EXHIBIT A

No. 18-2781

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRANCESCA ALLEN, ET AL.,

Plaintiffs-Appellants,

v.

WELLS FARGO & COMPANY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Minnesota, No. 0:16-cv-03405-PJS

BRIEF FOR THE AMERICAN BENEFITS COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ERISA INDUSTRY COMMITTEE, AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

Mark A. Perry
Counsel of Record
Allison K. Turbiville
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae
[Additional counsel inside cover]

Appellate Case: 18-2781 Page: 2 Date Filed: 11/16/2018 Entry ID: 4726928

Janet Jacobson
AMERICAN BENEFITS COUNCIL
1501 M Street NW, Suite 600
Washington, D.C. 20005
(202) 289-6700

Counsel for the American Benefits Council

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Will Hansen
THE ERISA INDUSTRY COMMITTEE
701 8th Street NW, Suite 610
Washington, DC 20001
(202) 789-1400

Senior Vice President, Retirement & Compensation Policy for The ERISA Industry Committee

Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7300

Counsel for the Securities Industry and Financial Markets Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, none of the *amici* are a subsidiary of any other corporation, and no publicly held corporation owns 10% or more of any *amicus*'s stock.

TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. ERISA FIDUCIARIES HAVE NO HEIGHTENED DUTY TO DISCLOSE INSIDE INFORMATION..8

A. The Securities Laws Provide The Applicable Disclosure Standard 9

B. Imposing A Heightened Duty To Disclose Under ERISA Would Undermine The Securities Laws 12

II. DUTY OF LOYALTY CLAIMS ARE GOVERNED BY AN OBJECTIVE PLEADING STANDARD..16

A. The Duty Of Loyalty Inquiry In This Context Is Objective 16

B. The *Dudenhoeffer* Standard Applies To Duty Of Loyalty Claims Where The Alleged Breach Is A Failure To Disclose Inside Information 18

CONCLUSION 20

Appellate Case: 18-2781 Page: 5 Date Filed: 11/16/2018 Entry ID: 4726928

TABLE OF AUTHORITIES

Page(s)

Cases

A.F. v. Providence Health Plan,
173 F. Supp. 3d 1061 (D. Or. 2016) 17

Amgen Inc. v. Harris,
136 S. Ct. 758 (2016) 7

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 19

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009) 4

In re Citigroup ERISA Litig.,
662 F.3d 128 (2d Cir. 2011) 8

In re Comput. Scis. Corp. ERISA Litig.,
635 F. Supp. 2d 1128 (C.D. Cal. 2009) 15

Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007) 8-9

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 9

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

Hefler v. Wells Fargo & Co.,
2018 WL 4207245 (N.D. Cal. Sept. 4, 2018) 11

Higginbotham v. Baxter Int'l, Inc.,
495 F.3d 753 (7th Cir. 2007) 15

Howell v. Motorola, Inc.,
633 F.3d 552 (7th Cir. 2011) 9

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

Page(s)

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

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006)...4, 14

Roth v. Sawyer-Cleator Lumber Co.,
16 F.3d 915 (8th Cir. 1994) 4-5

Sprague v. Gen. Motors Corp.,
133 F.3d 388 (6th Cir. 1998) 11

Uselton v. Commercial Lovelace Motor Freight, Inc.,
940 F.2d 564 (10th Cir. 1991) 9

Washington v. Bert Bell/Pete Rozelle NFL Ret. Plan,
504 F.3d 818 (9th Cir. 2007) 5, 17

White v. Marshall & Ilsley Corp.,
714 F.3d 980 (7th Cir. 2013) 19

Statutes

15 U.S.C. § 77z-1(a)(2)(A) 14

15 U.S.C. § 77z-1(b) 14

15 U.S.C. § 78m(*l*) 11

26 U.S.C. § 402(e)(4)..6

26 U.S.C. § 4975 6

ERISA § 102(a)..10

ERISA § 103(a)(1)(A) 10

ERISA § 404(a)(1) 7, 16

ERISA § 404(a)(1)(A)(i)...16

ERISA § 406(b) 17

Appellate Case: 18-2781 Page: 7 Date Filed: 11/16/2018 Entry ID: 4726928

TABLE OF AUTHORITIES
(continued)

Page(s)

ERISA § 408(b)(2) 17

ERISA § 408(c)(2) 17

ERISA § 514(d) 4, 9, 13

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67,
109 Stat. 737 4

Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 6

Regulations

17 C.F.R § 243.100 .... 11, 13

17 C.F.R § 250.10b-5 11

29 C.F.R. § 2520.104 *et seq.* 10

Additional Form 8-K Disclosure Requirements and Acceleration of
Filing Date, 69 Fed. Reg. 15,594 (Mar. 25, 2004) 11

Other Authorities

Cornerstone Research, *ERISA Company Stock Cases*,
https://www.cornerstone.com/Publications/Research/ERISA-
Company-Stock-Cases (last visited Nov. 16, 2018) 3

Securities Litigation: A Practitioner's Guide, Practicing Law Institute
(Jonathan C. Dickey et al. eds., 2d ed. 2016) 9, 13-14, 19

The Federalist No. 78 (Alexander Hamilton) 13

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The American Benefits Council ("Council") is a national nonprofit 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 Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing the Nation's largest sponsors of ERISA-covered pension, healthcare, disa-

Appellate Case: 18-2781 Page: 9 Date Filed: 11/16/2018 Entry ID: 4726928

bility, and other employee benefits plans. ERIC's members provide benefits to millions of active employees, retired workers, and their families nationwide. ERIC often participates as *amicus curiae* in cases that may impact employee benefits plan design or administration.

The Securities Industry and Financial Markets Association ("SIFMA"), a securities industry trade association representing the interests of hundreds of broker-dealers, banks, and asset managers across the United States, is the voice of the U.S. securities industry. SIFMA's mission is to support a strong financial sector, while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets. SIFMA's members regularly provide administrative, investment advisory, and other services to plan fiduciaries in connection with retirement plans, usually pursuant to written agreements. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise legal issues of vital concern to securities industry participants. For more information about SIFMA, visit http://www.sifma.org.

Many of *amici*'s members sponsor or advise employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and that allow plan participants the option of investing in the sponsoring company's stock. This

Appellate Case: 18-2781 Page: 10 Date Filed: 11/16/2018 Entry ID: 4726928

lawsuit is like many others in which plan participants have brought suit under ERISA following a decline in the sponsoring company's stock price, alleging that plan fiduciaries who are also company officials failed to disclose inside information. *See* Cornerstone Research, *ERISA Company Stock Cases*, https://www.cornerstone.com/Publications/Research/ERISA-Company-Stock-Cases (last visited Nov. 16, 2018) (256 "stock-drop" cases were filed between 1997 and 2014). The Supreme Court recently clarified the standard by which courts are to evaluate complaints alleging a breach of the duty of prudence in such cases. *See Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). This case involves, among other things, the applicability of the *Dudenhoeffer* standard to an alleged breach of the duty of loyalty. *Amici* and their members have an interest in the continued development of consistent legal doctrines under ERISA, including the standards for pleading claims against ERISA fiduciaries.

Amici have requested leave from the Court to file this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Appellate Case: 18-2781 Page: 11 Date Filed: 11/16/2018 Entry ID: 4726928

SUMMARY OF ARGUMENT

I. Plan fiduciaries who are company officials have no heightened duty under ERISA to disclose material inside information, because the federal securities laws already provide the applicable disclosure standard. That is the clear import of ERISA § 514(d), which preserves other federal laws applicable to ERISA plans, as well as the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2472-73 (2014). Imposing a heightened duty to disclose under ERISA would only undermine the securities laws. For one, it would effectively render the relevant corporate disclosure requirements imposed by the securities laws a dead letter. For another, it would further incentivize plaintiffs to use ERISA to circumvent the important procedural hurdles imposed by the Private Securities Litigation Reform Act of 1995 ("Reform Act"), Pub. L. No. 104-67, 109 Stat. 737—hurdles that weed out abusive and meritless class action lawsuits. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). Imposing a heightened duty to disclose under ERISA could also result in the provision of incomplete information by ERISA fiduciaries and lead to overcorrection in the market, thereby harming the very plan participants that fiduciaries are charged with protecting.

II. This Court has long recognized that duty of prudence claims are governed by an objective inquiry. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th

Appellate Case: 18-2781 Page: 12 Date Filed: 11/16/2018 Entry ID: 4726928

Cir. 1994). Duty of loyalty claims, too, require an objective inquiry, as the Ninth Circuit has recognized. *See Washington v. Bert Bell/Pete Rozelle NFL Ret. Plan*, 504 F.3d 818, 824 (9th Cir. 2007). The district court's contrary suggestion that the duty of loyalty inquiry is subjective, ADD-30–31, if adopted, would result in an end-run around *Dudenhoeffer* and place public companies and plan fiduciaries in an impossible bind by further exposing them to costly, and often meritless, litigation. Indeed, the *Dudenhoeffer* pleading standard is equally applicable to loyalty as to prudence claims where the alleged misconduct by the ERISA fiduciaries is, as here, limited to a failure to disclose material inside information.

Appellate Case: 18-2781 Page: 13 Date Filed: 11/16/2018 Entry ID: 4726928

ARGUMENT

Congress has repeatedly encouraged employees' ownership of their employers' stock as a means of promoting economic growth. *See Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2469-70 (2014); *see also*, *e.g.*, Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590 (characterizing "employee stock ownership plans as a bold and innovative method of strengthening the free private enterprise system"). For example, Congress has provided that appreciation on company stock can be taxed at long-term capital gains rates, while appreciation on other investments in 401(k) plans is taxed as ordinary income on distribution. *See* 26 U.S.C. § 402(e)(4). Congress has also instructed courts to refrain from judicial action that would discourage employees from investing in company stock or "treat employee stock ownership plans as conventional retirement plans." *Id.* § 4975 (notes); *see also* Tax Reform Act of 1976, § 803(h), 90 Stat. at 1590. As a result, many public companies that sponsor a defined contribution retirement plan include an option for plan participants to invest in the company's stock. These retirement plans are overseen by ERISA fiduciaries.

ERISA plan fiduciaries are required to exercise, among other duties, twin duties of loyalty and prudence. They must act "solely in the interest of [plan] participants and beneficiaries" and carry out their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in

Appellate Case: 18-2781 Page: 14 Date Filed: 11/16/2018 Entry ID: 4726928

a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1). A plan participant who complains that an ERISA fiduciary has violated these duties must plead, and ultimately prove, that these standards were transgressed.

In 2014, the Supreme Court set forth the pleading standard for a duty of prudence claim based on an ERISA fiduciary's failure to disclose material inside information. The Court acknowledged that Congress has encouraged employees' ownership of their employers' stock and explained that the standard it was articulating is the appropriate way to "weed[] out meritless claims." *Dudenhoeffer*, 134 S. Ct. at 2470-71. The Court unanimously held that to state a claim, "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and 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; *see also Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (adhering to the *Dudenhoeffer* pleading standard). The Court further instructed that "where a complaint faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public," a court "should 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

Appellate Case: 18-2781 Page: 15 Date Filed: 11/16/2018 Entry ID: 4726928

with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Dudenhoeffer*, 134 S. Ct. at 2473.

In this case, participants in the Wells Fargo employee benefit plan complain that the plan fiduciaries breached their duties by failing to disclose inside information regarding the company's account-opening practices—information which, when revealed to the market, allegedly caused a decline in the company's stock price. The district court ruled, correctly, that their duty of prudence claim had to be dismissed because they could not satisfy the *Dudenhoeffer* standard. ADD-10–17. The court subsequently ruled that their duty of loyalty claim also had to be dismissed. ADD-34–39. *Amici* focus primarily on this second theory advanced by the plan participants.

I. ERISA FIDUCIARIES HAVE NO HEIGHTENED DUTY TO DISCLOSE INSIDE INFORMATION.

Appellants ask this Court to create an alternative disclosure regime in which ERISA plan fiduciaries who are company officials have a heightened duty to disclose inside information that might affect the price of company stock in which plan participants are invested. Appellants' Opening Br. at 23-35. But five courts of appeals—the Second, Third, Fifth, Seventh, and Eleventh Circuits—have already held that ERISA does not impose a heightened duty to disclose. *See, e.g.*, *In re Citigroup ERISA Litig.*, 662 F.3d 128, 143 (2d Cir. 2011); *Edgar v. Avaya, Inc.*, 503 F.3d 340,

Appellate Case: 18-2781 Page: 16 Date Filed: 11/16/2018 Entry ID: 4726928

350 (3d Cir. 2007); *Kopp v. Klein*, 722 F.3d 327, 340 (5th Cir. 2013); *Howell v. Motorola, Inc.*, 633 F.3d 552, 572 (7th Cir. 2011); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1284-85 (11th Cir. 2012); *see also* Securities Litigation: A Practitioner's Guide ("PLI Treatise"), Practicing Law Institute, § 15:4.2 at 30 (Jonathan C. Dickey et al. eds., 2d ed. 2016). This Court should follow the well-reasoned approach of its sister circuits and hold that ERISA does not provide the heightened standard that Appellants seek. Imposing a heightened duty to disclose under ERISA would only further incentivize investors to use ERISA to undermine the securities laws and to disguise meritless securities claims in order to extract settlements from plan fiduciaries and the public companies that often indemnify them.

A. The Securities Laws Provide The Applicable Disclosure Standard.

"ERISA does not . . . displace the protection of the securities laws and its disclosure provisions." *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 582 (10th Cir. 1991) (internal quotation mark omitted). Instead, ERISA has to be construed *in pari materia* with the securities laws. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (statutes must be read to create a coherent and symmetrical statutory scheme); ERISA § 514(d) (providing that nothing in Subchapter I of ERISA "shall be construed to alter, amend, modify,

Appellate Case: 18-2781 Page: 17 Date Filed: 11/16/2018 Entry ID: 4726928

invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law”).

To be sure, ERISA and its associated regulations impose certain obligations on plan fiduciaries to disclose *plan-related* information. For example, ERISA requires plan fiduciaries to furnish a summary plan description to plan participants, *see* ERISA § 102(a), and to file annual reports with the Secretary of Labor, *see id.* § 103(a)(1)(A); *see also* 29 C.F.R. § 2520.104 *et seq*. That is not the kind of information involved in this case. Here, Appellants claim not that the plan fiduciaries failed to disclose plan-specific information as required by ERISA, but rather that they breached their fiduciary duties by failing to disclose inside information about the operations of the company—information that, it is alleged, would be material not just to plan participants but to all investors in the company’s stock. Appellants’ Opening Br. at 42, 49.

Where, as here, plan participants’ fiduciary-breach claim ultimately turns on the alleged nondisclosure of material inside information by company officials, the securities laws provide the applicable disclosure standard, as the district court correctly recognized. *See* ADD-36 (“[D]efendants have no duty under ERISA to disclose [inside] information [that might affect the value of the corporation’s stock]; any such duty would arise under the securities laws, and, if defendants have acted wrongly, they can be held accountable under those laws”).

Under the securities laws and regulations, a public company must promptly disclose material information. The Sarbanes-Oxley Act, for example, requires public companies to disclose "on a rapid and current basis . . . additional information concerning material changes in [their] financial condition or operations." 15 U.S.C. § 78m(*l*); *see also*, *e.g.*, 17 C.F.R §§ 243.100, 250.10b-5; Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, 69 Fed. Reg. 15,594 (Mar. 25, 2004). Because the federal securities laws provide the applicable disclosure standard—a standard that already provides for prompt reporting, this Court should decline to impose a heightened duty to disclose under ERISA. As the en banc Sixth Circuit has observed, "[i]t would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998) (en banc).

Retreating, Appellants make the strained contention (at 30) that the securities remedies are inadequate, because they were excluded from a settlement class comprised of investors in Wells Fargo stock under the securities laws. *See Hefler v. Wells Fargo & Co.*, 2018 WL 4207245 (N.D. Cal. Sept. 4, 2018). That is misleading. What they fail to inform the Court is that the plan is a member of the settlement class. *See id.* at *2 (defining the settlement class as "[a]ll persons and entities who purchased Wells Fargo common stock from February 26, 2014 through September

20, 2016"); Notice of Pendency of Class Action and Proposed Settlement at 14 (N.D. Cal. July 31, 2018), ECF No. 225-1. Appellants stand to recover from the class settlement because any recovery the plan obtains by claiming in the settlement will be allocated to the affected plan participants. Likewise, if the plan opts out of the settlement class, the plan could pursue securities claims on behalf of Appellants.

B. Imposing A Heightened Duty To Disclose Under ERISA Would Undermine The Securities Laws.

In *Dudenhoeffer*, the Supreme Court cautioned that "where a complaint faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued," "courts should 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." 134 S. Ct. at 2473. Of course, a failure to disclose material inside information is the gravamen of the claim made by Appellants here. Careful adherence to the Supreme Court's cautionary directive is necessary because Congress has instructed that nothing in Subchapter I of ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or reg-

Appellate Case: 18-2781 Page: 20 Date Filed: 11/16/2018 Entry ID: 4726928

ulation issued under any such law." ERISA § 514(d). The upshot is that in considering Appellants' request to construe ERISA as imposing a new disclosure standard, this Court must ensure that it is not "substitut[ing] [its] own pleasure to the constitutional intentions of the legislature." The Federalist No. 78 (Alexander Hamilton).

Appellants' suggestion that ERISA should be construed as imposing a heightened duty to disclose material inside information should be rejected, because such a construction unquestionably would undermine the securities laws. Any such construction is prohibited by ERISA § 514(d).

First, imposing a heightened duty would effectively render the securities laws that provide the disclosure standard for material inside information a dead letter. ERISA "would determine . . . corporations' disclosures to their shareholders, rather than the federal securities laws that were enacted to regulate that very thing." PLI Treatise § 15:4.2 at 29. Regulation FD (Fair Disclosure), in particular, would be rendered superfluous. *See* 17 C.F.R. § 243.100. Regulation FD does not require public companies to make premature disclosures of inside information and explicitly exempts from disclosure communications made "[t]o a person who owes a duty of trust or confidence to the issuer." *Id.* For this reason alone, the Court should decline to impose a heightened duty to disclose under ERISA, where plaintiffs base their duty of loyalty claims on a failure to disclose material inside information.

Appellate Case: 18-2781 Page: 21 Date Filed: 11/16/2018 Entry ID: 4726928

Second, a heightened duty to disclose under ERISA would impair the additional procedural hurdles imposed by the Reform Act. These hurdles include, among other things, an automatic stay on discovery pending resolution of any motion to dismiss (with limited exceptions) and a heavily structured lead plaintiff appointment process. *See*, *e.g.*, 15 U.S.C. § 77z-1(a)(2)(A), (b). Congress passed the Reform Act because it viewed "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent'" as a great source of abuse. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995)). Since the Reform Act was passed in 1995, ERISA stock-drop cases have proliferated. Indeed, "[f]rom 1997 through 2015, about 260 . . . stock drop cases [were] brought. Of those, approximately 158 have been settled for a total of over $2.5 billion." PLI Treatise § 15:1 at 2. Yet "in cases involving publicly offered securities the plaintiffs have not obtained a final litigated judgment in their favor." *Id.* Imposing a heightened duty to disclose under ERISA would only further incentivize plaintiffs to use ERISA to disguise meritless securities claims in order to extort settlements from plan fiduciaries and public companies.

Third, a heightened duty to disclose under ERISA also could require fiduciaries to make public statements about their employer's financial state that are based on incomplete information or are contrary to disclosures that are required by the

Appellate Case: 18-2781 Page: 22 Date Filed: 11/16/2018 Entry ID: 4726928

securities laws and made by company officials tasked with the responsibility to provide the markets with such information. Courts have recognized that "[p]rudent managers conduct inquiries rather than jump the gun with half-formed stories as soon as a problem comes to their attention." *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760-61 (7th Cir. 2007). Indeed, "[t]aking the time necessary to get things right is both proper and lawful" under the federal securities laws. *Id.* at 761. The provision of incomplete information by ERISA fiduciaries could lead to overcorrection in the market, possibly exacerbating decreases in stock prices, and thereby harming the plan participants the fiduciaries are charged with protecting. *Cf. In re Comput. Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009) (observing that eliminating company stock as an investment option in a plan "is a clarion call to the investment world that the [plan fiduciary] lacked confidence in the value of its stock, and could have a catastrophic effect on [the] stock price, severely harming . . . Plan members"), *aff'd sub nom. Quan v. Comput. Scis. Corp*, 623 F.3d 870 (9th Cir. 2010).

*   *   *

For all of these reasons, this Court should decline to impose a heightened duty to disclose material inside information on ERISA fiduciaries who are company officials.

Appellate Case: 18-2781 Page: 23 Date Filed: 11/16/2018 Entry ID: 4726928

II. DUTY OF LOYALTY CLAIMS ARE GOVERNED BY AN OBJECTIVE PLEADING STANDARD.

The district court suggested that whereas the pleading standard the Supreme Court articulated in *Dudenhoeffer* for a duty of prudence claim is objective, the duty of loyalty inquiry is subjective because it turns in part on the fiduciary's "purpose." ADD-30–31. Any suggestion that loyalty requires a subjective inquiry is wrong, as the court below implicitly conceded when it "applied an objective test" to Appellants' duty of loyalty allegations. Appellants' Opening Br. at 42. Indeed, where—as here—a duty of loyalty claim is based on the identical alleged misconduct (i.e., a failure to disclose inside information) as the duty of prudence claim at issue in *Dudenhoeffer*, the *Dudenhoeffer* pleading standard applies. Any other approach would improperly elevate form over substance.

A. The Duty Of Loyalty Inquiry In This Context Is Objective.

While a fiduciary's "purpose" is, of course, relevant, ERISA § 404(a)(1)(A)(i), whether the fiduciary acted "solely in the interest of the [plan] participants and beneficiaries," *id.* § 404(a)(1), and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries," *id.* § 404(a)(1)(A)(i), is an inquiry that ultimately turns on objective facts, as the Ninth Circuit has recognized.

Appellate Case: 18-2781 Page: 24 Date Filed: 11/16/2018 Entry ID: 4726928

See Washington v. Bert Bell/Pete Rozelle NFL Ret. Plan, 504 F.3d 818, 824 (9th Cir. 2007).

An objective inquiry is also consistent with ERISA's prohibited transactions provisions and the statutory exceptions to those provisions, which qualify ERISA's duty of loyalty. Under ERISA § 406(b), a fiduciary may not (1) deal with plan assets for his own interests or account; (2) act in a transaction involving the plan on behalf of a party with interests adverse to the plan, plan participants, or beneficiaries; or (3) receive "consideration" for his personal account from a person dealing with the plan in a transaction involving plan assets. Under the statutory exceptions, a fiduciary who is a service provider can receive no more than "reasonable compensation." *See id.* § 408(b)(2), (c)(2). These provisions require a court to undertake an objective inquiry: For example, did the fiduciary stand to gain a financial benefit? Did the fiduciary receive more than reasonable compensation?

The district court cited only one out-of-circuit district court case, *A.F. v. Providence Health Plan*, 173 F. Supp. 3d 1061, 1073 (D. Or. 2016), where the court observed that it should "look[ ] to the fiduciary's subjective motivation in determining whether the fiduciary" has complied with ERISA's duty of loyalty. But the sole authority on which that court relied recognized that "[s]ubjective purpose . . . is necessarily inferred from objective facts." *Id.* (citing Peter J. Wiedenbeck, *ERISA in the Courts* 165 (Federal Judicial Center 2008)). Where, as here, the alleged breach

Appellate Case: 18-2781 Page: 25 Date Filed: 11/16/2018 Entry ID: 4726928

of the duty of loyalty turns entirely on the plan fiduciary's failure to disclose inside information, the inquiry is *necessarily* objective—as *Dudenhoeffer* confirms.

B. The *Dudenhoeffer* Standard Applies To Duty Of Loyalty Claims Where The Alleged Breach Is A Failure To Disclose Inside Information.

Although *Dudenhoeffer* was a duty of prudence case, *see* 134 S. Ct. at 2464, there is no reason grounded in either ERISA or common sense to apply a different pleading standard to a duty of loyalty claim where the alleged misconduct by the ERISA fiduciaries—the nondisclosure of material inside information—is identical. Appellants' effort to recast their duty of loyalty claim as a conflict of interest claim fails, because the only conflict they allege is that the ERISA fiduciaries failed to disclose material inside information because they also served as company officials. *See* Second Am. Compl. ¶¶ 316-19 (D. Minn. Oct. 27, 2017), ECF No. 185 (alleging that the ERISA fiduciaries who were company officials "were incentivized to avoid doing or saying anything that would harm the image or reputation" of the company). That should come as no surprise. After all, the district court concluded that Appellants' first amended complaint did not even "clearly separate the[ ] [duty of loyalty and prudence] claims" or "explain how . . . defendants' failure to make an earlier disclosure . . . could violate their duty of loyalty even if it did not violate their duty of prudence." ADD-18. At bottom, this case involves a disclosure claim.

Appellate Case: 18-2781 Page: 26 Date Filed: 11/16/2018 Entry ID: 4726928

Applying a different pleading standard to duty of loyalty claims where the alleged breach is a failure to disclose material inside information would provide plan participants with an end-run around *Dudenhoeffer* (and the Reform Act's heightened pleading requirements). Specifically, it would allow plan participants and the class-action attorneys who represent them to file claims against ERISA fiduciaries based on the exact same allegations that the Supreme Court has held fail to state a duty of prudence claim. Indeed, this case is Exhibit A for this proposition: Appellants' duty of prudence claim is clearly precluded by *Dudenhoeffer*, so Appellants are trying to get to discovery by recasting the identical allegations as a duty of loyalty claim.

This approach, if accepted by this Court, would put public companies and plan fiduciaries in an untenable position by exposing them to costly, and often meritless, litigation that results in massive settlements. *See* PLI Treatise § 15:1 at 2; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). It could also ultimately cause plan sponsors, who regularly indemnify plan fiduciaries, to refrain from offering company stock as an investment option to plan participants, thereby contravening Congress's clear intent to promote employee ownership of company stock. *See White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 987 (7th Cir. 2013). Applying the *Dudenhoeffer* pleading standard to duty of loyalty claims like Appellants' provides needed certainty to plan fiduciaries, plan sponsors, and everyone, including *amici* and their members, who supports employer-sponsored retirement plans. It also ensures the

Appellate Case: 18-2781 Page: 27 Date Filed: 11/16/2018 Entry ID: 4726928

continued availability of company stock investment options in 401(k) retirement plans regulated by ERISA.

The pleading standard set forth in *Dudenhoeffer* requires Appellants to "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." 134 S. Ct. at 2472. For the reasons stated in Appellees' brief (at 27-37), Appellants have failed to plausibly allege such an alternative action here.

CONCLUSION

Amici respectfully submit that the Court should decline to impose a heightened duty to disclose material inside information on ERISA fiduciaries who are company officials. In addition, the Court should apply an objective pleading standard to duty of loyalty claims premised on nondisclosure of material inside information—the same standard articulated in *Dudenhoeffer* for duty of prudence claims premised on the same alleged misconduct.

Appellate Case: 18-2781 Page: 28 Date Filed: 11/16/2018 Entry ID: 4726928

Dated: November 16, 2018

Respectfully submitted,

/s/ Mark A. Perry

Mark A. Perry
Counsel of Record
Allison K. Turbiville
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Amici Curiae

Janet Jacobson
AMERICAN BENEFITS COUNCIL
1501 M Street NW, Suite 600
Washington, D.C. 20005
(202) 289-6700

Counsel for the American Benefits Council

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Will Hansen
THE ERISA INDUSTRY COMMITTEE
701 8th Street NW, Suite 610
Washington, DC 20001
(202) 789-1400

Senior Vice President, Retirement & Compensation Policy for The ERISA Industry Committee

Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7300

Counsel for the Securities Industry and Financial Markets Association

Appellate Case: 18-2781 Page: 29 Date Filed: 11/16/2018 Entry ID: 4726928

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirements of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4,473 words; and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

Dated: November 16, 2018

/s/ Mark A. Perry
Mark A. Perry

Counsel of Record for Amici Curiae

CIRCUIT RULE 28A(h) CERTIFICATION

Pursuant to Circuit Rule 28A(h)(2), I hereby certify that the brief has been scanned for viruses and is virus-free.

Dated: November 16, 2018

/s/ Mark A. Perry
Mark A. Perry

Counsel of Record for Amici Curiae

CERTIFICATE OF SERVICE

I, Mark A. Perry, hereby certify that on this 16th day of November, 2018, a true and correct copy of the foregoing Brief for the American Benefits Council, the Chamber of Commerce of the United States of America, The ERISA Industry Committee, and the Securities Industry and Financial Markets Association as *Amici Curiae* in Support of Defendants-Appellees and Affirmance was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel who are CM/ECF users. All attorneys in this case are CM/ECF users.

/s/ Mark A. Perry
Mark A. Perry

Counsel of Record for Amici Curiae