No. 18-2781

In the United States Court of Appeals For the Eighth Circuit

Francesca Allen, John Sterling Ross and Mary Lou Shank, individually and on behalf of all other similarly-situated participants in, and beneficiaries of, the Wells Fargo & Company 401(k) Plan,

Plaintiffs-Appellants,

v.

Wells Fargo & Company, Hope Hardison, Justin Thornton, John Shrewsberry, Kevin Oden, Patricia Callahan, Stanhope Kelly, Dawn Martin Harp, Suzanne Ramos, James Steiner, George Wick, Martin Davis, Thomas Wolfe, Lloyd Dean, John Chen, Susan Engel, Donald James, and Stephen Sanger,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
Civil No. 16-cv-03405-PJS-BRT

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Adam J. Levitt
Daniel R. Ferri
DICELLO LEVITT & CASEY LLC
10 North Dearborn Street
Eleventh Floor
Chicago, Illinois 60602
Telephone: (312) 214-7900
alevitt@dlcfirm.com
dferri@dlcfirm.com

Robert K. Shelquist
Rebecca A. Peterson
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, Minnesota 55401
Telephone: (612) 339-6900
rkshelquist@locklaw.com
rapeterson@locklaw.com

Additional Counsel on Next Page

W. Daniel "Dee" Miles, III
Leslie L. Pescia
BEASLEY ALLEN CROW METHVIN PORTIS & MILES, P.C.
218 Commerce Street
Montgomery, Alabama 36103
Telephone: (334) 269-2343
Dee.Miles@beasleyallen.com
Leslie.Pescia@beasleyallen.com

Samuel E. Bonderoff
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, New York 10004
Telephone: (212) 742-1414
samuel@zamansky.com

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER AUTHORITIES

The extensive briefing makes it easy to lose sight of the fact that this appeal turns on two questions: (1) is it plausible that Defendants acted disloyally; and (2) is it plausible that Defendants acted imprudently? Defendants avoid directly confronting these questions because the answer to each of them is "yes," thereby requiring reversal.

I. DEFENDANTS PLAUSIBLY BREACHED THE DUTY OF LOYALTY.

Plaintiffs' disloyalty claim stands on its own. While the continued investment in Wells Fargo stock was imprudent, this was not the result of loyal, but careless, fiduciaries. Rather, the facts show insider fiduciaries, comprised of Wells Fargo's corporate elite, placing their own financial well-being over that of the participants in the Wells Fargo 401(k) Plan (the "Plan") when they furthered the concealment of the massive, ongoing fraud within Wells Fargo's retail banking business by continuing to allow Plan investment in inflated Wells Fargo stock. The facts show that Defendants did not act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a).

A. Defendants Breached Their Duty to Disclose Material Information.

The evidence of disloyalty begins with the undisputed allegations that Defendants knew of the fraud and its impact on Wells Fargo's share price, but never disclosed it to Plan participants. (Appendix-455-62, 484-96 ("App-").) As the fiduciaries in charge of offering Wells Fargo stock as an investment option, Defendants should have informed Plan participants of facts—facts which the Plan participants could not have foreseen—which would reasonably lead them to consider other investment options for their retirement monies. This conclusion is completely consistent with the common law of trusts, which holds that "a trustee has a duty . . . to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter." Restatement (Third) of Trusts § 78(3). It is also in accord with law of this circuit, which has held that the "duty of loyalty requires an ERISA fiduciary to communicate any material facts which could adversely affect a plan member's interests," *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir. 1997), and materiality "turns on the effect information would have on a reasonable participant's decisions about how to allocate his or her investments among the options in the Plan." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 599 (8th Cir. 2009).

Contrary to Defendants' argument (Appellees' Br. at 48), *Shea* and *Braden*, as well as *Kalda v. Sioux Valley Physician Partners, Inc.*, 481

F.3d 639 (8th Cir. 2007), draw no distinction between the types of material information that must be disclosed. The important question, clear from *Braden*, is whether the nondisclosed information is material. *Braden*, 588 F.3d at 600 (holding that district court erred by not applying materiality analysis).

The nondisclosed information in *Braden*, moreover, was material for the same reason as the nondisclosed information here. *Braden* involved the nondisclosure of information relating to specific investment options available under the plan, the information being material because it "could influence a reasonable participant in evaluating his or her options under the Plan." *Braden*, 588 F.3d at 599-60. Here, Defendants also did not disclose critical information relating to a specific investment option under the Plan (Wells Fargo stock) which would have influenced a reasonable participant in evaluating her Plan investment options. Under the doctrine of *stare decisis*, the Court must follow *Braden* and hold that Defendants' nondisclosure of material information gives rise to a claim for breach of the duty of loyalty. *See Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.”).

Wilson v. Sw. Bell Tel. Co., 55 F.3d 399 (8th Cir. 1995), cited by Defendants, did not recognize an exception to the general duty to disclose material information, such that plan fiduciaries are free to withhold non-public company information. *Wilson* concerned *potential* plan beneficiaries, and the court affirmed a summary judgment ruling that an employer fiduciary was not required to inform employees of information relevant to the offering of a *potential* benefit plan. *Id.* at 406. The court said nothing to suggest that fiduciaries do not have a full duty to disclose information material to the interests of current plan participants for whom they were fiduciaries, as was recognized in *Shea* and *Braden*.

This circuit is not alone in recognizing a broad fiduciary duty to disclose information material to plan members’ interests. *See, e.g., Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1045 (9th Cir. 2001) (recognizing an ERISA fiduciary’s “duty to disclose facts material to investment issues”); *Terraza v. Safeway, Inc.*, 241 F. Supp. 3d 1057, 1074 (N.D. Cal. 2017) (citing *Braden*); *Horn v. Cendant*

Operations, Inc., 69 F. App'x 421, 427–29 (10th Cir. 2003); *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 380–81 (4th Cir. 2001); *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750-51 (D.D.C. 1990) ("[The] duty to communicate complete and correct material information about a beneficiary's status and options is not a novel one.").

And while some circuits have held that ESOP fiduciaries do not need to disclose *all* potentially adverse company information to plan participants, those circuits have not gone so far as to hold that fiduciaries can never be held liable for a failure to disclose material information regarding company stock. Rather, they have generally rested their holdings on findings that the Plan participants were aware of the risks inherent in the company stock. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1285-86 (11th Cir. 2012) (finding that the fiduciaries had "adequately informed the participants about the risks of investing" in company stock.)[1]; *In re Citigroup ERISA Litig.*, 662 F.3d 128, 143 (2d Cir. 2011) (finding that the fiduciaries had provided an adequate warning that company stock was subject to volatility, and did

---

[1] *Fisch v. Suntrust Banks, Inc.*, 511 F. App'x 906, 908 (11th Cir. 2013) did not expound upon the existence of a duty to disclose, but simply referred to *Lanfear*.

not have a further duty to "forecast as to when this volatility would manifest itself in a sharp decline in stock price.")[2]; *Edgar v. Avaya, Inc.*, 503 F.3d 340, 350-51 (3d Cir. 2007) (recognizing a duty to disclose, but finding that the defendants had adequately informed plan participants of the risk associated with the investment in employer stock such that they could make their own "informed investment choice."); *Kopp v. Klein*, 722 F.3d 327, 342 (5th Cir. 2013) (recognizing possibility of duty to disclose non-public company information in special circumstances); *Howell v. Motorola, Inc.*, 633 F.3d 552, 570-72 (7th Cir. 2011) (recognizing a duty to disclose under ERISA, but finding that that the defendants had not "misled Plan participants" by not disclosing a bad business decision).

Here, Plaintiffs are not claiming that Defendants should have disclosed run-of-the-mill adverse information, or that they should have provided "investment advice" or "opine[d] on" the condition of Wells

[2] *Slaymon v. SLM Corp.*, 506 F. App'x 61, 64 (2d Cir. 2012); *Gearren v. The McGraw-Hill Cos., Inc.*, 660 F.3d 605, 610 (2d Cir. 2011) simply referred to *Citigroup*. Further, the nondisclosed information in these cases was consistent with the risk inherent in the ordinary business of the employer. The information was not an anomaly, like widespread fraud, that could not have been foreseen by plan participants investing in the stock.

Fargo stock. *Edgar*, 503 F.3d at 350. Rather, they allege that Defendants knew of massive fraud, material to Wells Fargo's stock price, that Plan participants could not have known or foreseen. Plan participants did not have an opportunity to make an informed decision regarding their investment options. Thus, even if the Court was inclined to depart from *Shea* and *Braden* and impose a limitation on the material information that must be disclosed, other courts' rationales do not compel the conclusion that Defendants' actions fell outside the fiduciary duty to disclose recognized under ERISA and the common law of trusts.

Conceding that they'd have had a duty to disclose under trust law, Defendants point to the Supreme Court's language that "trust law does not tell the entire story" with respect to ERISA's fiduciary duties. (Appellees' Br. at 52 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1999).) They fail to explain, however, that this was because "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity*, 516 U.S. at 497.

Indeed, Defendants can't point to any Supreme Court precedent suggesting that Plan members should be entitled to *less* fiduciary protections under ERISA than under the common law. The Supreme Court has never held that the ERISA fiduciary duties deviate from those under the common law of trusts in a way that would exempt fiduciaries from disclosing material information. If that were the case, it would render ERISA fiduciary status a sham. Fiduciaries would be free, for their own convenience or advantage, to offer investment options that they know to be bad investments, just as they did here. This circuit's *Shea/Braden* precedent is fair and consistent with ERISA's purpose and intent, which is to "promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989).

Dudenhoeffer did not overrule this precedent. The *Dudenhoeffer* Court explicitly "limit[ed] [its] review" to "duty-of-prudence claims," *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2464 (2014), and there is thus no conflict between *Dudenhoeffer* and the duty to loyally disclose material information.

Defendants argue that *Dudenhoeffer* contemplates the possibility of certain situations where a prudent fiduciary would refrain from disclosure out of fear that it might harm the plan. But even if such a factual scenario provided *a defense* to a claim that defendants breached the duty of loyalty by not disclosing material information, nothing in this record shows that such a situation existed here. There is no indication that any of the fiduciaries thought they were helping the Plan by not disclosing the fraud. Indeed, where the Plan was a net purchaser of Wells Fargo stock and where disclosure would have effectively forced the bank to take measures to stop ongoing fraud, Defendants could not possibly have believed that they were benefitting the Plan or its participants by allowing years of Wells Fargo stock purchases at artificially inflated prices.

B. *Amici*[3] Demand that the Court Ignore Its Own Precedent and, Based on the Specter of Harms Untied to This Case, Hold That Fiduciaries Never Have a Duty To Disclose Company Information.

Amici, which have no interest in plan participants being able to hold fiduciaries legally accountable, blithely ignore *Shea* and *Braden* in arguing that Plaintiffs "ask this Court to create an alternative disclosure regime" under which "fiduciaries have a heightened duty to disclose." (*Amici* Br. at 8.) Not true. As explained above, Plaintiffs' disclosure argument is consistent with this circuit's precedent and the common law of trusts.

In following its precedent, the Court would not be "substitut[ing] [its] own pleasure to the constitutional intentions of the legislature." (*Amici* Br. at 13 (quoting The Federalist No. 78 (Alexander Hamilton).) To the contrary, the Court would be fulfilling the legislature's intention that: (1) ERISA would provide "safeguards" with respect to the "operation" of employee benefit plans, 29 U.S.C. § 1001, and (2) that the

[3] Plaintiffs intend to oppose The American Benefits Council, the Chamber of Commerce, The ERISA Industry Committee, and the Security Industry and Financial Markets Association's motion for leave to file a brief as *Amici Curiae* in support of Defendants-Appellees, but address their arguments in the event that their motion is granted and their *amici curiae* brief is considered.

common law of trusts would define the general scope of a fiduciary's responsibility. *See Varity*, 516 U.S. at 496.

Nor is this Court's precedent at odds with Congress's instruction "to refrain from judicial action that would discourage employees from investing in company stock." (*Amici* Br. at 6.) To the contrary, by ensuring that ESOP plans are protected by un-eroded fiduciary standards, the Court will encourage employee investment in company stock. Weakening the fiduciary standards would make company stock a riskier, and less-appealing, option for the investment of employees' retirement monies.

Moreover, the recognition of a duty to disclose material information does not compel fiduciaries to prematurely disclose "incomplete" information, as *Amici* argue. (*Amici* Br. at 14-15.) Certainly, this case does not require such a holding. Here, there are no facts suggesting that Defendants' disclosure of the massive fraud undermining Wells Fargo's purported "cross-selling" achievements would have been premature. Indeed, Defendants sat on the information for over two years. (App-484-94.)

There is also no merit to *Amici*'s purported concern that holding insider fiduciaries to the duty to disclose will serve as an end-around the Private Securities Litigation Reform Act. (*Amici* Br. at 14.) Not every securities stock-drop case can be reframed under the ERISA duty to disclose because the ERISA action requires plausible allegations that *plan fiduciaries* knew of the material information. When such facts do exist, there is no reason that plan participants should be denied the right to individually assert claims against the fiduciaries who withheld material information to their detriment.

C. The Securities Laws Do Not Provide Adequate Protection.

The duty to disclose recognized in *Shea* and *Braden* does not undermine the securities laws, as *Amici* contend. Rather, as both the district court and the SEC recognized, a fiduciary's duty to disclose inside information is consistent with the letter and the spirit of the securities laws. (Appellant's Br. at 28-29.) ERISA's savings clause, which provides that ERISA shall not be construed to "invalidate, impair, or supersede any law of the United States," 29 U.S.C. § 1144(d), is not implicated because the duty to disclose does not invalidate, impair, or supersede the securities laws.

Amici rightly point out that "[u]nder the securities laws and regulations, a public company most promptly disclose material information." (*Amici* Br. at 11.) It is unclear how the securities laws are undermined—or who is harmed—by ERISA specifically requiring fiduciaries to disclose material information.[4]

Moreover, and critically, the securities laws do not provide Plaintiffs an adequate remedy here. Plaintiffs would not be able to bring claims under the securities laws because they were not technically purchasers of Wells Fargo stock. This is evident from the proposed settlement of the securities litigation relating to Wells Fargo's fraud. *See Hefler v. Wells Fargo & Co.*, No. 16-cv-5479, 2018 WL 4207245 (N.D. Cal. Sept. 4, 2018). As Defendants point out, the settlement class notice in *Hefler* provides that Plan participants cannot submit individual claims under the settlement, but that a Plan fiduciary *may* determine whether the Plan will participate in the settlement. *Hefler*, No. 16-cv-5479, Dkt. No. 225-1, Ex. A-1 (question

---

[4] Regulation FD (Fair Disclosure) would not be rendered superfluous, as *Amici* contend. The regulation obligates an issuer to publicly disclose material information that it has non-publicly disclosed to a person outside the issuer. The regulation is unaffected by insider fiduciaries having an obligation to disclose material information.

49). Plan participants, therefore, are precluded from submitting their own claims under the securities settlement, and would be precluded from bringing their own securities claims. Moreover, there is not even an assurance that the Plan will participate in the settlement.

Amici accuse Plaintiffs of attempting to "mislead[]" the Court into thinking that the Plan participants were excluded from the securities settlement. This is false. The only reference to the Plan's *potential* participation in the securities settlement is buried in the settlement class notice. There is no reference to the Plan's participation in the settlement agreement itself, which instead states that the settlement does not release any claims asserted in any ERISA action. *Hefler*, No. 16-cv-5479, Dkt. No. 225-1, at 11-12. If anything is misleading, it is Wells Fargo entering into a securities settlement agreement which explicitly preserves ERISA claims, and then arguing here that the securities settlement is a reason to deny Plan participants' ERISA claims.

To accept Defendants' and *Amici*'s argument that the securities laws provide the appropriate remedy in cases where plan participants were harmed by a failure to disclose material company information would be to deny plan participants the right to seek recovery on their own behalf. Plan participants would have to hope the plan—likely at the initiative of the same fiduciaries who they accuse of disloyalty—would bring a securities action or agree to a securities settlement brought by others. This result would contravene Congress' intention that "private individuals would play an important role in enforcing ERISA's fiduciary duties." *Braden*, 588 F.3d at 598. And it would be an absurd state of affairs if plan participants, who supposedly could rely on fiduciaries governed by standards which are the "highest known to law," are denied the opportunity to individually assert claims against these fiduciaries for their misconduct, while these same fiduciaries' misconduct provides the basis for securities claims brought by arms-length purchasers.[5]

D. Defendants' Conflicts of Interest Compromised Their Loyalty.

Although Defendants dispute the existence of the pure duty to disclose material information recognized in *Shea* and *Braden*, they admit that Plaintiffs have a viable disloyalty claim if they have asserted

[5] Defendants Shrewsberry and Hardison are also named defendants in the *Hefler* case.

facts which "give rise to a plausible inference that Defendants acted disloyally in this case." (Appellees' Br. at 54.) Plaintiffs have asserted such facts.

Defendants concealed the ongoing fraud for years, during which time they allowed the Plan participants to invest in stock that they knew to be artificially inflated. (App-455-62, 484-96.) While they concealed the ongoing fraud, they profited from sales of their own company stock. (App-502-03, 539-40.) Further, Defendants were largely high-ranking members of Wells Fargo's management who would have been aware that they and their peers had the most to lose if they disclosed the fraud. (App-455-62, 539-40.) These losses are not merely hypothetical. When the fraud was disclosed, the CEO lost his job. (App-483.) And on October 25, 2018, it was reported that Defendant Hope Hardison was placed on leave of absence as a result of "reviews by regulatory agencies in connection with historical retail banking sales practices."[6] Wells Fargo, moreover, has even admitted that it "should

---

[6] Kevin Wack, *Wells Fargo Puts Two Top Execs on Leave as Scandal's Reach Grows*, American Banker, Oct. 24, 2018, available at https://www.americanbanker.com/news/wells-fargo-puts-chief-admin-officer-auditor-on-leave-amid-ongoing-scandals (last accessed Nov. 27, 2018).

have done more sooner to eliminate unethical conduct and unintended incentives," (App-483), so it can hardly be concluded that the continued concealment was part of some master plan to right the ship.

This case is replete with factual allegations that could not be asserted in every stock-drop or duty of prudence of case. Not every stock drop case will contain facts so clearly showing that insider fiduciaries were aware of the adverse information which affects the stock price. Rarely will a stock drop be associated with massive and ongoing fraud, which fiduciaries are motivated to conceal for fear that its revelation will cost people their jobs. Even more rare will be those instances when it can be shown that the revelation did cost people their jobs. And not every stock drop case involves clear facts showing that the insider fiduciaries were disposing of their own stock at inflated prices.

What more facts could Plaintiffs reasonably expect to uncover that would "give rise to a plausible inference that Defendants acted disloyally"? (Appellees' Mem. at 54.) As this court has recognized: "If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer." *Braden*, 588 F.3d at 598.

Moreover, on the other side, there is not a single fact suggesting that Defendants were serving the Plan by allowing years of investment in knowingly overpriced company stock. The scales tilt strongly towards disloyalty, and this case more than satisfies the plausibility standard. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" (*quoting Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)).[7]

[7] The district court failed to conduct a plausibility analysis. Instead, the district court simply concluded that it was not *per se* illegal for defendants to either wear "two hats" or not disclose material information to plan participants. (Add-34-35.) The district court did not consider whether all of the alleged facts create a plausible inference that Defendants acted disloyally when they took no action to protect Plan participants.

E. Plaintiffs' Loyalty Claim Does Not Rise and Fall With Their Prudence Claim.

Plaintiffs' plausible disloyalty claim cannot be simply dismissed as derivative of a prudence claim as Defendants contend.[8] (Appellees' Br. at 59-62.) Claims under the duty of prudence and duty of loyalty are distinct,[9] and they are governed by different standards. The plain language of ERISA makes this clear.

The duty of prudence requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing *that a prudent man* acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B) (emphasis added). As the district court rightly recognized, duty of prudence claims are thus

---

[8] Although in *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010), this Court dismissed a loyalty claim as derivative of a prudence claim, it did so perfunctorily. This Court did not suggest that where a prudence and a loyalty claims arise from the same set of facts, the viability of the loyalty claim hinges on the success of the prudence claim.

[9] *See, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570-71 (1985) (describing the distinct duties of loyalty and prudence); *Sacerdote v. New York Univ.*, 2017 WL 3701482 at **3-4, 9 n.3 (S.D.N.Y. Aug. 25, 2017) (stating that the duty of loyalty is "analytically distinct" from the duty of prudence).

governed by an objective standard. (Add-29); *see also Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) ("Prudence is measured according to the objective 'prudent person' standard developed in the common law of trusts."). It does not matter *why* a fiduciary did what she did, it only matters that there was some imaginary *prudent* person who might have done the same thing.

The duty of loyalty, on the other hand, is governed by a subjective standard. As the district court explained: "the duty of loyalty requires fiduciaries to act 'for the exclusive *purpose* of . . . providing benefits to participants and their beneficiaries.' 29 U.S.C. § 1104(a)(1)(A)(i). This is a subjective standard; what matters is *why* the defendant acted as he did." (Add-30-31 (emphasis in original).)[10]

[10] *See also Hugler v. Byrnes*, 247 F. Supp. 3d 223, 230 (N.D.N.Y. 2017) ("The language of the statute . . . suggests that a court should use a subjective test when determining whether a defendant has breached his duty of loyalty."); *Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361, at *4 (D. Mass. June 19, 2017) ("The Plaintiffs' burden, therefore, is to point to the Defendants' motivation behind specific disloyal conduct.") *Washington v. Bert Pell/Pete Rozelle NFL Ret. Plan*, 504 F.3d 818, 824 (9th Cir. 2007), cited by *Amici* is not to the contrary. The court simply noted that whether information is material – and must thus be disclosed – is objectively decided by reference to a reasonable person.

Thus, as this Court has recognized, a fiduciary can breach the duty of loyalty even in situations where it acted prudently. *See Tussey v. ABB, Inc.,* 830 F.3d 951, 958 (8th Cir. 2017) ("[a] fiduciary can abuse its discretion and breach its duties by acting on improper motives, even if one acting for the right reasons might have ended up in the same place."). Where there are facts showing that fiduciaries acted for a purpose other than providing benefits to participants and their beneficiaries, plaintiffs have stated a duty of loyalty claim.

The district court having recognized that prudence and disloyalty claims are analytically distinct, also correctly held that the *Dudenhoeffer* pleading standard cannot be rationally applied to disloyalty claims. *Amici* seek to reargue this point, intending to turn *Dudenhoeffer* into a tool for broadly immunizing ERISA fiduciaries. But they cannot overcome the fact that *Dudenhoeffer's* "more harm than good" standard only makes sense when applied to prudence claims.

The *Dudenhoeffer* Court repeatedly emphasized that it was addressing the duty of prudence and stated that while the respondents in *Dudenhoeffer* had alleged violations of the duties of both prudence and loyalty, it "limit[ed] [its] review to the duty-of-prudence claims."

134 S. Ct. at 2464. Accordingly, the "more harm than good" requirement objectively compares a defendant fiduciary's failure to take an alternative action with how *hypothetical prudent men* could have viewed the alternative action. The "more harm than good" requirement is unconcerned with the purpose, or the subjective motivation, behind a fiduciary's actions. It cannot be rationally applied to the duty of loyalty because it is indifferent to a fiduciary's actual motivation, which is the essence of the duty of loyalty.

Nor did the *Dudenhoeffer* Court intend to broadly immunize ESOP fiduciaries. The Court granted certiorari specifically to address the "presumption of prudence," which had been applied by some circuits to "reconcile congressional directives that are in some tension with each other." *Dudenhoeffer*, 134 S. Ct. 2459, 2465. Specifically, the courts recognized a tension between a fiduciary's duty of prudence and a Congressional directive encouraging the use of ESOPs, which are designed to invest primarily in employer stock. *Id.* at 2465-70. ESOP fiduciaries, who are required to invest in company stock by the ESOP plan documents, might feel compelled to do so even in situations where prudence might otherwise dictate divestment or diversification. *Id.*

Although it recognized the tension, the *Dudenhoeffer* Court held that the "presumption of prudence" was not the appropriate way to "weed out" meritless imprudence claims. *Id.* at 2470. Instead, the Court directed lower courts to apply the "more harm than good" requirement at the pleadings stage. *Id.* at 2473.

There is no inherent tension, however, between the duty of loyalty and a company's decision to offer an ESOP plan. Even if a company chooses to name corporate insiders as plan fiduciaries, these fiduciaries can always avoid breaching the duty of loyalty simply by being forthright with plan participants.

Further, the fact that a prudence claim cannot overcome the *Dudenhoeffer* pleading standard does not mean that the fiduciary's challenged decision did not harm the plan. It simply means that there is some hypothetical prudent fiduciary who might have made the same decision. The duty of loyalty, however, addresses those situations where that harmful decision was not made with a plan's best interests in mind.

Defendants argue that "allowing disloyalty claims like Plaintiffs' to go forward would eviscerate the *Dudenhoeffer* pleading standard."

(Appellee Br. at 61.) Essentially, Defendants contend that if the "more harm than good" requirement does not apply to every breach of fiduciary duty claim involving inside information related to employer stock investments, then plaintiffs will simply circumvent *Dudenhoeffer* by framing their imprudence claims as disloyalty claims.

But prudence and disloyalty claims are not interchangeable. Disloyalty claims require more than allegations of an imprudent investment and a stock-drop. Plaintiffs' disloyalty claim is thus grounded in those facts showing that Defendants' conflicts of interest motivated them to conceal the fraud to the detriment of the Plan. (*See* Section I.D, above.)

The duty of loyalty demands, in the words of Judge Cardozo, a "punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (Cardozo, J.)). To apply the "more harm than good" standard to disloyalty claims would diminish the duty of loyalty. Fiduciaries who become aware of negative inside information affecting plan participants' investments in company stock would no longer be held to a "punctilio of an honor the most sensitive." *Meinhard*, 164 N.E. at 546. Rather, their actions, no matter how disloyal, would be excused if there was a single, imaginary fiduciary who might have concluded that such actions were in the plan's interests.

F. The Duty of Loyalty Should Be Maintained.

Loyalty is the "most fundamental duty" owed by plan fiduciaries. *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000). When a fiduciary knows material information about an investment option under a plan that can't be known by the plan participants, he should be held to a duty to disclose that information. When plan participants have plausible allegations that fiduciaries, motivated by their own self-interest, took no action to prevent investment in an inflated plan option, plan participants' loyalty claim should be allowed to proceed. As Justice Cardozo stated, "the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd" only by the refusal of courts "to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions." *Meinhard*, 164 N.E. at 464. The district court's dismissal of Plaintiffs' disloyalty claim should be reversed.

II. DEFENDANTS PLAUSIBLY BREACHED THE DUTY OF PRUDENCE.

Defendants try to convince the Court of a *Dudenhoeffer* pleading standard that is so stringent that it cannot be overcome by any allegations of imprudence arising from fiduciaries' failure to act based on inside information. But this is decidedly not the teaching of *Dudenhoeffer*, which rejected a "presumption of prudence" and recognized the existence of "plausible sheep" amongst prudence claims arising from fiduciary's knowledge of inside information. *Dudenhoeffer*, 134 S. Ct. at 2470.

A. Plaintiffs' Alternative Actions Satisfy the "More Harm Than Good" Standard.

Defendants fundamentally misconstrue *Dudenhoeffer*'s "more harm than good" pleading standard. Plaintiffs are not required to *prove*, at the pleadings stage, that no hypothetical prudent fiduciary could have concluded that an alternative action would have done "more harm than good." Plaintiffs must simply allege facts showing that it is *plausible* that no hypothetical fiduciary could have so concluded. Once discovery has revealed exactly what Defendants knew, and the circumstances in which they knew it, the district court can objectively decide what a hypothetically prudent fiduciary might have thought.

Plaintiffs' opening brief sets forth the unique facts, presently known, that render it plausible that a prudent fiduciary in Defendants' position could not have concluded that Plaintiffs' alternative actions—

public disclosure of the truth about Wells Fargo's rampant misconduct, or freezing the ESOP until the artificial inflation of Wells Fargo's stock ended—would have done more harm than good. (Appellants' Br. at 51-54.) In return, Defendants offer a litany of generic reasons why the alleged facts cannot push Plaintiffs over the *Dudenhoeffer* bar. Each of these reasons is flawed.

Defendants' first argument against Plaintiffs' proposed alternative actions is that, "[a]s many courts … have held, early disclosure [of wrongdoing] is *not* always better for plan participants than a later disclosure." (Appellees Br. 28 (emphasis in original) (citations omitted).) But Plaintiffs do not merely contend that earlier disclosure of corporate wrongdoing is *always* better for ESOP participants. Rather, Plaintiffs have alleged that here, where the wrongdoing was well-established, well-known, and ongoing, earlier disclosure was clearly preferable because (a) it would limit the number of Plan participants buying ESOP shares at artificially inflated prices, (b) stem the ongoing fraud, thus reducing it compared to not disclosing it, and (c) reduce the risk to Wells Fargo's reputation for trustworthiness, and, therefore, the harm to Wells Fargo's stock price. (App-527-31.)

Defendants argue that it was hypothetically prudent for them to refrain from action until "a complete disclosure [could be] made after a full investigation has concluded." (Appellees Br. 29 (citations omitted).) But this argument assumes that Defendants lacked a sufficiently clear picture of the fraud to take *any* corrective action. Such an assumption is at odds with the alleged facts, which incorporate Wells Fargo's own admissions in its Board Report, showing that the scope of the fraud was well known. (App-484-92.) It is at odds with Wells Fargo's admission that it "should have done more sooner." (App-529.) And it is at odds with the conclusions of other courts, which have held in actions brought under the federal securities laws and state shareholder derivative laws that Wells Fargo insiders—including Defendant Shrewsberry, Wells Fargo's CFO—plausibly knew about, and should have taken action with respect to, the alleged fraudulent sales practices. *See In re Wells Fargo & Co. S'holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1098 (N.D. Cal. 2017) ("Plaintiffs have plausibly alleged that the Board and Wells Fargo senior management, and certainly a *company CFO*, should have known—based on any number of 'red flags'—that the company's cross-selling practices were fraudulent.") (emphasis added); *Hefler v. Wells*

Fargo & Co., 2018 WL 1070116, at *6 (N.D. Cal. Feb. 27, 2018) ("Thus, the Court finds that Plaintiffs have plausibly alleged that Defendants Stumpf, Sloan, *and Shrewsberry* made material and misleading statements through their participation in and approval of Wells Fargo's public filings.") (emphasis added).

When a fraud is this widespread and pernicious in its effects, so much so that state and federal law claims can plausibly be pled against Wells Fargo, its Board, and its senior officers—including some Defendants in this case—how can it credibly be argued that Plan fiduciaries, who owe Plan participants duties that are "'the highest known to the law[,]'" *Braden*, 588 F.3d at 598 (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)), are the only ones whose culpability is implausible as a *pleading* matter?

Defendants' also argue that the disclosures proposed by Plaintiffs, if not "made through regular corporate channels[,]" could "negatively impact the market and result in incomplete or inaccurate disclosures." (Appellees' Br. 30.) But, as explained in their opening brief, Plaintiffs have proposed "that corrective disclosure [be] made 'by Board members and managers to the public … and to government regulators including, but not limited to, the OCC, CFPB, SEC, FDIC, and DOL ….'" (Appellants' Br. 60 (quoting App-521-26).) These disclosures would be made by fiduciaries whose ranks include "Wells Fargo's CFO, Head of Risk and Compliance, Chief Administrative Officer, Head of Human Resources, other members of the Company's Management Committee, and members of the Board of Directors." (Appellants' Br. 60 (citing App-455-59).) Nowhere do Defendants explain why a reasonable fiduciary would have a plausible basis to fear that formal disclosure to multiple regulators and the public by a plethora of senior executives, including Board members and the CFO, would somehow be construed as outside "regular corporate channels."

Further, we know that Defendants, *in reality*, were not actually waiting for disclosure to be made through regular corporate channels. Defendants sat on the information until federal regulators dropped a bombshell, exposing the fraud and publicly denouncing Wells Fargo's conduct. (App-504-505.)

Defendants further argue that Plaintiffs' alternative actions fail to account for the benefit that accrued to some Plan participants who were able to sell their ESOP shares at artificially high prices. (Appellees' Br.

34.) This argument fails in the face of simple arithmetic. Plan participants who bought Wells Fargo stock at artificially inflated prices outpaced Plan participants who sold Wells Fargo stock at artificially inflated prices by approximately $1.5 billion during the relevant time period. (App-531.)[11]

And there is no merit to Defendants' argument that the Plan's status as a net buyer of Wells Fargo stock is something a prudent fiduciary could not have anticipated (Appellees' Br. 42.) It is implausible to suggest that a $1.5 billion difference between buyers and sellers over a period of several years can only be observed with the benefit of hindsight, and there is nothing in the record that supports this inference. That large of a difference in buying and selling activity with respect to the Wells Fargo ESOP should have been obvious to any reasonable fiduciary who was paying attention.

Finally, Defendants miss the point with their argument that "post-hoc public statements by Wells Fargo apologizing for not taking

---

[11] At least two courts have held that the "more harm than good" analysis should take into account the question of whether Plan participants bought more than they sold. *See In re BP P.L.C. Sec. Litig.*, 2017 WL 914995, at *5 (S.D. Tex. Mar. 8, 2017); *Jander v. Ret. Plans Comm. of IBM*, 272 F. Supp. 3d 444, 450 (S.D.N.Y. 2017).

earlier action" do not support Plaintiffs' contention that earlier action would have clearly benefitted Plan participants. Wells Fargo CEO Stumpf's admission that Wells Fargo "should have done more sooner," (App-483), may not, by itself, establish that Defendants acted imprudently. But it distinguishes this case from those that the *Dudenhoeffer* pleading standard was meant to deter. This is not a case where, despite everyone's best efforts, a fiduciary finds himself "between a rock and a hard place" as to whether it is prudent to act on inside information. *Dudenhoeffer*, 134 S. Ct. at 2470. Rather, there is an admission of failure at Wells Fargo's highest levels. When considered along with the other alleged facts (*see* Appellants' Br. at 51-54), it is plausible that the Wells Fargo's officers and Board members also failed in their capacity as fiduciaries.

B. Plaintiffs' Proposed Alternative Actions Are Consistent with the Securities Laws.

Defendants also argue that Plaintiffs' two proposed alternative actions—public disclosure and freezing the ESOP—are inconsistent with the securities laws. (Appellees Br. 36-42.) In so arguing, Defendants contravene the district court's holding, as well as the SEC's view, as discussed in Plaintiffs' opening brief. (Appellants' Br. 28, 49-50 (citing App. 8-9).) Defendants make no attempt to explain why the district court or the SEC is wrong.

In claiming that public disclosure of Wells Fargo's wrongdoing is inconsistent with the securities laws, Defendants argue that such disclosure could have been premature and spooked the market. (Appellees' Br. 37.) But this argument simply assumes that Defendants lacked knowledge of material facts concerning Wells Fargo's fraudulent practices that could have benefitted Plan participants. As discussed above, that inference is refuted by the alleged facts of Defendants' knowledge (App-484-94), and is at odds with the fact that Wells Fargo's failure to disclose its unlawful practices was sufficient to support a claim of securities fraud. *Hefler*, 2018 WL 107116, at *4-5.

Defendants ask this Court to ignore the unique, alleged facts, and instead accept their hypotheticals about what Defendants might have known or considered. But while the *Dudenhoeffer* pleading standard is indeed intended to provide a framework for rigorous analysis, it did not overturn the fundamental axiom that on a motion to dismiss "inferences are to be drawn in favor of the non-moving party." *Braden*, 588 F.3d at

595. The district court's dismissal of Plaintiffs' prudence claim should be reversed.

Dated: November 28, 2018

Respectfully submitted,

/s/ *Adam J. Levitt*
Adam J. Levitt
Daniel R. Ferri
DICELLO LEVITT & CASEY LLC
10 North Dearborn Street
Eleventh Floor
Chicago, Illinois 60602
Telephone: (312) 214-7900
alevitt@dlcfirm.com
dferri@dlcfirm.com

Robert K. Shelquist
Rebecca A. Peterson
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, Minnesota 55401
Telephone: (612) 339-6900
rkshelquist@locklaw.com
rapeterson@locklaw.com

W. Daniel "Dee" Miles, III
Leslie L. Pescia
BEASLEY ALLEN CROW
METHVIN PORTIS & MILES, P.C.
218 Commerce Street
Montgomery, Alabama 36103
Telephone: (334) 269-2343
Dee.Miles@beasleyallen.com
Leslie.Pescia@beasleyallen.com

Samuel E. Bonderoff
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, New York 10004
Telephone: (212) 742-1414
samuel@zamansky.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies, pursuant to Fed. R. App. P. 32(g) that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

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 2016 in Century Schoolbook 14.

The undersigned also certifies that the brief filed with the Court and served on all parties has been determined to be virus-free in compliance with Eighth Circuit Rule 28A(h)(2).

Dated: November 28, 2018.

/s/ Adam J. Levitt

DICELLO LEVITT & CASEY LLC

CERTIFICATE OF SERVICE

I certify that on November 28, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Adam J. Levitt

DICELLO LEVITT & CASEY LLC