pleading Standard by Permitting Generalized Allegations to Survive a Motion to Dismiss.

Since *Amgen*, every court—except the one below—has recognized that an imprudence claim is implausible if supported only by generalized allegations that a fiduciary had inside information about the employer's stock price that he should have disclosed to protect plan participants. *See O'Day*, 2019 WL 2404660 at *1, *Martone*, 902 F.3d at 527; *Singh*, 882 F.3d at 148–49; *Laffen*, 721 F. App'x at 644; *Graham*, 721 F. App'x at 435–37; *Saumer*, 853 F.3d at 864; *Whitley*, 838 F.3d at 529; *Loeza*, 659 F. App'x at 45–46.

The decision below departs from *Dudenhoeffer* and its progeny because it holds that generalized allegations are sufficient to make out an imprudence claim. Specifically, the court of appeals identified five allegations in the complaint that, in the court's view, made the imprudence claim plausible. However, each of those five generic allegations can be made in nearly every stock-drop case, and, indeed, they have been made in many other cases. Those five allegations—whether viewed collectively as a whole, or in isolation—fail to establish that a prudent fiduciary could not have concluded that disclosure would cause more harm than good.

*First*, the complaint alleged that the plan's fiduciaries knew that IBM stock was supposedly artificially inflated due to accounting irregularities that impaired the company's Microelectronics assets. Pet.App.15a. However, knowledge of non-public corporate information that supposedly should have been disclosed can be alleged in nearly every stock-drop case because ERISA fiduciaries are typically company insiders. *See, e.g.*, *Loeza*, 659 F. App'x. at 45 (alleging that ESOP fiduciaries knew of the chief information officer's risky practices and helped circumvent internal controls); *Martone*, 902 F.3d at 521, n.2 (alleging that the ESOP fiduciaries were the company's CEO, CFO, and General Counsel and knew of an alleged overcharging scheme); Second Consolidated Amended Complaint ¶¶ 80, 82–83, *In re HP ERISA Litig.*, No. 12-cv-6199 (N.D. Cal. July 16, 2014), Dkt. No. 121 ("*HP* Complaint") (alleging that plan fiduciaries were corporate executives who knew of alleged accounting improprieties within a company acquired by HP), *dismissal aff'd*, 721 F. App'x at 644; *In re BP p.l.c. Sec. Litig.*, No. 10-md-2185, 2015 WL 1781727, at *10 (S.D. Tex. Mar. 4, 2015) (alleging that ESOP fiduciaries were corporate insiders). The fact that an ERISA fiduciary possessed negative, non-public corporate information does not at all suggest impropriety, particularly since this Court has recognized that it is perfectly appropriate for corporate officers to serve as ERISA fiduciaries. *See Pegram*, 530 U.S. at 225. And simply possessing non-public information does not raise a plausible inference that there was a duty to do something with that information. *See, e.g.*, *Whitley*, 838 F.3d at 529.

*Second*, the complaint alleged that the plan's fiduciaries "had the power to disclose the truth to the public and correct the artificial inflation" because they were responsible for making corporate disclosures under the securities laws. Pet.App.16a. Here, too, because ERISA fiduciaries are often corporate insiders, plaintiffs will generally be able to allege that a defendant fiduciary could have disclosed the non-public information at issue in his or her corporate capacity through "regular" corporate channels. *See* Fourth Amended Complaint ¶ 210, *Loeza v. John Does No. 1–10,* No. 12-cv-4027 (S.D.N.Y. Jan. 8, 2015), Dkt. 61 ("*Loeza* Complaint"), *dismissal aff'd,* 659 F. App'x at 45; Amended Class Action Complaint ¶ 82, *Martone v. Robb*, No. 15-cv-877 (W.D. Tex. Oct. 14, 2016), Dkt. 41 ("*Martone* Complaint"), *dismissal aff'd*, 902 F.3d at 526–27; *HP* Complaint at ¶¶ 91–92, 113. Moreover, as explained in Point III, *infra*, the fact that a plan fiduciary had the power to disclose information in his or her corporate capacity cannot form the basis for liability under ERISA.

*Third*, the complaint alleged that it is always better for ESOP participants if a fiduciary discloses negative, non-public information sooner rather than later. Pet.App.16a–18a. That same allegation can be made in every case—and has been made in many other cases. *See Martone*, 902 F.3d at 526–27; *Laffen*, 721 F. App'x at 644; *Graham*, 721 F. App'x at 435–37; *Saumer*, 853 F.3d at 864; *Whitley*, 838 F.3d at 529; *Loeza* Complaint at ¶ 212. And courts have correctly rejected that allegation as speculative because a premature disclosure could have adverse effects of its own, including harming the company stock price and thus plan participants already invested in company stock. *See Martone*, 902 F.3d at 526–27; *Laffen,* 721 F. App'x at 644; *Graham*, 721 F. App'x at 436; *Saumer*, 853 F.3d at 864; *Whitley*, 838 F.3d at 529.

*Fourth*, the complaint alleged that IBM's stock traded on an efficient market, and there was thus no concern that the market would overreact to a premature disclosure. Pet.App.18a. There is nothing about that allegation that is specific to the case below; rather, it is a general economic principle that could be alleged in every case. *See Loeza* Complaint at ¶ 204; *Martone* Complaint at ¶¶ 4, 23; *Wilson v. Edison Int'l, Inc.*, 315 F. Supp. 3d 1177, 1193 (C.D. Cal. 2018) (rejecting as generic an allegation that under an efficient markets theory the stock price would simply fall back to its pre-inflation level following a disclosure), *appeal docketed*, No. 18-56139 (9th Cir. Aug. 23, 2018).

*Fifth*, the court below credited as "particularly important" an allegation that disclosure was "inevitable" on account of the likely sale of the allegedly impaired assets. Pet.App.19a. Since non-disclosure was supposedly no longer an option, the court below reasoned that a prudent fiduciary would necessarily disclose earlier. *Id.* There are at least two flaws with that holding. First, no fraud goes on in perpetuity, so disclosure can be alleged to be inevitable in every case. *See Martone* Complaint at ¶¶ 8, 25, 89, 92; *HP* Complaint at ¶ 114. Indeed, in every stock-drop case, the negative information has already come to light, which makes it easy to allege in hindsight that disclosure was inevitable. Second, even if disclosure were inevitable, a prudent fiduciary could still conclude that immediate disclosure is not warranted. Indeed, a prudent fiduciary could readily determine that immediate disclosure of negative information outside normal corporate channels of communication would spook the market and have a greater negative effect on the company stock price than a later disclosure through regular channels—regardless of whether disclosure is inevitable. *See Martone*, 902 F.3d at 526–27; *Laffen*, 721 F. App'x at 644; *Graham*, 721 F. App'x at 436; *Saumer*, 853 F.3d at 864; *Whitley*, 838 F.3d at 529; *see also McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1089–90 (9th Cir. 2003) (explaining that early disclosure of a pending merger caused HBOC stock to drop sharply when merger discussions later came to a standstill and "wreak[ed] havoc" on the stock exchange ratio to be used for converting HBOC shares to McKesson shares).[8]

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[8] Similarly, a prudent fiduciary could readily conclude that disclosure of negative information prior to an appropriate investigation, or concomitant with such an investigation, would have a greater negative effect on company stock price than a

Taken together, the boilerplate allegations asserted in the complaint fail to give rise to a plausible imprudence claim because, even taking the allegations as true, it cannot be said that a prudent fiduciary could not have concluded that an earlier disclosure would have caused more harm than good under the circumstances. None of the allegations changes the fact that a prudent fiduciary could have determined that disclosure might have caused more harm than good by hindering the sale of IBM's microelectronics assets or causing the company stock price to plummet to the detriment of those already invested in the ESOP. The defendant fiduciaries should not face liability for deciding not to disclose when a prudent fiduciary could have reached the same conclusion.

If these generic allegations are sufficient to state a claim under ERISA, the plaintiffs' bar will be encouraged to make the same allegations whenever a company's stock price drops, and meritless stock-drop claims will once again be the norm. Consequently, as explained below, employers would have no choice but to remove ESOPs from their menu of investment options, thereby eliminating employee ownership and all of its attendant benefits.

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later disclosure. *See Laffen*, 721 F. App'x at 644 ("[A] prudent fiduciary must first investigate problems before acting."); *Martone*, 902 F.3d at 526–27 (same); *see also Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760 (7th Cir. 2007) ("Prudent managers conduct inquiries rather than jump the gun with half-formed stories as soon as a problem comes to their attention.").

### C. Affirmance Would Threaten ESOPs and the Benefits They Impart.

If the decision below is affirmed, it would significantly weaken the standard for pleading plausible imprudence claims against ESOP fiduciaries by allowing claims based on generic allegations to proceed to discovery. Employers would thus be discouraged from offering ESOPs in the first instance for fear of being forced into high-dollar settlements or incurring significant fees in litigation. A reduction in the availability of ESOPs would, in turn, eliminate the benefits that these funds engender, frustrate congressional purpose, and imperil retirement security.

Beginning in the late 1990s, with pronounced surges after the collapse of Enron and the 2007–2008 financial crisis, fiduciaries of ERISA plans offering ESOPs faced an onslaught of stock-drop lawsuits. *See* ERISA Company Stock Cases, Cornerstone Res., https://www.cornerstone.com/Publications/Research/ERISA-Company-Stock-Cases (last visited Aug. 12, 2019) (noting over 250 stock-drop cases filed between 1997 and 2014). *Dudenhoeffer* and *Amgen* have largely succeeded at reining in meritless claims by ensuring their dismissal at the pleading stage. If plaintiffs with meritless stock-drop claims are permitted to proceed to discovery, however, the plaintiffs' bar will rush to file nuisance suits every time the stock price of a company offering an ESOP drops. *See Twombly*, 550 U.S. at 558 (noting that allowing a meritless claim to survive into discovery creates "an *in terrorem* increment of the settlement value").

Because ERISA imprudence claims are fact-intensive, discovery in these cases is especially costly and burdensome. *See, e.g.*, *Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013) (stating that "the prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times"). When such claims do survive a motion to dismiss, fiduciaries are often pressured into settling claims for large sums of money. *See Twombly*, 550 U.S. at 558 (recognizing that the expense and inconvenience of discovery often compel a defendant to settle even an unmeritorious suit). Settlement values for ERISA company stock-drop cases for which data is available average $31.4 million, with a median settlement amount of $6.5 million. *See* Cornerstone, *supra*. The plaintiffs' bar thus has an enormous incentive to bring meritless stock-drop claims if its members believe that they can survive a motion to dismiss.

At bottom, an affirmance would weaken the plausibility standard prescribed by *Dudenhoeffer* and *Amgen*, discourage employers from offering ESOPs, and undermine the Congressional goal of encouraging employee ownership:

> Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of . . . employers to take the

> necessary steps to implement the plans, and which otherwise block the establishments and success of these plans.

Tax Reform Act, § 803(h). To preserve the ability of companies to offer ownership options to their employees, the decision below should be reversed.

### III. The Decision Below Improperly Merges Corporate and Fiduciary Obligations.

The decision below should be reversed for the additional reason that it disregards the "two hats" rule that this Court articulated in *Pegram v. Herdrich*, 530 U.S. 211 (2000).

ERISA expressly permits a corporate insider to serve as a plan fiduciary. 29 U.S.C. 1108(c)(3). That does not mean that the two roles merge, however. Rather, as this Court has explained, a corporate insider who also serves as a plan fiduciary may have "interests adverse to beneficiaries." *Pegram*, 530 U.S. at 225; *see also Varity Corp.*, 516 U.S. at 498. For example, corporate officers who also are ERISA fiduciaries can terminate a participant's employment or eliminate certain plan benefits while acting as corporate officers or plan settlors even though such actions would not be in the best interest of plan participants. *Pegram*, 530 U.S. at 225.

When an ERISA fiduciary also serves as a corporate officer, he or she must "wear only one [hat] at a time." *Id.*; *see also* 29 U.S.C. § 1002(21)(A) (defining an individual as a fiduciary "to the extent" he exercises discretionary authority or control over plan management or assets). That is to say, ERISA fiduciaries who also are officers must disregard their corporate obligations when making fiduciary decisions and disregard their fiduciary role when making decisions for the corporation. *Pegram,* 530 U.S. at 225–26. Accordingly, "[i]n every case charging breach of ERISA fiduciary duty, . . . the threshold question is . . . whether that person was acting as a fiduciary . . . when taking the action subject to complaint." *Id.* at 226. It follows that fiduciaries cannot breach an ERISA duty when acting in their role as a corporate officer because they have no duties to plan participants when wearing their officer "hat."

The court of appeals overlooked the distinction between fiduciary and corporate acts and held that the complaint plausibly alleged that the defendant fiduciaries acted imprudently by not disclosing negative, non-public information about IBM in part because two of the fiduciaries also served as corporate officers who had the power to make the disclosure in an SEC filing. Pet.App.16a. In the lower court's view, because those fiduciaries could make disclosures through the company's regular channels of communication in their roles as officers, there was no concern that a disclosure would seem unusual and thus spook the market into thinking that problems at the company were worse than they actually were. *Id.*

That holding impermissibly requires insider fiduciaries to take into account non-public information learned in their corporate role when wearing their fiduciary hat, to consider their responsibilities as corporate officers when making disclosure decisions in their fiduciary capacities, and potentially to make a disclosure of inside information where the securities laws do not otherwise require such a disclosure. The holding thus flies directly in the face of *Pegram*'s teaching that an insider fiduciary cannot consider his or her corporate duties when making fiduciary decisions, and it upsets the carefully balanced disclosure obligations established by Congress in the securities laws.[9]

In so ruling, the court below imposed additional disclosure obligations on an ESOP fiduciary who also happens to be an officer that would not exist if the fiduciary were not an officer. If the decision is affirmed, companies that otherwise have the expertise and

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[9] As discussed in Point I of Petitioners' Opening Brief, Respondents' claim fails at the threshold because it is predicated on a claim that ERISA fiduciaries have a duty to disclose non-public information acquired in their roles as corporate insiders that might affect the value of company stock. Requiring public disclosure would improperly create an ERISA-based duty to disclose that does not otherwise exist. *See Kopp v. Klein,* 722 F.3d 327, 340 (5th Cir. 2013); *Fisch v. Suntrust Banks, Inc.*, 511 F. App'x 906, 908 (11th Cir. 2013); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1284–85 (11th Cir. 2012); *Slaymon v. SLM Corp.*, 506 F. App'x 61, 64 (2d Cir. 2012) (summary order); *Gearren v. McGraw-Hill Cos.*, 660 F.3d 605, 610 (2d Cir. 2011); *In re Citigroup ERISA Litig.*, 662 F.3d 128, 142–43 (2d Cir. 2011); *Howell v. Motorola, Inc.*, 633 F.3d 552, 572 (7th Cir. 2011); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 350–51 (3d Cir. 2007); *see also Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (reserving the question of "whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative"); *Dudenhoeffer*, 573 U.S. at 429 (instructing the lower courts to consider whether public disclosure would conflict with the objectives and requirements of the securities laws). The decisions in *Home Depot*, *Citigroup*, *Gearren*, *Howell*, *Slaymon* and *Edgar* were abrogated on other grounds by *Dudenhoeffer*. *Kopp* was vacated on other grounds by *Dudenhoeffer*. 573 U.S. 956 (2014).

infrastructure to administer their retirement plans themselves would have to choose between employing outsider fiduciaries or eliminating the ESOP from their plans altogether because the alternative would be facing discovery on an imprudence claim every time the company's stock price falls. Hiring outside fiduciaries would increase inefficiency, put plan administration into the hands of individuals who are not at all familiar with the company or the plan participants, and lead to increased costs of plan administration that will either be passed onto participants and beneficiaries or convince companies to stop offering ESOPs as part of their ERISA retirement plans. Such a result would contravene Congress's desire to avoid "a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering […] benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497.

## CONCLUSION

For the foregoing reasons, Amici encourage the Court to reverse the decision below.

Respectfully submitted,


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