No. 16-1293

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. TATUM, Individually and on behalf of a class of all other persons similarly situated,
Plaintiff-Appellant,

v.

R.J.R. PENSION INVESTMENT COMMITTEE, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina
Case No. 1:02-CV-00373

Brief of the Amicus Curiae, Thomas E. Perez,
Secretary of Labor, United States Department of Labor,
in Support of Appellant

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for
Plan Benefits Security

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

JEFFREY M. HAHN
Senior Trial Attorney
U.S. Department of Labor
200 Constitution Ave. N.W.
Room N-4611
Washington, D.C. 20210
(202) 693-5695

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THE SECRETARY'S INTEREST

The Secretary of Labor is vested with primary regulatory and enforcement authority for Title I of the Employee Retirement Income Security Act (ERISA), see 29 U.S.C. §§ 1134, 1135, a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). The Secretary has a strong interest in ensuring that fiduciaries charged with administering employee benefit plans do so in a manner that is consistent with the fiduciary responsibilities set forth in ERISA section 404(a), 29 U.S.C. § 1104(a), and that plan participants and beneficiaries are able to effectively enforce these duties in federal court. In their response brief, Appellees raise questions concerning the standard for determining when participants and beneficiaries can recover losses they have incurred related to proven fiduciary breaches, questions that this Court conclusively answered in its previous decision in this case. The Secretary participated as amicus in the previous appeal and agrees with this Court's conclusion there that once the participants have proven that the fiduciaries breached their duties of procedural prudence and shown a related loss, as in this case, the burden is on the fiduciaries to prove that the loss would have occurred in any event by establishing that a prudent fiduciary who had investigated the matter "would have" made the same decision. The Secretary has

an interest in again defending that position in order to ensure that breaching fiduciaries cannot easily escape liability for their breaches.

STATEMENT OF THE ISSUE

The Secretary's brief is confined to the following issue raised by Appellees in their response brief:

Whether the Supreme Court's per curiam decision in Amgen, Inc. v. Harris, 136 S. Ct. 758 (2016), abrogated this Court's previous decision in Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014), which held that fiduciaries who have breached their duties can escape liability for losses related to their breaches only if they can prove that a hypothetical prudent fiduciary "would have" made the same decision anyway.

STATEMENT OF THE CASE

This case emanates from the spin-off in 1999 of RJR Nabisco, Inc.'s (RJR) food business from its tobacco business. JA 606. That spin-off meant that the ERISA plan sponsored by the spun-off tobacco company now held stock in a food company, Nabisco, with which it was no longer affiliated. JA 609. The plan's fiduciaries opted to sell off the Nabisco stock just six months after the spin-off, JA 626, even though the governing plan documents required that participants be permitted to maintain their existing investments in Nabisco stock, JA 614-15, and even though the price of Nabisco stock had plummeted since the spin off, JA 627,

which resulted in many of the plan's participants suffering large losses on their investments.

Plaintiff Richard Tatum, who had Nabisco stock in his individual account and who objected to the sell-off, brought a class action suit in May 2002 alleging that RJR breached its fiduciary duties under ERISA by liquidating the plan's Nabisco stock "on an arbitrary timeline without conducting a thorough investigation, thereby causing a substantial loss to the plan." Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 351 (4th Cir. 2014). After a bench trial, the district found that because the fiduciaries conducted no investigation prior to deciding to sell the Nabisco stock, "RJR did indeed breach its fiduciary duty of procedural prudence and so bore the burden of proving that this breach did not cause loss to the plan participants." Id. According to the district court, however, RJR satisfied its loss-causation burden by proving that the decision to sell off the Nabisco stock six months after the spin-off was "one which a reasonable and prudent fiduciary could have made after performing such an investigation." Tatum v. R.J. Reynolds Tobacco Co., 926 F. Supp. 2d 648, 651 (M.D.N.C. 2013) (emphasis added).

This Court affirmed the district court's finding that defendants breached their fiduciary duties and that the defendants therefore bore the burden of disproving loss causation, but concluded that the district court applied the wrong loss

causation standard and therefore reversed its decision that defendants were not responsible for the participants' losses. The Court said that the standard for loss causation is not whether the fiduciary "could have" made the same decision had it first undertaken a prudent investigation, but rather whether it "would have" done so. Tatum, 761 F.3d at 364.[1] As the Court explained, not only is that standard firmly grounded in precedent, see, e.g., Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 218 (4th Cir. 2011), but the alternative "would diminish ERISA's enforcement provision to an empty shell if we permitted a breaching fiduciary to escape liability by showing nothing more than the mere possibility that a prudent fiduciary 'could have' made the same decision." Tatum, 761 F.3d at 365.

In its decision, this Court also directly refuted Appellees' argument that the Supreme Court endorsed the "could have" standard for loss causation in Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014). The Court distinguished the portion of Dudenhoeffer cited by Appellees as confined only to cases involving

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[1] In addition to framing the loss-causation inquiry in terms of what the fiduciary in the case at hand would have done had it acted prudently, the Court also framed it as asking what a "hypothetical prudent fiduciary" would have done. Tatum, 761 F.3d at 364. The Court did not draw a distinction between these two conceptions of the inquiry, and the parties have not argued that there is a distinction. See Brief for the United States as Amicus Curiae, at 18, n. 8, RJR Pension Invest. Comm. v. Tatum, No. 14-656 (S. Ct.), available at https://www.justice.gov/sites/default/files/osg/briefs/2015/06/01/rjrpension_invite_20.pdf.

inside information, and noted that the decision, in any event, concerned pleading standards, not loss causation. Tatum, 761 F.3d at 366, n.14.

On remand, the district court re-evaluated the evidence applying the "would have" standard for loss causation, and concluded that a hypothetical prudent fiduciary "would have" made the same decision RJR made to divest the plan of Nabisco stock after six months. JA 660. Appellant now appeals on the ground that the district court misapplied the "would have" standard.

Although Appellees spend the bulk of their brief defending the district court's decision under that standard, they also argue that this Court can affirm on alternative grounds because of a recent Supreme Court decision, Amgen, Inc. v. Harris, 136 S. Ct. 758 (2016), which they read as clarifying that the district court's original "could have" standard was the right one all along. According to Appellees and their supporting amici, the U.S. Chamber of Commerce and the American Benefits Council, the Supreme Court's subsequent per-curiam decision in Amgen "makes clear that [this Court] misread [Dudenhoeffer]." Appellee's Br. at 56; Chamber Br. at 8 ("While this Court briefly distinguished Dudenhoeffer in a footnote, a subsequent Supreme Court decision shows that distinction is no longer tenable."). Amgen, they contend, reveals that Dudenhoeffer stands for the proposition that "there is no causation if the choice the defendant made is one that a prudent fiduciary 'could have' made." Appellee's Br. at 57 (emphasis added).

SUMMARY OF ARGUMENT

Appellees and their supporting amici seek to resurrect an issue that this Court conclusively decided the last time this case was before it: the standard for determining when a breaching fiduciary can be held liable for losses related to its breaches. They contend that this Court's previous decision – and, for that matter, the entire framework for determining loss causation in ERISA cases – has been upended by a most unlikely of sources, the Supreme Court's three-page per curiam opinion in Amgen, Inc. v. Harris, 136 S. Ct. 758 (2016). But not only is Amgen expressly confined to a narrow category of cases involving the use of inside information by fiduciaries of employee stock ownership plans that has nothing to do with this case, it does not even concern loss causation at all. Rather, Amgen – like its predecessor, Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) – was a case about pleading standards under Federal Rule of Civil Procedure 12(b), not "loss causation after a fiduciary breach has been established." See Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 366, n.14 (4th Cir. 2014) (distinguishing Dudenhoeffer). In short, Amgen was nothing more than a straightforward application of Dudenhoeffer to a case just like Dudenhoeffer. This Court's well-reasoned decision in Tatum was good law at the time, and it remains so today.

ARGUMENT

I. AS THIS COURT CORRECTLY RECOGNIZED, DUDENHOEFFER CONCERNED PLEADING STANDARDS UNDER RULE 12(b)(6), NOT LOSS CAUSATION AFTER A BREACH HAS BEEN PROVEN

Appellees' contention that the Supreme Court in Amgen endorsed the "could have" standard for loss causation is based entirely on a single quote from Dudenhoeffer – later repeated in Amgen – that Appellees remove from its narrow context, and to which they assign far-reaching consequences that the Supreme Court plainly did not intend. To understand the fallacy of Appellees' argument, therefore, first requires putting that quote from Dudenhoeffer back in its proper context. Doing so reveals that Dudenhoeffer merely established a pleading hurdle for a very narrow class of cases, not the substantive standard for loss causation for all cases thereafter arising under ERISA.

Prior to Dudenhoeffer, a number of lower courts had applied a "presumption of prudence" to an ESOP fiduciary's decision to invest in employer stock. See, e.g., Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995). This presumption sought to reconcile two seemingly competing forces facing ESOP fiduciaries: ERISA's stringent duty of prudence on the one hand, and ERISA's requirement that ESOPs invest "primarily" in employer stock on the other. See 29 U.S.C. § 1107(d)(6)(A) (defining an ESOP as a stock bonus plan "which is designed to invest primarily in qualifying employer securities."). With ERISA encouraging

ESOP fiduciaries to purchase employer stock, the theory went, these fiduciaries should be given some leeway for acting according to plan terms that required that such stock be offered. The Supreme Court disagreed, holding that no special presumption applies and that ESOP fiduciaries "are subject to the duty of prudence just as other ERISA fiduciaries are." Dudenhoeffer, 134 S. Ct. at 2467.

After rejecting the presumption of prudence, the Court in Dudenhoeffer went on to address concerns that the presumption's demise would lead inevitably to meritless lawsuits against ESOP fiduciaries. One way to separate the "plausible sheep from the meritless goats," the Court explained, is the pleading standard required to survive a motion to dismiss under Rule 12(b)(6), 134 S. Ct. at 2471, which the Supreme Court had recently explained in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). As those cases instruct, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Iqbal, 556 U.S. at 679 (emphasis added). One reason a claim might be implausible, the Court said in both Twombly and Iqbal, is where there is "an obvious alternative explanation" for the challenged conduct that renders it permissible. Twombly, 550 U.S. at 567; Iqbal, 556 U.S. at 682 ("As between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.") (quoting Twombly, 550 U.S. at 567).

The Court in Dudenhoeffer then offered guidance for how the plausibility standard of Rule 12(b)(6) applied to the case before it, where the plaintiffs alleged that defendants "behaved imprudently by failing to act on the basis of nonpublic information" calling into question the continued prudence of investing in employer stock, and should have instead stopped further purchases or disclosed the information to the public. Dudenhoeffer, 134 S. Ct. at 2472. The Court recognized that a fiduciary armed with inside information indicating that employer stock was mispriced would face two particular impediments to deploying that information: (1) "the complex insider trading and corporate disclosure requirements imposed by the federal securities laws," and (2) the prospect that stopping purchases or disclosing inside information to the public could cause the stock price to drop, thereby harming the plan and its participants. See id. at 2473. Because of these likely explanations for a fiduciary's reluctance to use inside information, the Court said that "[t]o state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." Id. at 2472 (emphasis added).

The Court then offered further specificity as to what a plaintiff must plead to address one of these explanations in particular, namely, that stopping purchases or publicly disclosing inside information would have caused the stock price to decline. According to the Court:

> "[L]ower courts faced with such claims [i.e., that a fiduciary failed to stop making purchases or disclose inside information] should also consider whether 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). It is this quote, containing the words "could not have" – a quote later repeated in Amgen, 136 S. Ct. at 759 – which Appellees and amici insist marks a new standard for loss causation in all ERISA cases. Appellees' Br. at 57 ("the Court held that causation requires that a prudent fiduciary 'could not have' made the same decision."); Chamber Br. at 6-7.

But as is apparent from its context, the Supreme Court in Dudenhoeffer was merely issuing a pleading directive that has nothing to do with loss causation after a breach has been proven, and everything to do with Twombly's requirement that a plaintiff must, at the pleading stage, contend with "obvious alternative explanation[s]" for why the defendant might have acted as it did. Twombly, 550 U.S. at 567. As explained, the Court in Dudenhoeffer was openly concerned that

trading on inside information could violate the securities laws, and that disclosing or stopping purchases might also cause the stock price to decline. See Dudenhoeffer, 134 S. Ct. at 2469 (describing Fifth-Third's concern about securities-law violations as "a legitimate one"). And it said that the way to account for these likely explanations for why a fiduciary might choose not to act on its inside information is to require plaintiffs, in their complaints, to "allege an alternative action" the fiduciary could have taken that would have been both legal and beneficial to the plan. Id. at 2472 (emphasis added). Thus, the quote that Appellees and amici seize upon as announcing a new and broadly applicable standard for loss causation in all ERISA cases is in reality a pleading requirement specific to a narrow category of cases (those involving inside information) that does not even include this case.[2]

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[2] The narrowness of this pleading requirement is further underscored by the fact that "obvious alternative explanations" of the type that render a complaint implausible if left unaddressed, such as those identified by the Supreme Court for inside-information cases, are rare. As the Eighth Circuit explained in Braden v. Wal-Mart Stores, Inc., "[n]ot every potential lawful explanation for the defendant's conduct renders the plaintiff's theory implausible." 588 F.3d 585, 597 (8th Cir. 2009). Indeed, "[r]equiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party, and would impose the sort of probability requirement at the pleading stage which Iqbal and Twombly explicitly reject." Id. (internal citation and quotations omitted). Rather, that requirement applies only "where there is a concrete, 'obvious alternative explanation' for the defendant's conduct" that is "precisely the result one would expect from lawful conduct in which the defendant is known to have engaged." Id. (emphasis added).

That is precisely how this Court distinguished Dudenhoeffer in its previous decision in this case. As the Court rightly recognized, unlike this case, "Dudenhoeffer addressed an allegation that a fiduciary failed to act on insider information." Tatum, 761 F.3d at 366, n.14. And this Court further pointed out that, in any event, Dudenhoeffer was about pleading, not about loss causation after a breach has been proven. See id. ("The [Supreme] Court's use of 'could not have' in this limited context does not cast doubt on our instruction that a 'would have' standard applies to determine loss causation after a fiduciary breach has been established."). The Court got it right then, and as explained below, nothing has changed since.

II. THE SUPREME COURT'S RECENT AMGEN DECISION WAS A STRAIGHTFORWARD APPLICATION OF DUDENHOEFFER'S PLEADING STANDARDS THAT, LIKE DUDENHOEFFER, HAS NOTHING TO DO WITH LOSS CAUSATION

Appellees and amici contend that the Supreme Court's subsequent per curiam decision in Amgen, Inc. v. Harris, 136 S. Ct. 758 (2016), laid bare this Court's error in distinguishing Dudenhoeffer, and clarified that Dudenhoeffer in fact endorsed a "could have" loss-causation standard for ERISA cases of every stripe. Appellee's Br. at 56; Chamber Br. at 8. Far from having the dramatic impact Appellees and amici ascribe to it, Amgen – befitting its "curt, per curiam" form, Chamber Br. at 11 – was nothing more than a straightforward application of

the pleading standards announced in Dudenhoeffer to the precise type of case identified in Dudenhoeffer.

Appellees and amici misconstrue Amgen in two respects in their effort to turn this molehill into a mountain. First, Appellees say that "Amgen does not rely on any allegations involving the use of insider information, indicating that [this Court's] distinction of [Dudenhoeffer] on this basis was erroneous." Appellee's Br. at 57. This is plainly wrong: Amgen is exactly the kind of inside-information case to which the Supreme Court referred in Dudenhoeffer. Indeed, the Amgen defendants specifically argued to the Ninth Circuit that the complaint was properly dismissed because, "if the Amgen Fund had been removed as an investment option based on nonpublic information about the company, this action may have brought about precisely the result plaintiffs seek to avoid: a drop in the stock price." Harris v. Amgen, Inc., 788 F.3d 916, 937 (9th Cir. 2015), rev'd, 136 S. Ct. 758 (2016) (emphasis added). And it was the Ninth Circuit's response to this very argument about the perils of using inside information – namely, that without regard to the complaint's allegations, it was, in the Ninth Circuit's view, "quite plausible . . . that defendants could remove the Fund from the list of investment options without causing undue harm to plan participants," id. at 938 – that the Supreme Court said did not comport with Dudenhoeffer. Amgen, Inc. v. Harris, 136 S. Ct. 758, 760 (2016).

Amici likewise argue that Amgen clarifies that Dudenhoeffer's "could not have" quote applies "across the board, not just in insider information cases." Chamber Br. at 4. They appear to base this contention on a single sentence at the outset of Amgen, where the Court described Dudenhoeffer as "a case which set forth the standards for stating a claim for breach of the duty of prudence against fiduciaries who manage employee stock ownership plans (ESOPs)." Amgen, 136 S. Ct. at 758; Chamber Br. at 10. But this generic, introductory description of Dudenhoeffer is entirely unremarkable and proves nothing, especially when Dudenhoeffer itself says that its pleading standards do not apply across the board. Instead, Dudenhoeffer makes clear that it is announcing the standard for "stat[ing] a claim for breach of the duty of prudence on the basis of inside information," and Amgen quotes this very language from Dudenhoeffer. Amgen, 136 S. Ct. at 759 (quoting Dudenhoeffer, 134 S. Ct. at 172). Indeed, this Court in Tatum correctly recognized that Dudenhoeffer expressly limited to inside-information cases its requirement that plaintiffs plead that a prudent fiduciary "could not have" determined that trading on or disclosing the information would have done more harm than good (i.e., the quote that Appellees misconstrue as announcing a loss-causation standard for every case). Tatum, 761 F.3d at 366, n.14.

And that is not the only hyper-specific pleading standard from Dudenhoeffer. Citing the presumption that a stock market price generally reflects

all relevant publicly available information, the Supreme Court also announced that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. Dudenhoeffer, 134 S. Ct. at 2471 (emphasis added). The Court's specificity as to when this "special-circumstances" pleading requirement is triggered – public stock cases where a fiduciary has allegedly ignored publicly available information – further belies amici's assertion that every standard announced in Dudenhoeffer applies in every case. Cf. Allen v. Greatbanc Trust Co., -- F.3d -- , No. 15-3569, 2016 WL 4474730, at *6 (7th Cir. Aug. 25, 2016) (refusing to apply Dudenhoeffer's "special circumstances" test to the private stock context).

Second, Appellees and amici strip all context from Amgen's quotation of Dudenhoeffer's pleading requirement for inside-information cases in contending that it established a causation standard. Dudenhoeffer, 134 S. Ct. at 2473. According to Appellees, the Court in Amgen "held that causation requires that a prudent fiduciary 'could not have' made the same decision." Appellee Br. 57 (emphasis added); Chamber Br. at 11. But Amgen, like Dudenhoeffer (see Part I, supra) does not concern causation; it never even mentions the word. Rather, Amgen, like Dudenhoeffer, was a decision reviewing the adequacy of a complaint

on a motion to dismiss. Amgen, 136 S. Ct. at 758 ("The Court considers for the second time the Ninth Circuit's determination that respondent stockholder's complaint states a claim"). And as the Court instructed in Dudenhoeffer, to survive a motion to dismiss, a complaint alleging that a fiduciary failed to act on inside information must also allege that a prudent fiduciary "could not have concluded" that acting on that information would do more harm than good. Dudenhoeffer, 134 S. Ct. at 2473. That directive is grounded squarely in Twombly and Iqbal's concern with overcoming "obvious alternative explanations" for the defendant's actions – namely, the risks of deploying inside information – not in any desire to implicitly re-write ERISA's causation standard. See Part I, supra. All the Court did in Amgen, then, was to apply Dudenhoeffer's pleading requirement for inside-information complaints to another inside-information complaint. A revelatory decision this was not.

III. AMICI'S CONCERNS WITH THE WORKABILITY OF THE "WOULD HAVE" STANDARD ARE OVERSTATED

After wrongly contending that Amgen adopted a "could have" standard for loss causation, amici then spend the remainder of their brief explaining why that standard, which this Court considered and rejected, is better than the "would have" standard that this Court adopted. Chamber Br. at 14-28. Though it takes a variety of forms, amici's concerns about the "would have" standard all flow from a single flawed premise: that the "would have" standard requires that a "defendant must

prove that a prudent fiduciary 'would have' made precisely the same choice." Chamber Br. at 15. Based on that assumption, amici conclude that the "would have" standard would be "impossible for most defendants to bear in practice" because "there is almost never just one prudent choice," id. at 14-15, a result that amici say will render loss causation a "toothless limitation on liability," id. at 18, and lead ultimately to the end of ERISA plans. Id. at 28.

Amici's concerns are overstated. First, some decisions are in fact "binary" ones where there is just one prudent choice – for example, to not steal money from the plan. Second, and more importantly, while it is true that a prudent fiduciary faced with an investment or other decision often, after investigation, could conclude that a number of options would all be prudent, this is entirely consistent with requiring a fiduciary who, as here, failed to conduct an adequate investigation to prove that his or her inaction, more likely than not, did not cause the subsequent loss to the plan. "Thus," as we stated in our previous brief, "the only question in this case involves a prediction about what would have happened if the investigation had been conducted in a prudent manner." See Brief of the Secretary of Labor as Amicus Curiae at 23, Tatum v. R.J. Reynolds Tobacco Co., No. 13-1360 (4th Cir.), https://www.dol.gov/sol/media/briefs/tatum(A)-06-25-2013.pdf. Finally, amici need look no further than this case – where the district court found that Appellees in fact surmounted the supposedly insurmountable "would have"

standard – to assuage their fears concerning the impossibility of meeting such a standard.

CONCLUSION

For these reasons, the Secretary requests that the Court re-affirm its holding in Tatum that a fiduciary that has breached its duties can escape liability only if it proves that a prudent fiduciary "would have" made the same decision anyway.

Respectfully submitted,

PATRICIA M. SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

/s/ Jeffrey Hahn
JEFFREY HAHN
Senior Trial Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave. N.W.
Room N-4611
Washington, DC 20210

CERTIFICATE OF COMPLIANCE

I certify that this amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

I further certify that this amicus 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 it has been prepared in a monospaced typeface using Microsoft Word version 2010 in 14-point Times New Roman font.

Dated: September 9, 2016

/s/ Jeffrey Hahn
JEFFREY HAHN
Trial Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave. N.W.
Room N-4611
Washington, DC 20210

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2016, true and correct copies of the foregoing Brief of the Amicus Curiae Thomas E. Perez, Secretary of the United States Department of Labor, in Support of Appellant were served upon counsel of record and this Court by ECF.

/s/ Jeffrey Hahn
JEFFREY HAHN