CASE NO. 15-20282

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs – Appellees,

v.

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

Defendants – Appellants.

On Appeal from the United States District Court
for the Southern District of Texas (Houston Division)
Case No. 4:10-cv-4214

BRIEF OF AMICI CURIAE AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT OF AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a, AARP Experience Corps, AARP Insurance Plan, also known as the AARP Health Trust, and AARP Financial.

AARP has no parent corporation, nor has it issued shares or securities.

Dated: October 28, 2015

/s/ *Mary Ellen Signorille*
Mary Ellen Signorille

CORPORATE DISCLOSURE STATEMENT OF NELA

The Internal Revenue Service has determined that the National Employment Lawyers Association (NELA) is organized and operated exclusively for advancing employee rights and serving lawyers who advocate for equality and justice in the American workplace pursuant to Section 501(c)(6) of the Internal Revenue Code and is exempt from income tax. NELA is also organized and operated as a not for profit corporation under the state laws of Ohio. The Employee Rights Advocacy Institute For Law & Policy is NELA's related charitable and educational organization under Section 501(c)(3) of the Internal Revenue Code.

NELA has no parent corporation, nor has it issued shares or securities.

Dated: October 28, 2015

/s/ *Matthew C. Koski*
Matthew C. Koski

INTERESTS OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization, dedicated to addressing the needs and interests of people age fifty and older, with a membership that seeks to strengthen communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment

[1] Counsel for AARP and NELA state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

and benefit cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace, including through cases to protect employee benefits.

The protections afforded by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, are of vital concern to workers of all ages and to retirees, as the quality of workers' lives in retirement depends heavily on their eligibility for, and the amount of, their retirement and welfare benefits. It is important to ERISA plan participants to ensure that plan assets will be available to pay the benefits to which they are entitled and that these assets are used exclusively for the benefit of participants. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). To this end, plan participants have a significant interest in ensuring that fiduciaries properly and prudently administer the plan and manage plan assets.

Accordingly, resolution of the issues in this case will have a direct and vital bearing on plan participants' ability to protect their retirement accounts from mismanagement and to ensure economic security in retirement. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief, as amici curiae, to facilitate a full consideration by the Court of these issues.

SUMMARY OF ARGUMENT

Under the current retirement savings regime, employees are required to bear the risks and responsibilities that were previously shouldered by their employers. The dominance of defined contribution plans over defined benefit plans has placed those risks on employees. Notwithstanding this shift, employers who sponsor defined contribution retirement savings plans, and other plan fiduciaries, still wield substantial influence over employees' savings decisions, including through the selection of investment options available to plan participants. ERISA prescribes fiduciary standards to ensure that employers and fiduciaries act prudently, loyally, and in the sole interest of plan participants when selecting such plan investment options.

On June 25, 2014, the Supreme Court unanimously eliminated the "presumption of prudence" that previously had been afforded ERISA fiduciaries regarding the investment of retirement plan assets in the employer's company stock. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467 (2014). In considering the duties applicable to fiduciaries of employee stock ownership plans ("ESOPs"), a type of retirement plan that invests primarily in the employer's stock, the Court concluded that "because ESOP fiduciaries are ERISA fiduciaries and because § 1104(a)(1)(B)'s duty of prudence applies to all ERISA fiduciaries, ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are." *Id*. Accordingly, plaintiffs may challenge—and courts may review—whether plan fiduciaries acted imprudently in deciding to continue to offer employer stock as a plan investment option.

The Court recently confirmed the paramountcy of the duty of prudence in *Tibble v. Edison*, where it unanimously held that a fiduciary has a duty to continually monitor investments and remove imprudent ones. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828-29 (2015).

In *Dudenhoeffer*, the Court also addressed the pleading standard for the main claim at issue in this appeal: that the fiduciaries breached their duties of prudence and loyalty by "offering, holding, and acquiring" employer stock at a time when they knew or should have known based on "material non-disclosed information" that the employer stock was overvalued, and thus not a prudent investment. The Court recognized that a prudent fiduciary cannot be expected to violate legal restrictions on trading stock based on inside information, and thus required plaintiffs to plead that fiduciaries had—and should have taken—a viable, alternative prudent course of action. *Dudenhoeffer*, 134 S. Ct. at 2472-73. Specifically, the Court stated lower courts should consider:

> [W]hether the complaint has plausibly alleged that *a* prudent fiduciary in the defendant's position *could not* have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information *would do more harm than*

> *good* to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.

Id. at 2473 (emphasis added).

Consistent with this standard, a plaintiff need not plead facts demonstrating that *all* prudent fiduciaries could not have concluded that particular action would not have done more harm than good; she need only plead that *a* prudent fiduciary could not have so concluded. *See also id.* at 2472 ("[A] plaintiff must plausibly allege an alternative action …that *a* prudent fiduciary … *would not have* viewed as more likely to harm the fund than help it.") (emphasis added).

Defendants seek to distort the *Dudenhoeffer* standard to require a plaintiff to plausibly allege that "*no* prudent fiduciary *could have* concluded that the proposed actions would have caused more harm than good to the fund." Br. of Defs.-Appellants at 4. In other words, notwithstanding that the Supreme Court's standard plainly allowed for claims to proceed in circumstances where reasonable fiduciaries could disagree, Defendants seek to impose an insurmountable pleading requirement according to which claims would be dismissed unless a plaintiff is able to plausibly allege that the entire spectrum of prudent fiduciaries would agree—*i.e.* that *not one of them* could have concluded that plaintiffs' proposed alternative actions would have caused more harm than good. This interpretation is too extreme.

The policy implications of Defendants' position are enormous. Given the spectrum of reasonable fiduciary opinions, a plaintiff would be precluded from challenging a fiduciary's continued investment in employer stock except in the most extreme cases, where such investment would offend the sensibilities of even the most risk-averse fiduciary. Defendants' position would immunize fiduciary misconduct concerning company stock in virtually every case, even cases like *Enron* and *WorldCom*[2]—where the plans were heavily invested in company stock while the company and its personnel, including fiduciaries, were engaged in criminal conduct that led to the company's collapse and caused the loss of the plans' entire investment in company stock.

Ultimately, Defendants would replace the "*presumption* of prudence" with a standard that essentially *eliminates any duty* of prudence with respect to the selection and retention of company stock in 401(k) plans. From a practical point of view, if this Court were to adopt Defendants' interpretation of *Dudenhoeffer*, plan participants would arguably be left with no one minding the plan, undermining ERISA's fundamental purpose of protecting the interests of ERISA plan participants.

[2] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003); *In re WorldCom, Inc.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003).

ARGUMENT

I. WITH DEFINED CONTRIBUTION PLANS BEING THE PRIMARY FORM OF EMPLOYER-SPONSORED RETIREMENT PLANS, PLAN FIDUCIARIES MUST ADHERE TO ERISA'S DUTY OF PRUDENCE IN MONITORING THE PLAN'S RETENTION OF EMPLOYER STOCK AS AN INVESTMENT OPTION.

A. Defined Contribution Plans are The Primary Vehicle for Retirement Savings Today.

The traditional regime of defined benefit plans, which prevailed at the time of ERISA's enactment in 1974, has waned in recent years, both in terms of the number of plans and the number of participants enrolled in those plans. As the Supreme Court recognized in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, "[d]efined contribution plans dominate the retirement plan scene today." 552 U.S. 248, 255 (2008). The number of participants in employer-sponsored defined contribution plans and the magnitude of assets held by those plans are significant. The defined contribution paradigm is entrenched in today's retirement, tax and social policy, and it has changed the way that American workers plan for retirement. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm,* 114 Yale L.J. 451, 457-58 (2004).

According to the most recent statistics released by the U.S. Department of Labor, more than 92 million participants are currently covered by the 636,991 defined contribution plans in existence. *See* U.S. Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2013*

Form 5500 Annual Reports (2015). The total assets held by these plans exceeded $5 trillion as of the third quarter of 2013. *Id*. A recent survey indicates that 76% of respondents believe that their defined contribution plans can help them to meet their retirement goals. *See* Am. Benefits Council, *401(k) fast facts* (2014), http://www.americanbenefitscouncil.org/documents2013/401k_stats.pdf.

B. Participants in Defined Contribution Plans Rely on Fiduciaries to Prudently Select and Monitor Plan Investment Options.

In contrast to a participant in a defined benefit plan—who is guaranteed a predictable benefit and whose employer bears the risk of investment performance—a participant in a defined contribution plan bears all of the investment risk. The dollar amount such a participant receives in retirement depends not only on the amount contributed to the plan, but also the investment performance of those assets.[3] In this environment, a fiduciary's duty of selecting prudent investments rises to critical significance because participants' investments are limited by the plan fiduciary's selection of available investment options. Opportunities for plan participants to meet retirement savings goals as to

[3] *See, e.g.*, *LaRue*, 552 U.S. at 250 n.1.; Strengthening Worker Retirement Security Before the H. Comm. on Education and Labor, S.1, 111th Cong. § 3 (2009) (statement of John C. Bogle, Founder and Former Chief Executive of the Vanguard Group), http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg47491/html/CHRG-111hhrg47491.htm (describing this transition to defined contribution plans as "a massive transfer from business enterprises to their employees of both investment risk (and return) and the longevity risk of retirement funding").

accumulation, growth, and security are entirely facilitated or constrained by the investment options made available by plan fiduciaries.

Moreover, research indicates that participants are not confident in their abilities to select among available investment options. For example, a survey of stock owners ages 50 to 70 indicates that:

> close to three in four respondents (72-76%) have more confidence in the abilities of mutual fund managers or stock brokers to conduct transactions for them than they have in their own abilities to conduct transactions. In contrast, only one in three (33%) are confident in their ability to buy and sell individual stocks without the assistance of stock brokers.

AARP, Investor Perceptions and Preferences Toward Selected Stock Market Conditions and Practices: An AARP Survey of Stock Owners Ages 50 and Older at 4, 21-22 (Mar. 2004), http://assets.aarp.org/rgcenter/econ/investor.pdf.

Ultimately, the rapid growth and primacy of defined contribution plans, the attendant shift in investment risk, and the limited opportunity and ability of participants to make suitable investment decisions makes it vital that plan fiduciaries exercise great care to ensure that defined contribution plans offer only prudent investment options.

C. Millions of Participants are Enrolled in Employer-Sponsored Defined Contribution Plans That Offer Employer Stock as an Investment Option, A Matching Contribution, or Both.

Within the realm of employer-sponsored defined contributions plans are plans that feature employer securities as an available investment option. Such company stock plans offer plan participants stock in their own employer, either as an investment option, a matching contribution, or both, depending on the terms of the particular employer's plan. Employer stock might be offered as simply another investment option within a plan, or it can be offered as part of an ESOP. Over 50% of participants enrolled in plans sponsored by a large employer (*i.e.* those covering at least 5,000 participants) were offered employer stock as an investment option in 2013.[4]

A study by the Vanguard Group confirms that company stock plans tend to be larger, "with a median participant population of 2,704 versus 236 for non-company stock plans."[5] At the close of 2012, approximately 36% of participants were enrolled in plans that offered employer securities as an investment option under the terms of the plan. *See* VanDerhei, Holden, Alonso & Bass, *supra*, at 19.

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[4] *See* Jack VanDerhei, Sarah Holden, Luis Alonso & Steven Bass, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2013* at 18 (Employee Benefits Research Inst., Issue Brief No. 408, 2014) (hereinafter "VanDerhei, Holden, Alonso & Bass").

[5] John A. Lamancusa & Jean A. Young, *Company Stock in Defined Contribution plans: An Update* at 2, Vanguard (Dec. 2014), https://institutional.vanguard.com/iam/pdf/CRREVO_122014.pdf?cbdForceDomain=false (hereinafter "Lamancusa & Young").

D. Employees Disproportionately Select Employer Stock When it is Offered by Defined Contribution Plans.

More than half of employees who are offered company stock choose to make the investment. Lamancusa & Young, *supra*, at 2. In 2010, the aggregate dollar amount of employer stock held in retirement plans equaled $240 billion.[6]

Workers at large companies are the most likely to maintain a concentrated position in employer securities. For example, employees at Exxon Mobil Corp., McDonald's, and Lowe's Companies had more than 50% of their total 401(k) plan assets invested in their company's stock at the end of 2011. *See* Blanchett, *supra*. Among those employers actively offering employer stock plans, 52% of participants have retirement funds invested in their employer's securities. Lamancusa & Young, *supra*, at 2. These participants tend to be older employees with longer tenures at their employers' businesses.[7]

Participants own employer securities for a number of reasons. Many companies match their employees' salary deferrals with company stock, or allow employees to purchase their stock at a discount price. Blanchett, *supra*, at 6.

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[6] David Blanchett, *Emp'r Stock Ownership in 401(k) Plans and Subsequent Co. Stock Performance*, Morningstar Investment Management (2013), https://corporate.morningstar.com/us/documents/MethodologyDocuments/ResearchPapers/Employer-Stock-Ownership-in-401k-Plans.pdf (hereinafter "Blanchett").

[7] Stephen P. Utkus & Jean A. Young, *The evolution of company stock in defined contribution plans* at 6, Vanguard (May 2014), https://institutional.vanguard.com/iam/pdf/CRREVO.pdf?cbdForceDomain=false.

Company stock plans tend to have higher median contributions by both employers and employees, resulting in higher median account balances in company stock plans than the balances under non-company-stock plans. Lamancusa & Young, *supra*, at 3-4. Indeed, the average account balance of a participant in a plan that actively offers company stock is 19% higher than the balance of a participant who is not offered company stock. *Id*. at 3.

In addition, it is well-established that the number and character of investment options offered by a plan significantly affects how participants opt to allocate their assets in their participant-directed accounts. Employers play a significant role in motivating their employees to invest in company stock since employers are responsible for selecting the menu of available investment options, including the decision of whether or not to offer employer securities. Plan sponsor design decisions have the strongest and direct correlation to participant holdings in employer stock. One study finds that the mere act of offering employer stock as an option under the plan prompts employees to allocate significant amounts of money to that investment option.[8]

Researchers have found that investors are biased towards stocks that are "geographically proximate and familiar, which explains the desire for an employee

[8] Olivia S. Mitchell & Stephen P. Utkus, *Company Stock and Retirement Plan Diversification* 12 (Pension Research Council of the Wharton Sch. Of the Univ. of Penn., PRC WP 2002-4, 2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304461.

to invest in his employer's stock since it usually is both geographically proximate and familiar (known as the "local bias effect"). Blanchett, *supra*, at 7. They have also found that in plans that include an employer match of company stock, the match represents an implicit endorsement of the company, and participants are more than twice as likely to have concentrated positions in employer stock when a company-stock match is provided (known as the "endorsement effect"). Blanchett, *supra*, at 6. The odds of having a concentrated portfolio increases further when employers provide participants with other non-matching contributions in employer stock in addition to the match. *Id*. at 2. Indeed, 56% of participants have a concentrated position of greater than 20% when an organization directs any employer contributions to company stock. Lamancusa & Young, *supra*, at 7. This is striking in comparison to the 15% of participants who have concentrated holdings at companies that make employer contributions in cash. *Id*.

Against the backdrop of the various ways that employers, whether intentionally or unintentionally, encourage employees to purchase company-stock, it is significant that employees are inclined to greatly underestimate the riskiness of concentrating their investments in employer securities. To illustrate, data collected for the National Financial Capability Study revealed that only half of those surveyed understood that, according to generally accepted principles of investment, buying a stock mutual fund provides a safer return than concentrating money in a single company's stock.[9] As another survey reveals, 25% of respondents believe that concentrating their investments in company stock is less risky than a diversified portfolio, with another 39% asserting that the level of risk is equivalent.[10]

E. Significant Losses in Account Balances Due to Fiduciaries' Failure to Monitor Employer Securities Wreaks Havoc on Employees' Retirement Security.

Because defined contribution plans (outside of Social Security benefits) are the primary vehicle for providing retirement income, *see, e.g.*, *LaRue*, 552 U.S. at 255, n.5, and because employer stock is one of the most significant financial assets for participants in such plans, the retirement security of millions of Americans is particularly tied to the performance of their employers' stock. Significant declines in the value of employer stock thus can create dire consequences for those workers. Since the likelihood of a company offering an employer-stock plan grows in proportion to the size of that company, a decline in the value of a large company's stock means that a colossal loss in retirement income occurs simultaneously for a substantial number of employees.

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[9] Annamaria Lusardi & Olivia S. Mitchell, *Fin. Literacy and Ret. Planning in the U. S.* 2, 4 (Nat'l Bureau of Econ. Research, NBER Working Paper No. 17108 (2011), http://www.nber.org/papers /w17108.

[10] *See* Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus & Cass R. Sunstein, *The Law and Econs. of Company Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 54 (2007) (hereinafter "Benartzi, Thaler, Utkus & Sunstein").

Lessons from our not-so-distant past have certainly demonstrated the pitfalls of concentrated investments in employer stock by plan participants working for large companies. As an example, one needs to look no further than the Enron bankruptcy in December, 2001. When the value of Enron's stock plummeted from over $80 per share to less than $0.70 per share between 2001 and 2002, Enron's 401(k) plan lost approximately $1.3 billion in aggregate value.[11] As a result, many participants lost between 70 and 90 percent of their retirement savings, decimating their retirement accounts at the same time they lost their jobs.[12] Although more than 20,000 former Enron employees sued and received what is still the biggest settlement to date – $250 million, it represented only a fraction of those people's $1.3 billion in losses.[13]

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[11] Patrick J. Purcell, Cong. Research Serv., RS21115, *The Enron Bankruptcy and Employer Stock in Retirement Plans 1* (2002), http://fpc.state.gov/documents/organization/9102.pdf.

[12] *See* Susan J. Stabile, *Symposium Enron and its Aftermath: Enron, Global Crossing, and Beyond: Implications for Workers*, 76 St. John's L. Rev. 815, 824 (2002); *see also* David Millon, *Symposium Enron and its Aftermath: Worker Ownership Through 401(k) Retirement Plans: Enron's Cautionary Tale*, 76 St. John's L. Rev. 835, 841 (2002) ("As Enron's share price fell from a high of nearly ninety dollars to around twenty-five cents, its 401(k) plan – in which 15,000 employees participated – lost 1.3 billion dollars.").

[13] *See Workers' Lawsuits Rap Execs for 401(k) Losses: The Hot Claim Lately in Class Acts? Breach of Fiduciary Duty*, Crain's N.Y. Bus. (Feb. 3, 2011), http://www.crainsnewyork.com/article/20110213/SUB/110219949#ixzz20hG3gMBE.

Similarly, WorldCom's 401(k) plan held 32% or $642.3 million in employer stock when the stock dropped from $56 to $0.14 per share.[14] The total loss to WorldCom's 401(k) plan was estimated to be $800 million. The recovery from various sources to WorldCom participants was approximately recovered $48.435 million.

Even after the Enron and WorldCom collapses, employees of other companies offering employer stock lost much of their retirement savings when their companies went bankrupt. The 401(k) plan of Countrywide Financial Corp. held $349.9 million in employer stock, representing 38 percent of the plan's total assets.[15] The participants recovered only $55 million.[16] In the Lehman Brothers debacle, not only did more than 13,000 employees, half the company's workforce, lose their jobs immediately following the events that toppled the company, but they also lost $228.7 million that was invested in the Lehman Bros. Stock Fund in their 401(k) plan as the Fund became worthless after Lehman's bankruptcy.[17] Bear

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[14] David E. Rovella, MCI, WorldCom's Ebbers Settle 401K Suit for $51 Mln (Update3) Bloomberg (July 6, 2004), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqypuAjvRgpk.

[15] *Countrywide is Sued by Workers Over 401(k) Losses*, Los Angeles Times (Sept. 13, 2007), http://articles.latimes.com/2007/sep/13/business/fi-country13.

[16] Rebecca Moore, *BoA Settles with Countrywide Plan Participants for $55M*, Plan Sponsor (Aug. 11, 2009), http://www.plansponsor.com/NewsStory.aspx?Id=6442451711.

[17] *See* Linda Sandler, *Lehman Retirement Plan Sues Fuld over Repo*, Bloomberg Businessweek 105 (Dec. 7, 2010), http://www.bloomberg.com/news/2010-06-04/ex-lehman-chief-fuld-seeks-to-toss-repo-105-lawsuit.html; Bloomberg,

Stearns' employees shared a $10 million settlement for losses in their retirement accounts, but that settlement was equal to only 10 to 28 percent of their total losses, given that Bear Stearns' stock price fell to $4.30 per share from a previous 15-month high of approximately $160.[18]

The long-term effects of these losses wreak havoc, financially and emotionally, on participants and their families. This is particularly true when a participant suffers such losses in income at or near retirement age, as the participant does not have sufficient time to make up for the losses. Countless employees, especially those over age 45, have been compelled to postpone retirement and return to work (frequently at lower pay), or have had to radically adjust their lifestyles after their nest eggs have suddenly vanished.[19]

Lehman 401(k) *Participants Sue Top Exec*, *Pensions & Investments* (Dec. 8, 2010), http://www.pionline.com/article/20101208/DAILYREG/101209904.

[18] Bob Van Voris, *Ex-Bear Stearns Employees to Get $10 Million in Settlement*, Bloomberg (Mar. 12, 2012), http://www.bloomberg.com/news/2012-03-21/ex-bear-stearns-employees-to-get-10-million-in-settlement .html; Rebecca Moore, *J.P. Morgan Agrees to Settle Bear Stearns Stock Drop Suit*, Plan Adviser (Mar. 22, 2012), http://www.plansponsor.com/JP_Morgan_Agrees_to_Settle_Bear_Stearns_Stock_Drop_Suit.aspx; Russell Goldman, *Bear Stearns Calls in Grief Counselors*, ABC News (Mar. 19, 2008), http://abcnews.go.com/Business/story?id=4476286&page=1#.UAMLiZHhfpw.

[19] *See, e.g.*, Colette Thayer, *Retirement Security or Insecurity? The Experience of Workers Aged 45 and Older* at i-iii (2008), http://www.aarp.org /work/retirement-planning/info-10-2008/retirement_ survey_08.html.

While captivating, the headlines detailing the falls and subsequent legal battles faced by these corporate giants should not overshadow the heart-rending, personal stories of their former employees. To illustrate, Enron's collapse affected solidly middle-class individuals in tragic ways. At Portland General Electric, the Oregon utility once acquired by Enron, older married couples were reported to have lost as much as $800,000 to $900,000 in retirement savings.[20] One former Enron employee, Mark Lindquist, a Web designer who lost his job and all his benefits, was reported as struggling to figure out how to pay for therapy for his autistic son, while Clyde Johnson, a single parent, lost his ability to make timely payments on the home he shared with his 11-year old son. Countless others were released on a job market where Enron had won little goodwill.[21] Enron provided a mere $4,500 in severance pay, regardless of an employee's tenure, and all health and medical insurance contracts for the 5000 terminated employees were cancelled.[22] By the time an employee could overcome the "presumption of prudence," the company had collapsed causing real damage to employees' lives.

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[20] Richard A. Oppel Jr., E*mployees' Retirement Plan Is a Victim as Enron Tumbles*, N.Y. Times (Nov. 22, 2001), http://www.nytimes.com/2001/11/22/business/employees-retirement-plan-is-a-victim-as-enron-tumbles.html.

[21] *See* Rick Bragg*, ENRON'S COLLAPSE: WORKERS*; *Workers Feel Pain of Layoffs And Added Sting of Betrayal*, N.Y. Times (Jan. 20, 2002), http://www.nytimes.com/2002/01/20/us/enron-s-collapse-workers-workers-feel-pain-layoffs-added-sting -betrayal.html.

[22] *See* Steve Paulson, *Workers lose jobs, health care and savings at Enron*, WSWS (Jan. 14, 2002), https://www.wsws.org/en/articles/2002/01/enro-j14.html.

Yet despite these well-publicized incidents and personal stories over the last decade, it is still common for employees to have significant portions of their retirement investments concentrated in company stock. *See* Benartzi, Thaler, Utkus & Sunstein, *supra*. And although the "presumption of prudence" no longer is a bar to the ability of plan participants to timely challenge the imprudent selection of company stock as plan investment options, plan participants will be no better off than the employees of Enron, WorldCom, Countrywide, Bear Stearns or Lehman Brothers if the courts merely replace the "presumption of prudence" with yet another virtually insurmountable pleading requirement. It certainly seems counter-intuitive that a statute designed to protect the retirement security of employees would leave them no better off than the impetus for ERISA—the employees of the failed Studebaker Corporation.[23]

II. THE COURT SHOULD NOT INSULATE FIDUCIARIES FROM MEANINGFUL JUDICIAL REVIEW BY IMPOSING AN INSURMOUNTABLE PLEADING REQUIREMENT.

A. Defendants' Standard is Inconsistent with ERISA's Statutory Language, Trust Law and *Dudenhoeffer*.

ERISA imposes a duty of prudence on all plan fiduciaries. The statute provides:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the

[23] John H. Langbein *et al.*, *Pension and Employee Benefit Law* 78-83 (5th ed. 2010) ("The Studebaker Incident").

> exclusive purpose of…providing benefits to participants and their beneficiaries…; [and] (B) 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.

ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Those standards govern "fiduciaries' investment decisions and disposition of assets." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985). Congress modeled ERISA's duty of prudence on the "prudent person" standard developed in the common law of trusts. *See Tibble*, 135 S. Ct. at 1828. The Bogert treatise provides that "the trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent manager engaged in similar business affairs and with objectives similar to those of the trust in question." A. Hess, G. Bogert, & G. Bogert, *Law of Trusts and Trustees* § 541 (3d ed. 2009). *See also* Restatement (Third) of Trusts § 77 (2007) ("The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust.")

The key language from *Dudenhoeffer* at issue in this appeal is based on this "prudent person" standard. *Dudenhoeffer* states that lower courts must consider whether "the complaint has plausibly alleged that *a prudent fiduciary* in the defendant's position could not have concluded that [plaintiff's proposed alternative] … would do more harm than good." *Dudenhoeffer*, 134 S. Ct. at 2473; *see also id.* ("plaintiff must plausibly allege an alternative action that defendant could have taken that … *a prudent fiduciary* …would not have viewed as more likely to harm the fund than to help it.”).

Despite clear trust law and the plain language of both the statute and *Dudenhoeffer*, Defendants seek to replace the defunct “presumption of prudence” with yet another insurmountable pleading threshold. Specifically, they wish to require plaintiffs to plead that “*no* prudent fiduciary *could have* concluded that the proposed actions would have caused more harm than good to the fund.” Br. of Defs.-Appellants at 4. In other words, Defendants seek to require plaintiffs to plead that of the entire spectrum of prudent fiduciaries, not one of them could have concluded that the proposed alternative would have caused more harm than good. Under Defendants’ standard, if 99.99% of all prudent fiduciaries agreed with plaintiffs, but yet one sole fiduciary did not agree, then Plaintiffs have not stated a claim.

Defendants’ standard is too extreme. The test to show imprudence is *not* whether the fiduciary was acting as would *all reasonable, prudent persons*. Rather, under the statute, trust law, and *Dudenhoeffer*, in order to be a “prudent fiduciary,” a fiduciary must act as would *a reasonable, prudent person* in a like capacity. The corollary is that, in order to plead that a fiduciary was not prudent, the plaintiff must plausibly allege that the fiduciary was not acting as would *a reasonable, prudent person*.

Defendants' interpretation of *Dudenhoeffer* also lacks common sense. In *Dudenhoeffer*, the Supreme Court eliminated the "presumption of prudence"—an insurmountable pleading standard—because it was not found in the statute. In so holding, the Court underscored the fundamental ERISA principle that "a fiduciary of a pension plan [must] act prudently in managing the plan's assets." *Dudenhoeffer*, 134 S. Ct. at 2463. Similarly, in *Tibble*, the Court faulted the Ninth Circuit for failing to consider the ongoing nature of these fiduciary duties. *See Tibble*, 135 S. Ct. at 1828-29 ("The Ninth Circuit did not recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances."). It would not make sense for the Court in *Dudenhoeffer* to create another extra-statutory insurmountable pleading standard for allegations of the duty of prudence, when it just eliminated one. *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) ("[B]ecause ERISA is a comprehensive and reticulated statute, … it should not be supplemented by extratextual remedies[.]" (citations and quotation marks omitted)).

B. Defendants' Standard is Counter to the Purposes of a Complaint and a Motion to Dismiss.

Requiring an ERISA plaintiff to affirmatively plead that "*no* prudent fiduciary could have concluded that the proposed actions would have caused *more harm than good to the fund*" is counter to the purposes of a complaint and a motion to dismiss. "The function of a complaint is to give the defendant fair notice of the plaintiff's claim and the grounds upon which the plaintiff relies." *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000) (citing *Doss v. South Cent. Bell Tel. Co*., 834 F.2d 421, 424 (5th Cir. 1987) and *Conley v. Gibson*, 355 U.S. 41 (1957)). *See also Erickson v. Pardus*, 551 U.S. 89 (2007) (reaffirming notice pleading) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "The notice pleading requirements of Federal Rule of Civil Procedure 8 and case law do not require an inordinate amount of detail or precision." *Id*. A complaint must merely contain sufficient factual matter, taken as true, "to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [unlawful conduct]." *Bell Atl. Corp*., 550 U.S. at 545.

Relatedly, "[t]he purpose of a motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) is 'to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case.'" *Nat'l Cas. Co. v. Franklin Cnty.*, 718 F. Supp. 2d 785, 786 (S.D. Miss. 2010) (quoting Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1356 (2004)). "A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *See Harrington v. State Farm Fire & Cas. Co*., 563 F.3d 141, 147 (5th Cir. 2009) (quoting *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000), quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982)). The Court must accept as true all well-pleaded, non-conclusory allegations in the complaint and liberally construe the complaint in favor of the plaintiff. *Id*.

In this case, to pass muster under the notice pleading system and survive a motion to dismiss, the complaint must plausibly allege that "a prudent fiduciary in the defendant's position could not have concluded that stopping purchases…or publicly disclosing negative information would do more harm than good." *Dudenhoeffer*, 134 S. Ct. at 2473.

Consistent with Fifth Circuit and Supreme Court authority, these allegations of breach adequately place the defendants on notice of plaintiffs' theories liability. A decision to require an ERISA plaintiff to plead that "*no* prudent fiduciary could have concluded that the proposed actions would have caused *more harm than good to the fund*" conflicts with the Supreme Court's interpretation of Rule 8(a) as demanding "a short and plain statement of the claim" that only needs to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

Additionally, Defendants' interpretation of *Dudenhoeffer* ignores the Court's requirement for the lower court to give "careful, context-sensitive scrutiny" of a complaint's allegations. *Dudenhoeffer*, 134 S. Ct. at 2470. *See also Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claims for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."); *Tibble*, 135 S. Ct. at 1828-29 (the Ninth Circuit erred by not considering whether the fiduciary had prudently monitored the investment funds "with the nature and timing of the review contingent on the circumstances."). Defendants' standard simply ignores the *context* of a plaintiff's allegations, and would have all ERISA company stock claims dismissed.

It is not amici's position that "the filter of *Dudenhoeffer* [should be turned] into a tap, forcing EIAP fiduciaries to wait until summary judgment for relief from meritless lawsuits." District Court opinion at 29. Rather, pursuant to the directives from the Supreme Court, the lower court should look at the *context* of the case, and decide whether a plaintiff has plausibly alleged what a prudent fiduciary would have done.

For example, as the Ninth Circuit aptly explained the importance of context in evaluating whether plaintiffs had plausibly alleged what a prudent fiduciary would do:

> [W]here the securities laws do require disclosure of previously withheld material information, as in this case, the impact of the

> eventual disclosure of that information must be taken into account in assessing the net harm that will result from the withdrawal of the fund. In such a case…it is plausible to conclude that the withdrawal of the fund will result in a net benefit, rather than a net harm, to plan participants.

Harris v. Amgen, Inc., 788 F.3d 916, 920 (9th Cir. 2015). Conversely, if the securities laws do not require disclosure of material information, or if the stock drop is not significant, is followed by a quick rebound, and is not related to the practices at issue, then the complaint most likely should be dismissed.

Because Defendants' proposed standard creates a heightened pleading requirement that, in practice, would require courts to disregard the context of each particular case, amici respectfully request that this court affirm the pleading standard clearly established in *Dudenhoeffer* and properly applied by the district court below.

III. "INVESTMENT IN EMPLOYER STOCK" IS NOT A PRIMARY OBJECTIVE OF ERISA.

Defendants' amicus American Benefits Council ("ABC") argues that "congressional policy" promoting "employee stock ownership" requires "a robust pleading hurdle…to protect fiduciaries and encourage investment in employer stock." Br. Amicus Curiae of ABC Urging Reversal at 3-10. This argument was made, by defendants and their amici in *Dudenhoeffer*, and rejected. In that case, defendants and their amici argued that "the special purpose of an ESOP—investing participants' savings in the stock of their employer—calls for a presumption that such investments are prudent." *Dudenhoeffer*, 134 S. Ct. at 2467. The Court rejected the argument "that the content of ERISA's duty or prudence varies depending upon the specific nonpecuniary goal set out in an ERISA plan." *Id*. at 2468.

The Court explained that Congress promoted ESOPs through tax incentives and exempting ESOPs from ERISA's diversification requirement. The Court continued that it was not convinced "that Congress also sought to promote ESOPs by further relaxing the duty of prudence as applied to ESOPs with the sort of presumption proposed by petitioners." *Id*. at 2469.

This holding makes sense. The purpose of ERISA is "to protect…the interests of participants in employee benefit plans and their beneficiaries." ERISA § 2(b), 29 U.S.C. § 1001(b). This statement of purpose is found in the statute itself. It is difficult to imagine how Congress could have expressed more clearly the Act's overriding purpose. There is no similar statement concerning the importance of encouraging employee ownership.

ABC's reliance on legislative history regarding the purposes of ESOPs also is misplaced. For one thing, regardless of what corporate benefits were originally intended through the promotion ESOPs, nothing in the legislative history suggests that Congress intended these corporate benefits to supersede the fundamental purpose of ERISA: to protect the interests of plan participants and beneficiaries and to ensure their security in retirement. Indeed, as this Court has previously recognized, "[c]ompeting with Congress' expressed policy to foster the formation of ESOPs is the policy expressed in equally forceful terms in ERISA: that of safeguarding the interests of participants in employee benefit plans by vigorously enforcing standards of fiduciary responsibility." *Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983).

Additionally, ABC's reliance on legislative history from 1976 ignores the dramatic shift from defined benefit plans to defined contribution plans in the last two decades. *See supra* Section I.A. Indeed, the legislative history relied upon by ABC largely predates the existence of 401(k) defined contribution plans, which were first established in 1978 by Section 135(a) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2785 (1978). The factors that weighed in favor of promoting stand-alone employer stock funds within the prior landscape, where employees enjoyed guaranteed retirement benefits through employer-sponsored defined benefit plans, do not apply in the current environment, where defined contribution plans are the exclusive source of retirement funding (besides Social Security) for most American workers.[24] In this context, permitting plan fiduciaries

[24] ABC overlooks the fact that, most, if not all, of the legislation supporting ESOPs was promoted by one Senator—Senator Russell Long, chairman of the Senate Finance Committee. Once the Senator retired in 1986, such legislation waned. For a detailed account of Senator Russell Long and ESOPs, *see* Andrew W. Stumpff, *Fifty Years of Utopia; A Half-Century After Louis Kelso's The Capitalist*

to put corporate interests ahead of the interests of plan participants and beneficiaries by offering imprudent employer stock funds within defined contribution plans simply cannot be reconciled with the fundamental purpose of ERISA.[25]

Manifesto, a Look Back at the Weird History of the ESOP, 62 Tax Law. 419, 425-26 (2009); Peter J. Wiedenbeck, *Trust Variation and ERISA's 'Presumption of Prudence,'* 142 Tax Notes 1205 (2014).

[25] Additionally, it is questionable whether Defendants and their amicus can rely on ESOP-related legislation, as the plans here are not ESOPs. Br. of Amicus Curiae ABC at 3 n.3.

CONCLUSION

For the reasons stated here, *amici* respectfully request that the Court affirm the decision of the District Court.

Dated: October 28, 2015

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CERTIFICATE OF SERVICE

I certify that, on October 28, 2015, I filed a true and correct copy of the foregoing Brief of Amici Curiae AARP and National Employment Lawyers Association In Support Of Plaintiffs-Appellees with the Clerk of the United States Court of Appeals for the Fifth Circuit via the CM/ECF system. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all Filing Users listed below.

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Dated: October 28, 2015 /s/ Mary Ellen Signorille
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,651 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: October 28, 2015

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