No. 15-20282

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH WHITLEY, et al.,
Plaintiff-Appellees,

v.

BP, P.L.C., et al.,
Defendant-Appellants.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division
No. 4:10-CV-4214

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEES

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STATEMENT OF THE ISSUE

What plausible factual allegations are required to meet the "more harm than good to the fund" pleading standard articulated by the U.S. Supreme Court in Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2472–73 (2014)?

STATEMENT OF INTEREST

As the head of the federal agency with primary responsibility for enforcing and interpreting Title I of the Employee Retirement Income Security Act of 1974 (ERISA), the Secretary of Labor (Secretary) has a strong interest in ensuring that courts correctly interpret ERISA. The government participated as amicus curiae in Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014), a case involving the pleading standards required to state a fiduciary-breach claim against ERISA fiduciaries of pension plans that invest in public-employer stock. Brief of the United States as Amicus Curiae Supporting Respondents, Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) (No. 12-751), http://1.usa.gov/1RcfnAm [hereinafter U.S. Brief]. The Secretary has an interest in Fifth Third's application to public-employer-stock investments in retirement plans. The Secretary coordinated with the SEC in this briefing.

STATEMENT OF THE CASE

Defendant BP p.l.c. (BP) is a multinational oil and gas company. Pls.' Consolidated Am. Compl. ¶ 93, ECF No. 152-1 [hereinafter, "Pls.' Compl."].[1] It operates in the United States through its subsidiaries, including BP Corporation North America, Inc. (BPNA). Id. at ¶¶ 41–43, 94. BPNA sponsors four individual account pension plans (cumulatively, the "Plans"). Id. at ¶ 92.

Each plan offers the BP Stock Fund (Fund), an employee stock ownership plan (ESOP), as an investment option for Plan participants' individual accounts. The Fund invests primarily in BP American Depository Shares (BP ADSs). See Dkt. 92-4 at 2. BP ADSs are "traded on the New York and Toronto Stock Exchanges." See id. When participants direct Plan fiduciaries to buy or sell their Fund interests, the Fund may buy or sell BP ADSs on the open market to accommodate participant transactions. Id.; Dkt. 93-2 at 25; cf. Dkt. 93-2 at 7 ("requests to acquire or redeem units of participation in the [Fund] shall be effected on a daily basis"), 65 (daily "trading estimates" of BP stock). In addition to purchases, participants may also sell employer stock or interests in the Fund due to participants' death, retirement, resignation, and/or termination, see, e.g., 26 U.S.C. § 401(k)(2)(B), or sell their Fund investments in their accounts in exchange for

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[1] At this procedural posture, we will assume the truth of the facts as pleaded for the purposes of this brief.

other Plan investments, see, e.g., Dkt. 184-4 § 6.2(b), (c). The Fund's fiduciary can thus effect concurrent purchases and sales for the Plans' operation. See generally 29 U.S.C. § 1107(d)(6); 29 C.F.R. § 2550.407d-6; 26 U.S.C. § 401(a)(1), (k).

A. Amended Complaint Allegations

Since 2002, BP has been held responsible for numerous industrial accidents. Pls.' Compl. at ¶¶ 162, 164–168. For example, in 2005, an explosion at BP's Texas City Refinery caused 15 deaths and 180 injuries. Id. at ¶ 169. The incident caused $1.5 billion in company losses. Id. Afterwards, the U.S. Chemical Safety Board concluded that BP's safety failures were systemic in nature. Id. at ¶¶ 170–173. In response, BP commissioned a review panel chaired by former Secretary of State James Baker to study the problem and recommend solutions. Id. at ¶¶ 185–186. This panel issued a report (Baker Report) in January 2007 with recommendations concerning three areas: (a) corporate safety culture; (b) process safety management systems; and (c) performance evaluation, corrective action, and corporate oversight. Id. at ¶¶ 186–188. BP stated publicly that it was implementing the recommendations, id. at ¶¶ 198, 276–285, but corporate insiders knew such was not true, id. at ¶¶ 287, 292. BP had also established an operating management system (OMS) in 2006 to reduce the risk of accidents. Id. at ¶ 267. In public statements, BP touted its implementation of the OMS at all BP facilities; however,

it failed to disclose that it had not implemented the system at contractor-owned sites operated by BP. Id. at ¶ 268.

On April 20, 2010, an explosion occurred on a BP-operated, contractor-owned oil platform known as *Deepwater Horizon*. Id. at ¶ 157. The explosion caused the attached well to spill oil into the Gulf of Mexico. BP did not stop the spill for 87 days. Id. at ¶ 228. An estimated 4.9 million barrels of oil leaked into the Gulf. Id. After the explosion, BP repeatedly provided public estimates as to how much oil continued to spill. Id. at ¶¶ 217–228. Those estimates were, however, much lower than the company's internal estimates and independent estimates of the spill's magnitude. Id. Accounts from *Deepwater Horizon* personnel and others showed that prior to the explosion, BP knew of serious safety concerns at *Deepwater Horizon* but failed to implement the safety procedures it had publicly promised. Id. at ¶¶ 191–195. On the date of the explosion, the price of BP ADSs closed at $60.48. Id. at ¶ 215. By May 29, 2010, the price had fallen to $42.95. Id. After the New York Times published an article the next day showing BP knew about *Deepwater Horizon*'s safety issues months in advance of the explosion, the price fell again, closing on June 1, 2010, at $36.52. Id. ¶ 216.

Between January 16, 2007, and June 24, 2010 (the class period), plaintiffs invested in the Fund. Id. at ¶ 17. As relevant, plaintiffs assert that three individual defendants and corporate defendant BPNA (all allegedly ERISA fiduciaries) acted

imprudently by offering the Fund as an investment option despite knowing it was artificially inflated (1) before the explosion, by BP's misrepresentations regarding its safety improvements and the risk of future accidents, and (2) after the explosion, by BP's misrepresentations concerning the oil spill's magnitude. Id. at ¶¶ 22, 217–228, 262–309, 317–318, 337, 360–361.

Specifically, plaintiffs allege that BP Group Chief Executive Anthony Hayward had insider knowledge of BP's extensive accident record and knew that contractor-owned facilities like Deepwater Horizon lacked the new OMS. Id. at 210, 262–309, 362. Further, Hayward made misleading public statements regarding BP's implementation of safety reforms following the Baker Report. Id. BP America Inc. Chairman and President Lamar McKay – who served as BPNA's President since 2009 – was responsible for implementing the Baker Report's recommendations and knew contractor-owned facilities like *Deepwater Horizon* lacked the new OMS. Id. at ¶¶ 6, 46–47, 209, 362. Neil Shaw was BP's Senior Vice President in charge of the Gulf of Mexico division from 2007–2009. Id. at ¶¶ 83–84. He also knew that contractor-owned facilities lacked the new OMS. Id. at ¶¶ 209, 307, 362. McKay and Shaw both knew Hayward had publicly misstated BP's efforts to improve safety at its contractor facilities. Id. at ¶ 192; see also In re BP p.l.c. Sec. Litig., No. 4:10-cv-4214, slip op. at 20–21 (S.D. Tex. Jan. 15, 2015) (mem. order). The proposed amended complaint catalogues the defendants' insider

knowledge concerning the deficient safety reforms prior to the *Deepwater Horizon* explosion; the complaint also alleges the individual defendants should have known the actual magnitude of the oil spill caused by the explosion. Pls.' Compl. at ¶¶ 189–318, 362.

B. Procedural History

Plaintiffs filed a consolidated complaint in 2011, and defendants moved to dismiss. In March 2012, the district court granted defendants' motion, reasoning that plaintiffs had not alleged sufficient facts to overcome the "presumption of prudence" then applicable to the Plans' investment in BP stock. In re BP p.l.c. Sec. Litig, 866 F. Supp. 2d 709, 727–29 (S.D. Tex. 2012). Plaintiffs appealed.

The Supreme Court then issued its decision in Fifth Third, holding that no presumption of prudence applies. 134 S. Ct. at 2470–71. The Court further explained that to state a claim under ERISA based on a fiduciary's failure to act on nonpublic information with regard to employer stock, plaintiffs "must plausibly allege an alternative action . . . the defendant could have taken that would have been" consistent with the securities laws and their objectives, and that "a prudent fiduciary in the defendant's position could not have concluded that [these actions] would do more harm than good to the fund." Id. at 2473 (emphases added). In light of Fifth Third, this Court vacated the district court's decision and remanded for further proceedings. Whitley v. BP, P.L.C, 575 F. App'x 341 (5th Cir. 2014).

On September 19, 2014, plaintiffs moved to file an amended complaint. Defendants opposed the motion, arguing that plaintiffs' proposed amendments were futile because plaintiffs did not plausibly allege an alternative action that would have done more good than harm.

Because the standard of review for futility is identical to that of a motion to dismiss, the district court considered whether plaintiffs' proposed amended complaint "states at least one valid claim when viewed in the light most favorable to Plaintiffs" under a "plausibility" standard. In re BP p.l.c. Sec. Litig., No. 4:10-cv-4214, slip op. at 5 (S.D. Tex. Jan. 15, 2015) (mem. order). Applying this standard, the district court granted plaintiffs' motion to amend as to most of their claims involving the artificial inflation of the Fund. Id. at 30.

The district court first examined the alternative actions plaintiffs alleged defendants could have taken to protect the Plans, id. at 24–25 & n.14, and concluded that, among the proposed options, only freezing the stock fund and disclosure presented plausible alternative actions "consistent with the securities laws and ERISA." Id. at 27.

The court then turned to whether those two actions would have done "more harm than good" to the Plans. Plaintiffs argued that they need only "plausibly allege that a prudent fiduciary in the same circumstances would have viewed the proposed alternative as more likely to help the Fund than harm it." Id. at 28.

Defendants argued plaintiffs instead needed to plausibly allege a prudent fiduciary could not have concluded that any proposed alternative would have done more harm than good to the Plans. Id. at 27. The court found both formulations unhelpful, relying instead on the plausibility pleading standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Because the court could not "determine . . . that no prudent fiduciary would have concluded that removing the BP Stock Fund as an investment option, or fully disclosing the state and scope of BP's safety reforms, would do more good than harm," it held that plaintiffs plausibly alleged claims against BPNA, Hayward, McKay, and Shaw. In re BP, slip op. at 30.

On January 30, 2015, defendants requested that the court certify the following question for interlocutory appeal: "What plausible factual allegations are required to meet the 'more harm than good to the fund' pleading standard articulated by the Supreme Court in Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2472–73 (2014)?" The district court granted defendants' request, and this Court granted defendants leave to appeal the question the district court had certified.[2]

[2] On October 30, 2015, the district court granted defendants' motion to partially dismiss plaintiffs' amended complaint, resulting in the non-final dismissal of all ERISA claims against Hayward and BPNA based on the subsequent argument that they are not fiduciaries. In re BP Sec. Litig., No. 4:10-MD-2185, 2015 WL

Although the certified question addresses the "more harm than good" portion of Fifth Third's ruling, the question necessarily turns on the antecedent question of what alternative actions an ESOP fiduciary could have taken in this case consistent with the securities laws. The availability and scope of these alternative actions were disputed, and the parties continue to focus their briefing on first determining which actions are consistent with the securities laws and ERISA before applying the "more harm than good" standard. The Secretary will address both issues.

SUMMARY OF THE ARGUMENT

Plaintiffs' complaint satisfies the standard established in Fifth Third. Plaintiffs allege that fiduciaries of the Plan knew a BP insider had made publicly misleading statements – in violation of the securities laws – that inflated the value of the stock and concealed ongoing serious safety threats. In that circumstance, ERISA's duty of prudence required fiduciaries to protect plan participants and beneficiaries by taking corrective action to prevent the Plans' ESOP from continuing to purchase illegally overvalued company stock. Plaintiffs have plausibly alleged at least two actions – freezing the stock fund and, if necessary, making a public disclosure – that the defendant-fiduciaries could have taken

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6674576, at *3–5, *7–8 (S.D. Tex. Oct. 30, 2015). This ruling is not final. When this Court accepted defendants' appeal, both Hayward and BPNA were parties to this action and assumed to be fiduciaries. The Secretary's brief analyzes only the issues raised in the interlocutory decision certified for appeal and will assume Hayward and BPNA are both fiduciaries as alleged.

consistent with the securities laws and that a prudent fiduciary could not have concluded would do more harm than good given the ongoing fraud.

1. Neither freezing stock purchases nor public disclosure would violate the securities laws, as the SEC explains in detail in a separate brief. Under the securities laws, the issuer or its designees, or those that made the misstatements, can make a corrective disclosure that will sufficiently dissipate the artificial inflation. Here, the CEO of BP, who is one of the defendants, is alleged to have made the misstatements. The CEO could have, and indeed should have (under the facts alleged), made corrective securities-law disclosures. Other defendants could have attempted to induce the CEO as their co-fiduciary or the issuer to make such disclosures, or taken other steps, such as contacting the SEC, to protect plan participants (and the public at large) from making further purchases at inflated prices.

If the corrective action was not taken, the defendant-fiduciaries could have stopped purchasing and selling employer stock at the inflated price until corrective disclosures were made. Refraining from purchasing employer stock, even if based on inside information, does not violate the securities laws for corporate fiduciaries with inside knowledge of misstatements, so long as the fiduciary concurrently refrains from selling that stock for the Plans. Suspending trading would have triggered the requirement that the issuer file a Form 8-K with the SEC, which

would disclose the suspension and the reasons for it to the public. If all else fails, the plan fiduciaries could make a public disclosure of the fraud themselves.

2. In the particular circumstances of this case, those two courses of action would have satisfied the second requirement of Fifth Third: that a prudent fiduciary could not have concluded the actions would do more harm than good to the Plans' ESOP. Where a known, ongoing fraud exists – and therefore a corrective disclosure is separately required by the securities laws – the fiduciary's overarching objective presumptively must be to stop the fraud and prevent the Plan from continuing to purchase overvalued stock while the fraud continues. That conclusion is fortified in this case by the plaintiffs' specific allegations that earlier disclosure of the safety problems at BP would have caused far less harm to the Plans than continuing to conceal the fraud. In the circumstances here, putting an immediate end to the fraud advances the objectives of both ERISA and the securities laws.

ARGUMENT

A. Background

ERISA imposes a duty of prudence on all plan fiduciaries. See 29 U.S.C. § 1104(a). The statute provides that a fiduciary must "discharge his duties with respect to a plan solely in the interest of [its] participants and beneficiaries," and "with the care, skill, prudence, and diligence under the circumstances then

prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(A), (B). Both duties require fiduciaries to take protective action when they know or should know harm will come to the plan or its participants if they do nothing. See, e.g., NLRB v. Amax Coal Co., 453 U.S. 322, 331–34 (1981); see also Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015); Kujanek v. Hous. Poly Bag I, Ltd., 658 F.3d 483, 488 (5th Cir. 2011).

In the typical case, overpaying for an asset is not prudent or in the interests of plan participants or beneficiaries. E.g., Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992). For that reason, where a publicly traded stock is overvalued because the market is not yet aware of inside information, it ordinarily would be imprudent for the plan to purchase the asset. But Fifth Third teaches that a fiduciary is not invariably required to take action based on inside information indicating a stock is overvalued. The Supreme Court therefore articulated two elements necessary to "state a claim for breach of the [ERISA] duty of prudence on the basis of inside information." 134 S. Ct. at 2472.

First, a plaintiff must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws." Id. The Court identified two possible "alternative actions": "refraining from future stock purchases (including by removing the Plan's ESOP option

altogether); or . . . publicly disclosing the inside information so that the market would correct the stock price downward, with the result that the ESOP could continue to buy Fifth Third stock without paying an inflated price for it." Id. The Court did not limit the universe of possible fiduciary actions to these two alternatives. The Court advised that "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." Id. at 2473.

Second, a plaintiff must plausibly allege that "a prudent fiduciary in the defendant's position could not have concluded that [these actions] would do more harm than good to the fund." Fifth Third, 134 S. Ct. at 2473. A corrective action might do more harm than good if, for example, it "caus[ed] a drop in the stock price and a concomitant drop in the value of the stock already held by the fund" that is not offset by benefits to the plan – i.e., preventing the plan from continuing to purchase overvalued stock. Id.

In this case, plaintiffs' specific, plausible allegations—which rely critically on an ongoing, undisclosed *fraud* that not only inflated BP's stock but also violated the securities laws—satisfy both of those requirements. This brief does not address

how ERISA may apply to circumstances that do not involve an undisclosed fraud that is artificially inflating the price of employer stock.

B. The Plan Fiduciaries Could Have Taken Alternative Actions that Are Consistent with the Securities Laws to Protect the Plan

Taking the allegations in the complaint as true, the Plan fiduciaries could have taken actions to protect Plan assets that were consistent with the securities laws. The complaint in this case therefore meets the first Fifth Third requirement.

At the threshold, the duty of prudence requires fiduciaries who learn of negative undisclosed information about the company, or who learn that information the company has disclosed is inaccurate or misleading, to investigate the possibility that these misleading or incomplete disclosures violate the securities laws and then decide whether corrective action is warranted. E.g., Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 299 (5th Cir. 2000). The level of investigation required depends on the facts and circumstances of the case and whether there is a reasonable basis to believe that a securities-law violation exists. Id.; see also U.S. Brief at 29. Such an investigation could include bringing the facts and circumstances of which the fiduciaries are aware to the attention of responsible corporate officials, who could then undertake a further investigation. If a fiduciary's investigation and/or further investigation by corporate officials reveals that there is a reasonable basis to conclude a securities fraud exists, such as through

misleading or incomplete public disclosures, the fiduciary can take actions that comply with the securities laws.

Urging Insiders to Make Corrective Disclosures. As an initial step, the fiduciary can urge the issuer to correct any securities-law violations. Indeed, certain fiduciaries themselves may have an independent securities-law duty to disclose any improperly withheld material nonpublic information. For example, in this case, the district court has already determined in a parallel securities-law action that plaintiffs plausibly alleged Hayward violated his disclosure duties under the securities laws. In re BP p.l.c. Sec. Litig., 843 F. Supp. 2d 712, 782–84 (S.D. Tex. 2012). For any fiduciary with disclosure duties under the securities laws, her corresponding ERISA obligation to issue a corrective disclosure to eliminate the fraud is clear.

Other fiduciaries who have knowledge of an undisclosed fraud but do not have a disclosure duty under the securities laws can, consistently with the securities laws, urge those obligated to make corporate disclosures under the securities laws to do so. Thus, if the other defendant-fiduciaries in this case believed that a co-fiduciary or any other corporate actor, such as Hayward, violated his duty to disclose under the securities laws or ERISA, they lawfully could have insisted that such persons make corrective disclosures. See 29 U.S.C. § 1105(a)(3); see also 17 C.F.R. § 240.13a-15 (requiring management to certify

that "controls and other procedures of an issuer . . . are designed to ensure that information required to be disclosed by the issuer . . . is recorded, processed, summarized and reported").

Blackout. An ERISA fiduciary can direct a suspension of all trading of employer stock by the plan until indications of fraud are resolved through an investigation or otherwise, or a corrective disclosure is issued. Such a “blackout” is a well-accepted tool that fiduciaries can use to protect the plan and its participants from overpaying for employer stock, so long as the fiduciary at least has a reasonable basis to believe that a fraud exists and the corporation refuses to conduct an investigation—or, if the fiduciary concludes a fraud has occurred, to correct the fraud. See Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Appellees, Whitely v. BP, p.l.c., No. 15-20282 (5th Cir.), at 5–6 [hereinafter SEC Brief]. Although a fiduciary may not, consistent with the securities laws, *buy or sell* stock on the basis of inside information, a fiduciary does not violate the securities laws by *declining to purchase* more employer stock at an inflated price so long as that fiduciary suspends all trading, not just purchases, when he or she learns of an undisclosed fraud. See SEC Brief at 11–18.

Pursuant to the securities laws, instituting such a blackout requires the issuer to explain why the suspension of trading by the plan has occurred, thereby alerting

the market to ongoing artificial inflation. See SEC Brief at 17–18. Congress formalized a mechanism under ERISA to institute an immediate "blackout" – i.e., a suspension of all purchases and sales – in 29 U.S.C. § 1021(i). See 29 U.S.C. §§ 1021(i)(2)(A), (2)(C)(i), (7)(A), (7)(B)(i); 29 C.F.R. § 2520.101-3(a); 29 C.F.R. § 2520.101-3(e) (model notice for blackouts that informs participants when they will "not be able to direct the sale of . . . stocks from your account" during the suspension). Normally, a fiduciary must provide 30-days' notice of a blackout; however, under 29 U.S.C. § 1021(i)(2)(C)(i) and (7)(B)(i), fiduciaries may adopt a trading suspension without providing 30-days' notice (1) to avoid violating ERISA sections 404(a)(1)(A) and (B), or (2) when the suspension "occurs by reason of the application of the securities laws." An immediate blackout or suspension, however, will require the issuer to provide public notice soon after the blackout or suspension through filing of a Form 8-K. See SEC Brief at 17–18. Once the issuer provides notice of the reason for a suspension to all investors, the ERISA fiduciary can also immediately notify plan participants or the public about those disclosed reasons through a notice or by other means.[3]

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[3] See 29 C.F.R. § 2520.101-3(b)(2)(ii)(A); Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries, 68 Fed. Reg. 3716, 3718–19 (Jan. 24, 2003) (29 C.F.R. § 2520.101-3(b)(2)(ii)(A) would apply when, for example, the "ABC company has announced that it is filing Chapter 11 bankruptcy" and the "plan fiduciary and administrator, determines that, given this event, it would be prudent to temporarily suspend investments in the ABC

Although the blackout's length will vary depending on the circumstances of each case, it must stay in place until indications of possible fraud are dispelled by investigation or otherwise, a corrective disclosure is issued, the employer stock's artificial inflation dissipates, or the fraud no longer causes harm to the plan. This can occur when, for instance, the loss caused by a misrepresentation has become too attenuated to impact new stock purchases. See Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342–43 (2005); Schaaf v. Residential Funding Corp., 517 F.3d 544, 550 (8th Cir. 2008); Ray v. Citigroup Glob. Mrkts., Inc., 482 F.3d 991, 995–96 (7th Cir. 2007). Alternatively, the information itself could be superseded or become stale, thus becoming immaterial given the company's changing circumstances. E.g., Hillson Partners, Ltd. v. Adage, Inc., 42 F.3d 204, 219 (4th Cir. 1994). But normally, the artificial inflation ends when the company issues a proper disclosure. In concert with a blackout, fiduciaries may also choose, under the appropriate circumstances, to remove the employer stock fund as an investment option entirely, or to remove the sponsor's match in employer stock, assuming the plan provides for such a match. See, e.g., Tibble, 135 S. Ct. at 1828–29.

Public Disclosure by the Fiduciary. Finally, if the blackout and further action by the corporation do not resolve the situation, an ERISA fiduciary may

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company stock, effective immediately."); see also 29 C.F.R. § 2520.101-3(b)(2)(ii)(B).

himself or herself publicly disclose the corrective information, even if that fiduciary has no independent obligation under the securities laws to do so (for example, because he or she did not make, and was not responsible for, the misstatements or omissions). That action would not violate any federal securities laws. See SEC Brief at 5. Even if such a disclosure is not sufficient under the securities laws to permit the plan fiduciary to sell the stock, see id. at 8–10 (discussing requirements), it would likely still prompt a corrective disclosure from the proper corporate actors, which would stop the fraud and prevent the plan from purchasing stock at an artificially inflated price. Such disclosure, however, should be a last resort that is undertaken only when a fiduciary is firmly convinced that a fraud has resulted in an inflated price. As the SEC explains in its brief, if the fiduciary's disclosure is incomplete or inaccurate in material respects, the fiduciary itself could potentially be subject to liability under the securities laws. See SEC Brief at 8.

It is not anomalous that an ERISA fiduciary who is also a corporate insider may have broader obligations to disclose inside information in the face of an ongoing fraud than what the securities laws alone require. That is merely the "consequence of the corporation's own decision to establish an ESOP and to install its own officers as plan fiduciaries." U.S. Brief at 30; see, e.g., Amax Coal, 453 U.S. at 333–34; see also U.S. Brief at 30; see also Harzewski v. Guidant Corp., 489

F.3d 799, 805 (7th Cir. 2007). Given the high level of care under which ERISA fiduciaries must operate, prudent fiduciaries may be required to disclose material nonpublic information if they have a reasonable basis to conclude that the issuer has misrepresented material information in violation of the securities laws and if other corrective measures are unavailable or have failed.[4]

* * *

The foregoing corrective actions are consistent with the securities laws and would discharge an ERISA fiduciary's duty to protect the plan from purchasing artificially inflated stock. In the complaint in this case, plaintiffs have alleged that plan fiduciaries could have either frozen further purchases or disclosed the fraud. The complaint therefore satisfies the first requirement of Fifth Third.

C. The Fiduciaries in the Circumstances Alleged Here Could Not Have Concluded That Making or Prompting Others to Make Corrective Disclosures Would Have Caused More Harm Than Good to the Plan

[4] There are also other actions that fiduciaries who have found a reasonable basis to conclude a fraud exists may lawfully take to compel a corrective disclosure. For example, one option could be for a plan fiduciary, representing the plan as an investor in company stock, to question the corporate insiders when they participate in investor conference calls. Another option for plan fiduciaries who learn of a possible ongoing fraud is to alert the SEC or the Department of Labor to the potential violations. The district court erroneously described the regulatory response to a whistleblower as a "purely cosmetic" effort. In re BP, slip op. at 25 n.14. That characterization is inaccurate, as evidenced by Congress's creation of whistleblower programs in the securities contexts. See Lawson v. FMR LLC, 134 S. Ct. 1158, 1169 (2014); 18 U.S.C. § 1514A(a)(1).

The second requirement for a claim that an ESOP fiduciary should have acted on inside information that a stock was overvalued is that "a prudent fiduciary in the defendant's position could not have concluded that [these actions] would do more harm than good to the fund." Fifth Third, 134 S. Ct. at 2473. The complaint here meets that requirement as well.

The plaintiffs in this case have pleaded that, given that the ongoing fraud would have come to light eventually, a freeze on stock purchases or corrective disclosures "were available to Defendants and . . . would not have been more likely to harm the BP Stock Fund than to help it." Pls.' Compl. at ¶ 339. Consistent with this brief, plaintiffs also state these actions would have been taken only after proper prudent investigation into the fraud. E.g., id. at ¶¶ 20, 339, 350. Those allegations are plausible in light of the facts set forth in the complaint.

The complaint alleges an ongoing fraud arising out of Hayward's material misstatements. The complaint plausibly alleges Hayward made many of the misleading public statements both before and after the *Deepwater Horizon* accident; indeed, parallel securities-law claims against Hayward survived a motion to dismiss. See In re BP p.l.c. Sec. Litig., 922 F. Supp. 2d 600, 640 (S.D. Tex. 2013). The complaint is unclear whether McKay and Shaw were also required to publicly disclose information based on the securities laws, and there are no parallel securities-law claims against them. But McKay was BP America Inc. Chairman,

as well as BPNA's President, and he was in charge of implementing the Baker Report – a project that never came to fruition. Pls.' Compl. at ¶¶ 188, 283, 376. As BP's Senior Vice President, Shaw oversaw BP operations in the Gulf of Mexico and knew based on inside information that contractor-owned oil rigs in that region had not implemented OMS. Id. at ¶¶ 6, 307. Both knew that Hayward had publicly misrepresented the level of safety reform, but neither did anything to stop the fraud those misstatements and omissions caused – despite having personal and intimate knowledge as to BP's true state of safety reform. Id. at ¶¶ 192, 209, 271–272, 362. These defendants allegedly knew that BP was claiming to have fully implemented its promised safety reforms, and they also knew such claims were false.

Given the ongoing fraud that Hayward was required to disclose under the securities laws, the plaintiffs have plausibly alleged that a prudent fiduciary could not have concluded that taking the sort of corrective action described above would have caused more harm than good to Plan assets. A reasonable fiduciary would have operated under the assumption that, because corporate insiders had an independent securities-law duty to correct Hayward's misstatements, the fraud would eventually come to light. In other words, it would have been unreasonable and imprudent for a fiduciary to continue purchasing BP stock on the assumption that BP's serious, safety-related fraud from the failure to fully implement the

significant safety measures, and the attendant risks to the company, would never be uncovered. And because of that, although a corrective public disclosure likely would have decreased the value of stock already held by the Plan, a reasonable fiduciary would have understood that such a drop in value would have eventually occurred anyway once the fraud was revealed, potentially through a safety disaster, and thus would have acted to stop any further harm to the Plan by refusing to purchase more BP stock until the fraud was disclosed. Where insiders are concealing a fraud in violation of the securities laws, the failure to bring the fraud to light does not prevent the ultimate loss in value to the plan, but merely ensures that, in the interim before the market learns the truth, the Plans will buy still *more* stock at inflated prices, causing further harm.

Moreover, the plaintiffs plausibly allege that "[a] less significant stock price drop would have occurred upon an earlier disclosure of the material information concerning BP's process safety and disaster recovery issues." Pls.' Compl. at ¶ 339. Rather than waiting for the fraud to become known through other means, such as here through the realization of the increased safety risk through a disaster like *Deepwater Horizon*, "[e]arly and candid disclosures would have caused the stock to drop less because, among other things, disclosure would have mitigated reputational damage to the Company, minimized the risk of nondisclosure claims arising from the *Deepwater Horizon* explosion, and lessened the risk of defending

against governmental investigations and paying the associated penalties." Id. (citation omitted). It is thus especially plausible on the specific facts of this case here that a reasonable fiduciary would have known that if BP had timely disclosed the true nature of its safety programs, as the securities laws required, the losses to investors could have been mitigated, thus causing less ultimate harm to the Plan. Cf. FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1310–17 (11th Cir. 2011) (discussing corrective disclosures generally); William Shakespeare, Merchant of Venice, act 2, sc. 2 ("truth will out"). That conclusion is fortified by the BP's long history of costly accidents, its chronic safety problems, and its repeated emphasis on the importance of safety to its business. E.g., Pls.' Compl. at ¶¶ 157–184, 268–273, 280, 284–286, 348.

Under the specific circumstances alleged here, in order to prevent the alleged greater harm caused by delayed disclosure, plan fiduciaries must make inquiries; make public corrective disclosures if they are responsible for the fraud; then demand compliance with the securities laws; use a blackout; and, if all else fails, disclose to the public, so that the plan no longer buys at an inflated price. No reasonable fiduciary could have concluded that refraining from purchasing stock that was inflated due to the fraudulent concealment of safety problems would have caused more harm than good to plan participants.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's decision.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULES 29 & 32 and FIFTH CIRCUIT R. 28.1 & 32.2

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B), and Fifth Cir. R. 29.2 and 32.2, because: this brief contains 5,870 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

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Dated: March 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2016, I electronically filed the Brief for the Amicus Curiae, Thomas E. Perez, Secretary of Labor, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

s/Eirik Cheverud
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