No. 18-1165

IN THE

Supreme Court of the United States

RETIREMENT PLANS COMMITTEE OF IBM, et al.,
Petitioners,
v.
LARRY W. JANDER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

TOYJA E. KELLEY
PRESIDENT OF DRI—THE VOICE OF THE DEFENSE BAR
SAUL EWING ARNSTEIN & LEHR LLP
500 East Pratt Street
Baltimore, MD 21202
(410) 332-8689
toyja.kelley@saul.com

MICHAEL R. PENNINGTON
BRADLEY ARANT BOULT CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203

SCOTT BURNETT SMITH
Counsel of Record
CAROLINE D. SPORE
BRADLEY ARANT BOULT CUMMINGS LLP
200 Clinton Avenue West
Suite 900
Huntsville, AL 35801
(256) 517-5100
ssmith@bradley.com

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI—The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes promoting appreciation of the role of defense lawyers in the civil justice system, anticipating and addressing substantive and procedural issues germane to defense lawyers and their clients, improving the civil justice system, and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court appeals presenting questions that are important to civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

DRI members have extensive experience with the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. DRI's membership includes not only representatives of companies and organizations with ERISA plans, but its membership represents even more such businesses and entities. The outcome of this case will have significant ramifications for ERISA plans, more specifically, for a subset of congressionally preferred plans known as

1. In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this *amicus curiae* brief.

employee stock ownership plans, which enable employees to invest primarily in their employers' stock. The decision below allows ESOP plan participants bringing an ERISA stock-drop action to survive a motion to dismiss by making only the most generic and conclusory allegations, ensuring that defendants in such cases will be subject to double-barreled securities and ERISA strike suits, enormously expensive discovery, and the potential for *in terrorem* settlements.

SUMMARY OF THE ARGUMENT

This case provides an opportunity for this Court to set forth the elements of an ESOP stock-drop case against insider fiduciaries in light of the pleading standard established by *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). Without a clear identification of the essential elements for a breach of fiduciary duty in an ESOP stock-drop action, the *Dudenhoeffer* standard—requiring plaintiffs to "plausibly allege[] that a prudent fiduciary in the defendant's position *could not have concluded* that [an alternative action] would do more harm than good to the fund"—only goes so far. *Id.* at 429−30 (emphasis added). To sharpen the *Dudenhoeffer* standard, this Court should ensure that plaintiffs bringing ESOP stock-drop cases must comply with essential elements carefully tailored to effectuate the congressionally identified purpose of ESOPs under ERISA. The elements should also recognize the reality that corporate insider fiduciaries will at times be subject to conflicting duties.

This brief proposes five essential elements for ESOP stock-drop suits that challengers must prove:

(1) the defendant was acting in a fiduciary capacity; (2) the defendant was governed by a specific fiduciary duty; (3) the defendant breached that specific fiduciary duty; (4) the breach caused loss; and (5) the plaintiff(s) suffered economic loss or damage. These proposed elements follow from the statutory text, prior Court decisions, and the common law of trusts. Applying these elements, Plaintiffs fell far short of pleading a plausible claim for breach of fiduciary duty; the Second Circuit's judgment should be reversed and rendered in favor of Petitioners.

ARGUMENT

I. Congress Has Expressed a Clear Preference for ESOPs and Acknowledged That Such Plans Are Unique.

The essential elements of an ESOP stock-drop claim should align with *both* express congressional preference for ESOPs *and* Congress's acknowledgement that such plans serve a different purpose from conventional retirement plans. Contrary to this expressed preference and understanding, the Second Circuit's decision would allow every stock-drop plaintiff to survive dismissal by making "generic allegations that disclosure was inevitable and disclosure sooner-rather-than-later is always the prudent course." *See* Pet. Br. at 2. Such a conclusion undermines congressional policy reflected in ERISA's legislative history and effectuated by the statutory text.

ESOPs are unique statutory creatures that were never intended to serve as guaranteed sources of retirement income. Rather, their chief purpose has always been to serve as a "bold and innovative method of strengthening the free private enterprise system," thereby "solv[ing] the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1583, 1590. The Second Circuit's decision would vitiate this purpose by making it almost impossible for corporate insiders to serve as ESOP fiduciaries without risking liability. Given that Congress authorized corporate insiders to act as ESOP fiduciaries, such a result cannot be correct purely as a textual matter. *See* 29 U.S.C. § 1108(c)(3). The Second Circuit's decision would undermine Congress's stated policy preferences by making ESOPs less desirable options for employers. Such a result is contradicted by ERISA's legislative history, by trust law principles, and most importantly by the statutory text itself.

The first ESOP was established in 1956, predating ERISA by almost two decades. *See* Matthew M. O'Toole, *The Disproportionate Effects of an ESOP's Proportional Voting*, 85 NW. U. L. REV. 824, 833 (1991). They were the brainchild of Louis Kelso, an attorney who propounded ESOPs as part of his theory of "universal capitalism." *See* D. Bret Carlson, *ESOP and Universal Capitalism*, 31 TAX. L. REV. 289, 291 (1976). Kelso believed that ESOPs would achieve two important goals: allowing employees to own capital in their employers while simultaneously giving their employers a new source of capital. *See id.* at 293–95.

Kelso's ideology did not become a political reality until he joined forces with Senator Russell Long. *See* O'Toole, *The Disproportionate Effects of an ESOP's Proportional Voting*, 85 NW. U. L. REV. at 833 ("Kelso's lobbying of the powerful then-Senate Finance Committee Chairman Russell Long provided the impetus behind ERISA's passage."). Persuaded by Kelso's vision of workers achieving an ownership interest in their employers, Senator Long successfully inserted a provision for ESOPs into ERISA. Ezra S. Field, Note, *Money for Nothing and Leverage for Free: The Politics and History of the Leveraged ESOP Tax Subsidy*, 97 COLUM. L. REV. 740, 748 (1997).

Neither Kelso nor Senator Long advocated ESOPs as traditional retirement savings plans. In fact, Kelso argued that "to the degree [ESOP] financing is *substituted for conventional pension and profit sharing techniques* of providing private retirement security, employees will benefit by increased private income and ownership security, corporations will benefit by lower costs, and the economy will benefit through reduction of inflationary pressures." *Welfare and Pension Plan Legislation: Hearing on H.R. 2 and H.R. 462 Before the General Subcomm. on Labor of H. Comm. on Education and Labor*, 93rd Congress 746 (1973) (statement of Louis O. Kelso, General Counsel, Bangert & Co.) (emphasis added). Congress also understood ESOPs would serve a purpose distinct from other retirement plans. *See* S. Rep. No. 93-1090, at 313 (1974) (Conf. Rep.) ("The conferees understand that the basic element common to all [ESOPs] is that they are qualified stock bonus plans designed to invest primarily in qualifying securities of the employer whose employees are covered by the plan."). Thus, the inclusion of ESOPs in ERISA was motivated more by the desire to incentivize the use of such plans, providing employees with a capital stake in the economic success of the company for which they worked, and less by any belief that such plans were the best option to secure retirement savings.

After ERISA's passage in 1974, Congress continued to emphasize "the special purposes" of ESOPs as plans that would "solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees." 90 Stat. at 1590. Notably absent from the congressional statement of intent is any statement that ESOPs were intended to be vehicles for retirement savings; in fact, Congress *contrasted* ESOPs with "conventional retirement plans." *Id.* Congress's duly-enacted statement of intent is proof of its intended purpose for ESOPs. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 217 (2012) (stating that an enacted purpose clause is a "permissible indicator of meaning"). Further, the statement of intent evinces a clear understanding of Senator Long's vision: "The ESOP's primary purpose, however, is not to serve as a retirement vehicle but, rather, to serve as an incentive for corporations to structure their financing in such a way that employees can gain an ownership stake in the company for which they work." 129 Cong. Rec. 33,821 (Nov. 17, 1983) (statement of Sen. Long proposing the Employee Stock Ownership Act of 1983); *accord* 90 Stat. at 1590.

Therefore, neither the original proponents of ESOPs nor the Congress that embraced them intended them to be stand-ins for traditional retirement savings plans. Instead, Congress included ESOPs in ERISA to serve a different, but equally laudable, set of policy goals: allowing all employees to enjoy an ownership interest in their own corporate employers, who will simultaneously benefit from the infusion of capital.

ERISA's treatment of ESOPs is consistent with the policy goals expressed in its legislative history, since Congress has exempted ESOPs from some of ERISA's more restrictive rules and regulations. As this Court noted in *Dudenhoeffer*, "an ESOP fiduciary is not obliged under § 1104(a)(1)(C) to 'diversif[y] the investments of the plan so as to minimize the risk of large losses.'" *Dudenhoeffer*, 573 U.S. at 417 (quoting 29 U.S.C. § 1104(a)(1)(C)); *see* 29 U.S.C. § 1104(a)(2) (stating that eligible individual account plans, which include ESOPs, are exempt from diversification requirement and fiduciaries of such plans are not under a duty to diversify). Similarly, ESOPs are exempt from the prohibited transactions provisions of ERISA as long as certain other conditions apply. *See* Field, *Money for Nothing*, 97 COLUM. L. REV. at 755 (noting that while "ERISA generally requires that a pension plan not . . . engage in 'prohibited transactions'—transactions with 'part[ies] in interest,'" ESOPs are exempt from these rules provided that the transaction is for "adequate consideration") (quoting 29 U.S.C. § 1106(a)); *see also* 29 U.S.C. § 1108(e).

Congress has also passed other statutes in order to encourage entities to adopt ESOPs. *See, e.g.*, 26 U.S.C. § 404(a)(9) (allowing employers to deduct ESOP contributions if those contributions are "applied by the plan to the repayment of the principal of a loan incurred for the purpose of acquiring qualifying employer securities"); 26 U.S.C. § 512(e)(3) (exempting shares of an S corporation's business profits held by ESOPs from unrelated business income tax); 45 U.S.C. § 721(d)(2) (authorizing the United States Railroad Association to increase the principal amount of a loan made to a railroad if the railroad "is making a good faith effort to establish an employee stock ownership plan").

Congress thus ensured that the "primary purpose" of ESOPs was effectuated by holding these plans to more relaxed rules than ordinary retirement plans. Congress has done so despite its understanding and acknowledgment that undiversified investment portfolios are riskier choices. Indeed, at the same time it exempted ESOPs from ERISA's diversification requirement, Congress recognized that "diversification of assets is a basic principle of sound investment policy and [] requiring certain contributions to be invested in employer securities may create tension with the objectives of diversification." S. Rep. No. 108-266, at 9 (2004); *see also* 29 U.S.C. § 1104(a)(1)(C) (purpose of diversification requirement is "to minimize the risk of large losses"). Yet ESOPs still thrive, in large part because Congress has continued to nurture them. Up until the Second Circuit's decision, courts were careful to evaluate claims against ESOP fiduciaries for breach of the duty of prudence in light of ESOPs' legislative purpose. Affirming the Second Circuit's decision here would turn ESOPs into a liability trap for corporate insider fiduciaries in contravention of congressional recognition that such plans are valuable despite their risks.

Clearly, ERISA's reticulated statutory scheme is the product of a careful balance between two distinct (and at times competing) policy goals: ensuring that employees can enjoy an ownership stake in their employers, on the one hand, and protecting the security of employees' retirement savings, on the other. Because the Second Circuit's decision disrupts Congress's carefully wrought compromise, it should be reversed.

II. The Existing Legal Framework Already Accommodates the Conflicting Duties of Insider Fiduciaries, and Petitioners Properly Discharged Their Duties Within This Framework.

In addition to balancing the goal of encouraging employee ownership of capital against the goal of promoting employee retirement security, ERISA also balances two competing sets of *duties*: the duties owed by corporate insiders to the company's shareholders versus the duties owed by corporate insider fiduciaries to plan beneficiaries. The elements of an ESOP stock-drop claim should be set forth in a way that complements this existing legal framework.

A. ERISA Accommodates the Conflicting Duties of Insider Fiduciaries.

ERISA explicitly permits corporate officers and directors to serve as fiduciaries to an employee pension plan or an ESOP plan. 29 U.S.C. § 1108(c)(3). In that role, the insider fiduciary will necessarily owe multiple duties to different groups. Corporate law imposes a fiduciary duty on the insider to act in the best interests of all the shareholders of the corporation. *See generally* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §§ 3.01, 3.02, 4.01 (AM. LAW INST. 1994). Securities law imposes a duty on the insider not to trade on material non-public information. *See generally id.* § 5.04. And ERISA imposes duties of trust on the insider, including duties of loyalty, prudence, diversification, and adherence to plan documents. 29 U.S.C. § 1104(a)(1). When these duties conflict, as they inevitably will, the law cannot hold the fiduciary liable no matter what decision the insider makes. There must be some "play in the joints" between the conflicting duties. *See* Pet. Br. at 43.

In fact, ERISA anticipates and moderates this conflict in several ways. ERISA's fiduciary duties only apply to a person "to the extent" he or she "exercises any discretionary authority or discretionary control respecting management" of the plan "or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A). ERISA also includes a temporal limit on the fiduciary's duty. The fiduciary's duty to act with "care, skill, prudence, and diligence" is to be judged only by "the circumstances then prevailing." *Id.* § 1104(a)(1)(B). This requires only procedural (not substantive) foresight and removes hindsight bias. *Barchock v. CVS Health Corp.*, 886 F.3d 43, 44–45 (1st Cir. 2018); *Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 384–85 (6th Cir. 2015); RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. b (AM. LAW INST. 2007).

This Court has likewise acknowledged the conflicting duties insider fiduciaries face. ERISA does not require that "employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Shaw v. Delta Airlines*, 463 U.S. 85, 91 (1983). An ERISA fiduciary can have "financial interests adverse to [participants and] beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). An ERISA fiduciary can fire an employee for reasons unrelated to the plan. *Id.* Employers or other plan sponsors are likewise free to adopt, modify, restrict, or even terminate a plan without breaching ERISA's fiduciary obligations. *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 443 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). In all of these examples, the insider wears different hats. Decisions made by an insider wearing the corporate officer hat should not be second-guessed by plan participants or beneficiaries who prefer the ERISA fiduciary hat. ERISA recognizes that "the fiduciary with two hats" may "wear only one at a time." *Pegram*, 530 U.S. at 225. The ERISA hat fits *only* when the fiduciary is "making fiduciary decisions" in "relation to a plan." *Id.* at 225–26.

An ERISA fiduciary cannot be held liable for a participant's individual decision to invest an imprudent proportion of investment funds in an ESOP. ERISA's safe harbor provision insulates the insider fiduciary from liability for such losses. If the pension plan provides for individual accounts and gives the beneficiary control over individual investments, "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii). The ERISA safe-harbor regulation also exempts an insider fiduciary from any duty to disclose material non-public information to a participant if such disclosure would violate federal securities law. It says that a participant's investment decision is not independent if a "plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, *unless* the disclosure of such information by the plan fiduciary . . . would violate any provision of federal law. . . ." 29 C.F.R. § 2550.404c-1(c)(2)(ii) (emphasis added). Similarly, officers of a national bank's trust department cannot "use material inside information in connection with any decision or recommendation to purchase or sell any security." 12 C.F.R. § 9.5(b). Federal securities laws specifically govern when and how an insider should disclose material non-public information and outlaw disclosures that lead, directly or indirectly, to securities trading. *See*, *e.g.*, 15 U.S.C. § 78j; 17 C.F.R. § 240.10b5-1; *id.* § 243.100(b)(1)(iv). An insider fiduciary thus cannot be compelled to disclose material non-public information to an ESOP participant for purposes of directing employer stock trades in an individual ESOP account.

B. The Law of Trusts Likewise Permits an Insider Fiduciary to Act in Dual Roles.

ERISA draws on the common law of trusts to shape the duties and responsibilities of plan fiduciaries. *Pegram*, 530 U.S. at 224. Under ERISA, an ESOP is analogous to a trust instrument that gives the settlor power to define the investments of the trust corpus in the stock of a single corporation, notwithstanding the imprudence of such an investment. Where, as here, the terms of the instrument reserve to the settlor "a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision . . . and to comply with any exercise of that power." RESTATEMENT (THIRD), TRUSTS § 75; *see also id.* § 91(b) (in investing funds, the trustee "has a duty to conform to the terms of the trust directing or restricting investments by the trustee."). Thus, if the terms of a trust direct the trustee to acquire specific investments, "the trustee must ordinarily comply with [that] direction" or "be liable for a loss resulting from a failure to comply with the trust provision." *Id.* § 75 cmt. b.

This general rule applies specifically to a corporate trustee's purchase of the corporation's own shares as a trust investment. If authorized by the express terms of the trust or the informed consent of all beneficiaries, the trustee may purchase its own stock. *Id.* § 78 cmt. e(2). So too, when the trustee assumes the role of officer or director of a corporation in which the trust owns stock. In this circumstance, the trust's beneficiaries accept "that the trustee's duties to it will be subordinated to any legal duties to which the trustee is subject when acting in the role of director, officer, manager, or the like." *Id.* cmt. d(1).

C. Petitioners Properly Executed Their Dual Roles.

The IBM 401(k) Plus Plan provides that IBM's ESOP "shall be invested, to the maximum extent practicable, *entirely in the common stock of IBM at all times*, except to the extent that cash may be required to make distributions under the Plan, to pay expenses, or to meet other short-term needs." Ex. Q in Support of Defs.' Mot. to Dismiss at 6, *Jander v. Int'l Bus. Machines Corp.*, No. 1:15-cv-03781 (S.D.N.Y. Oct. 26, 2015), ECF No. 21-18 (emphasis added). The beneficiaries consented to this directive by choosing to invest a portion of their retirement savings in the ESOP, as opposed to other investment options available within the Plan. Ex. R in Support of Defs.' Mot. to Dismiss at 7, *Jander v. Int'l Bus. Machines Corp.*, No. 1:15-cv-03781 (S.D.N.Y. Oct. 26, 2015), ECF No. 21-19 (stating that beneficiaries "have the flexibility to change how [they] want new contributions to be invested as often as [they] wish, and [they] can transfer funds within the existing options at any time"). The Plan also instructed beneficiaries that the ESOP was not a diversified investment and that "[i]nvesting in a non-diversified, unmanaged single stock involves more investment risk than investing in a diversified fund." *Id.* at 10.

These provisions bespeak the Plan's caution and the care taken to ensure that ESOP participants were informed of the risks of their investment. By investing the ESOP funds in IBM's common stock, the corporate insider fiduciaries abided by the terms of the ESOP and investment directions with respect to ESOPs. By self-directing their contributions, Plan participants assumed the risk that necessarily accompanies investing in the ESOP. Since the Plan expressly warned the participants of precisely this risk, they should not be able to impose liability on the Plan fiduciaries for simply doing what the Plan instructed—*i.e.*, investing ESOP funds in IBM common stock.

III. The Court Should Take This Opportunity to Clearly Define the Elements of an ESOP Stock-Drop Claim Against Insider Fiduciaries.

Under the well-established pleading standard in the Court's *Twombly* and *Iqbal* decisions, pleadings "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court's decision in *Dudenhoeffer* applied this pleading standard to ESOP stock-drop cases. But the Court failed to remove the existing uncertainty on what constitutes a valid claim, nor did it clearly identify the burden of proving such a claim. Once the elements and burdens are clarified, *Dudenhoeffer*'s pleading standard can be applied with more precision.

The Court should take the opportunity here to establish the elements of an ESOP stock-drop case against insider fiduciaries. Based on prior precedent and the law outlined above, those elements should be:

1. Acting in a fiduciary (as opposed to a corporate) capacity;

2. Existence of a fiduciary duty, specifically tied to 29 U.S.C. § 1104(a);

3. Breach of that fiduciary duty;

4. Causation (both transaction causation and loss causation); and

5. Economic loss or damage.

See Pegram, 530 U.S. at 226; *Dura Pharm. v. Broudo*, 544 U.S. 336, 341–42 (2005); *Nelson v. Hodowal*, 512 F.3d 347, 350–51 (7th Cir. 2008).

As corporate law requires generally, the burden of proving this specific claim should fall on the party challenging the conduct of the ESOP fiduciary. *See* PRINCIPLES OF CORPORATE GOVERNANCE § 4.01(d). In this context, the Court properly rejected the "presumption" of prudence because it is "imprecise and subject to misinterpretation," that is, it might be "thought to be irrebuttable or to establish a special evidentiary standard." *Id.* § 401 cmt. g. The better legal standard to protect the business judgment of corporate officers and directors is one that places "both the burden of coming forward with evidence" and "the burden of persuading the trier of fact" squarely on the challenger. *Id.*, cmt. to § 4.01(d).

Applying these elements and burdens to the record here, especially in light of the pleading standard imposed by *Dudenhoeffer*, requires the Court to reverse the Second Circuit. The Plaintiffs' complaint in this case is legally insufficient, failing to meet at least three of the proposed essential elements.

First, Petitioners did not act as ESOP fiduciaries when they failed to disclose, or otherwise act on, inside information about the Microelectronics transaction. At that time, they were wearing their corporate hats, not their ERISA hats, and were acting to preserve inside information. Plaintiffs allege the most ephemeral fiduciary role imaginable under ERISA, echoing only the terms of the statutory definition. JA 155.

Second, the complaint contains no detail about the alleged breach. It simply alleges, "Defendants breached their duties to prudently and loyally manage the Plan's assets." JA 157. Plaintiffs then hint at a *different* duty breached, namely disclosure of information "about the stock that artificially inflated its value." *Id.* If this breach turns on "publicly available information" and a belief that the market was overvaluing the stock, such an allegation is "implausible as a general rule" under *Dudenhoffer*. *See* 573 U.S. at 426. If instead the alleged breach turns on non-public insider information, the defendants' actions should be governed by federal securities laws, not ERISA. To hold otherwise would create a liability trap fatal to the very insider-managed ESOP Congress expressly wanted to create. Disclosing the inside information would violate securities law; failing to disclose would violate ERISA. The Court should not put insider ESOP fiduciaries in such a Catch-22.

Third, Plaintiffs' allegations of causation are equally unclear. They accuse Petitioners of directly causing losses to the Plan, indirectly felt by Plaintiffs. JA 157. But that cannot be accurate. In a defined contribution ESOP plan such as this, individual participants choose from a list of available investment options that includes the ESOP. The plaintiffs had the discretion to choose how to invest their contributions. If they chose the ESOP, they assumed the risk that the stock would go down, and thus their own actions would be the direct cause of their alleged loss. *See* Ex. R in Support of Defs.' Mot. to Dismiss at 10, *Jander v. Int'l Bus. Machines Corp.*, No. 1:15-cv-03781 (S.D.N.Y. Oct. 26, 2015), ECF No. 21-19 (warning participants that "[i]nvesting in a non-diversified, unmanaged single stock involves more investment risk than investing in a diversified fund"). There can be no transaction causation because the Plan mandates that ESOP investments be made only in IBM stock, so IBM stock would have been chosen regardless of the price. *See Dura Pharm.*, 554 U.S. at 341 (element of transaction causation, or reliance, is met by pleading facts showing that stock would not have been purchased in absence of misrepresentation). Finally, loss causation is defeated by the ERISA safe harbor provision, which insulates a fiduciary from liability for "any loss" resulting from a beneficiary's "exercise of control" over individual investments, where the plan provides for individual accounts and gives the beneficiary control over such investments. 29 U.S.C. § 1104(c)(1)(A)(ii). Since the Plan here expressly gave beneficiaries the "flexibility to change how [they] want new contributions to be invested" and to "transfer funds within the existing options at any time," ERISA forecloses holding the Plan fiduciaries liable for "causing" the alleged loss. *See* Ex. R in Support of

Defs.' Mot. to Dismiss at 7, *Jander v. Int'l Bus. Machines Corp.*, No. 1:15-cv-03781 (S.D.N.Y. Oct. 26, 2015), ECF No. 21-19.

CONCLUSION

Although the complaint in this action contains over 158 paragraphs, running over 125 appendix pages (JA 33–159), the single cause of action pleaded contains only the vaguest allegations (in only seven paragraphs) pertaining to the elements of an ESOP stock-drop claim under ERISA. JA 155–57. Once the Court precisely defines those elements and identifies which party has the burden of proving them—in light of the purpose for including ESOPs in ERISA, the statutory text, and principles of the common law of trusts—it is apparent that Plaintiffs' complaint must be dismissed for failing to state an actionable claim. The Court should therefore reverse and render judgment in favor of Petitioners.

Respectfully submitted.

TOYJA E. KELLEY
PRESIDENT OF DRI—THE VOICE
OF THE DEFENSE BAR
SAUL EWING ARNSTEIN
& LEHR LLP
500 East Pratt Street
Baltimore, MD 21202
(410) 332-8689
toyja.kelley@saul.com

MICHAEL R. PENNINGTON
BRADLEY ARANT BOULT
CUMMINGS LLP
1819 Fifth Avenue North
Birmingham, AL 35203

SCOTT BURNETT SMITH
Counsel of Record
CAROLINE D. SPORE
BRADLEY ARANT BOULT
CUMMINGS LLP
200 Clinton Avenue West
Suite 900
Huntsville, AL 35801
(256) 517-5100
ssmith@bradley.com

Counsel for Amicus Curiae

August 13, 2019