

17-3518

Jander v. International

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2019

(Argued: September 7, 2018

Decided: December 10, 2018

Vacated: January 14, 2020

Reinstated: June 22, 2020)

Docket No. 17-3518

LARRY W. JANDER, and all other individuals similarly situated,
RICHARD J. WAKSMAN,

Plaintiffs-Appellants,

— v. —

RETIREMENT PLANS COMMITTEE OF IBM, RICHARD CARROLL,
ROBERT WEBER, MARTIN SCHROETER,

Defendants-Appellees,

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

B e f o r e:

KATZMANN, *Chief Judge*, SACK AND RAGGI, *Circuit Judges*.

The judgment entered pursuant to our initial opinion in this appeal, *see* 910 F.3d 620 (2d Cir. 2018), was vacated by the Supreme Court and remanded for further consideration. We reinstate the judgment.

Samuel E. Bonderoff, Jacob H. Zamansky, James Ostaszewski,
Zamansky LLC, New York, NY, *for Plaintiffs-Appellants.*

Paul D. Clement, George W. Hicks, Jr., C. Harker Rhodes IV,
Kirkland & Ellis LLP, Washington, DC; Lawrence Portnoy,
Michael S. Flynn, David B. Toscano, Zachary A. Kaufman,
Davis Polk & Wardwell LLP, New York, NY, *for*
Defendants-Appellees.

Kate O'Scannlain, Solicitor of Labor, G. William Scott, Associate
Solicitor for Plan Benefits Security, Thomas Tso, Counsel for
Appellate and Special Litigation, Eirik Cheverud, Trial
Attorney, U.S. Department of Labor, Washington, DC, *for*
Amicus Curiae U.S. Secretary of Labor.

Michael A. Conley, Solicitor, David D. Lisitza, Senior Litigation
Counsel, Securities and Exchange Commission, Washington,
DC, *for Amicus Curiae Securities and Exchange Commission.*

Nicole A. Saharsky, Brian D. Netter, Mayer Brown LLP,
Washington, DC; Nancy G. Ross, Mayer Brown LLP, Chicago,
IL, *for Amici Curiae the Chamber of Commerce of the United States*
of America, the Securities Industry and Financial Markets
Association, the ERISA Industry Committee, and the American
Benefits Council in Support of Defendants-Appellees.

PER CURIAM:

In this case, plaintiffs, participants in IBM's employee stock option plan, allege that the plan's fiduciaries breached their duty of prudence under the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court granted defendants' motion to dismiss, *Jander v. Ret. Plans Comm. of IBM*, 272 F. Supp. 3d 444 (S.D.N.Y. 2017), and this Court reversed and remanded, *Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018). The Supreme Court then granted defendants' petition for certiorari, *Ret. Plans Comm. of IBM v. Jander*, 139 S. Ct. 2667 (2019) (mem.), which presented the question whether a plaintiff can state a duty-of-prudence claim based on "generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time," Petition for Writ of Certiorari at *i*, *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020) (No. 18-1165). The Supreme Court also granted the government's motion to participate in oral argument as an amicus curiae in support of neither party, so that it could present the views of the Department of Labor and the Securities and Exchange Commission. *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 398 (2019) (mem.).

After hearing oral argument, the Supreme Court vacated the judgment of this Court and remanded for further proceedings. *See Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (per curiam). In its opinion, the Supreme Court explained that defendants' and the government's post-certiorari arguments primarily addressed matters that fell beyond the question presented to the Supreme Court, and that had not been raised before this Court. So that this Court could "have an opportunity to decide whether to entertain these arguments in the first instance," the Supreme Court "le[ft] it to the Second Circuit whether to determine their merits, taking such action as it deems appropriate." *Id.*

On remand, we invited the parties to submit supplemental briefs regarding the appropriate disposition of this appeal, including whether we should consider any arguments not previously raised before this Court. We also invited the government to submit a supplemental brief as an amicus curiae. The parties and the government have now submitted supplemental briefs, as have amici curiae the Chamber of Commerce of the United States of America, the Securities Industry and Financial Markets Association, the ERISA Industry Committee, and the American Benefits Council.

Having reviewed the submissions from the parties and amici, we now reinstate the judgment entered pursuant to our initial opinion. The arguments raised in the supplemental briefs either were previously considered by this Court or were not properly raised. To the extent that the arguments were previously considered, we will not revisit them. To the extent that they were not properly raised, they have been forfeited, and we decline to entertain them. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs . . . normally will not be addressed on appeal."). Accordingly, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with our initial opinion.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: June 22, 2020
Docket #: 17-3518cv
Short Title: Jander v. International Business Machine

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 15-cv-3781
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Pauley

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature