No. 17-3518-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LARRY JANDER, and all other individuals similarly situated, and RICHARD J. WAKSMAN,
Plaintiffs-Appellants,
v.

RETIREMENT PLANS COMMITTEE OF IBM, RICHARD CARROLL, ROBERT WEBER, and MARTIN SCHROETER,
Defendants-Appellees,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant.

Appeal from Decision of the U.S. District Court for the Southern District of New York, No. 1:15-cv-3781

BRIEF OF *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

Nancy G. Ross
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Nicole A. Saharsky
Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 21-3, the undersigned counsel certifies that none of the *amici* is a subsidiary of any other corporation, and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTEREST OF *AMICI CURIAE*

The **Chamber of Commerce of the United States of America** (the Chamber) is the world's largest business federation.[1*] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

The **Securities Industry and Financial Markets Association** (SIFMA) is a trade association that brings together the shared interests of more than 600 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry.

The ERISA Industry Committee (ERIC) is a national nonprofit organization exclusively representing the Nation's largest employers that sponsor employee benefit plans for their nationwide workforce. With member companies that are leaders in every sector of the economy, ERIC

---

[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief either in whole or in part, and no one other than *amici*, *amici*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief. This brief is accompanied by a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a)(3).

is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans for active and retired workers, as well as their families.

The **American Benefits Council** (Council) is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Its approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually every American who participates in employer-sponsored benefit programs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Supreme Court held that district courts confronting ERISA stock-drop lawsuits must engage in "careful, context-sensitive scrutiny of a complaint's allegations" to "divide the plausible sheep from the meritless goats." *Id.* at 425. The Court made clear that stock-drop cases should advance to discovery only if the plaintiff can allege a context-specific action that the defendant could have taken 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 428. After all, permitting meritless stock-

drop cases to proceed to discovery would undermine the viability of ESOPs, which Congress has sought to protect.

As part of the requirement that ERISA stock-drop plaintiffs identify an alternative course of action, the Court emphasized that fiduciaries must operate within the constraints of background legal principles. To avoid individual liability, fiduciaries cannot be forced to violate the securities laws or to breach the wall between their fiduciary and non-fiduciary responsibilities. Nor should the Court create an ERISA claim for breach of fiduciary duty based on securities disclosures that sweeps more broadly than the laws specifically drafted to regulate securities disclosures.

ARGUMENT

The central failing of the plaintiffs' complaint is that they do not allege that fiduciaries, *while acting in a fiduciary capacity*, would have acted differently than the defendants here.

A. ERISA provides that fiduciaries may wear two hats.

1. The complaint in this lawsuit alleges that, because IBM appointed senior executives to the committee overseeing its retirement plan, those executives should have used their knowledge that the microelectronics unit was troubled and their power to influence IBM's SEC disclosures to alert plan participants that IBM's stock was overvalued. A-49 to 104.

That theory of liability conflates the fiduciary and non-fiduciary roles of IBM's committee members. ERISA's "two hats" rule recognizes that individuals may alternate between corporate and fiduciary roles. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). Plaintiffs' alternative would require fiduciaries to act always in their fiduciary capacity, treating all information that they acquire (in their fiduciary capacity or otherwise) as the participants' information, and conflating their fiduciary and non-fiduciary powers.

ERISA expressly permits individuals to serve in multiple capacities. 29 U.S.C. § 1108(c)(3). This Court should therefore hold that, when making decisions on behalf of plan participants, a fiduciary must consider the information reasonably available to individuals in their fiduciary capacity, and must weigh the responses available to individuals acting in a fiduciary capacity. However, fiduciaries need not assess information they acquired outside the fiduciary context or use their corporate powers to serve fiduciary functions.

2. Although "ERISA abounds with the language and terminology of trust law," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), Congress did not merely codify the law of trusts when it enacted ERISA. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). Rather, after completing "a decade of congressional study of the Nation's private employee benefit sys-

tem," Congress adopted "a 'comprehensive and reticulated statute'" designed to depart from trust law in critical respects. *Mertens*, 508 U.S. at 251 (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). Those "depart[ures] from common-law trust requirements" are reflected throughout ERISA—in "the language of the statute, its structure, [and] its purposes." *Varity Corp.*, 516 U.S. at 497.

Most notably for present purposes, Congress departed from trust-law principles in permitting employers also to serve as plan administrators and fiduciaries. Under the common law, a trustee cannot hold a separate post in which his interests potentially are at odds with those of his trust's beneficiaries. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981). But ERISA specifically contemplates that officers and employees of the plan sponsor will serve as fiduciaries. *See* 29 U.S.C. §§ 1002(16), 1108(c)(3).

Under ERISA, then, even when individuals assume fiduciary responsibility over a benefits plan, they are fiduciaries only "'to the extent' that [they] 'exercise[] any discretionary authority or discretionary control respecting management' of the plan, or 'ha[ve] any discretionary authority or discretionary responsibility in the administration' of the plan." *Varity Corp.*, 516 U.S. at 498 (quoting 29 U.S.C. § 1002(21)(A)(iii)). Even as to an individual who acts as a fiduciary in some contexts, "ERISA's fiduciary duty requirement simply is not implicated" when the fiduciary

acts in a non-fiduciary context. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999).

ERISA permits fiduciaries to wear two hats; its restriction is "that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram*, 530 U.S. at 225. And a defendant's fiduciary status must be assessed at the outset of any challenge to his or her decisions. The Court applied the two-hats standard to a question of participant disclosures in *Varity Corp.* In that case, the plaintiffs alleged that Varity, the corporate parent of their former employer, Massey-Ferguson, Inc., had encouraged them to transfer their employment to Massey Combines, a separately incorporated Varity subsidiary, by making false representations about the security of the benefits plans at Massey Combines. The Court held that these misrepresentations constituted fiduciary acts because "Varity *intentionally* connected its statements about Massey Combines' financial health to statements it made about the future of benefits, so that its intended communication about the security of benefits was rendered materially misleading." 516 U.S. at 505.

In so holding, the Court emphasized that it was not holding "that Varity acted as a fiduciary simply because it made statements about its expected financial condition or because an ordinary business decision turned out to have an adverse impact on the plan." *Id.* (alterations omitted). Not all acts taken by a part-time fiduciary are fiduciary acts.

This Court must account for those critical limitations on the Supreme Court's holding. If ESOP fiduciaries had to use their corporate powers in the sole interests of ESOP participants, then there would be no non-fiduciary "statements about [a company's] expected financial condition." And if ESOP fiduciaries had to use corporate information for the benefit of ESOP participants, then there would be no "ordinary business decisions" that end up affecting the ESOP. Rather, fiduciaries would always need to wear their fiduciary hats. Plaintiffs' view simply is not consistent with the Supreme Court's guidance.

ERISA applies fiduciary duties to individuals only "to the extent" that they act in a fiduciary capacity, not for all purposes. *See* 29 U.S.C. § 1002(21)(A). And Congress determined not to create unpredictable traps that would increase the burdens of administering benefit plans. *See Mass. Mut. Life Ins. v. Russell*, 473 U.S. 134, 148 n.17 (1985). Advancing Plaintiffs' complaint would contravene both of those directives.

3. Just as fiduciaries must honor the wall between their corporate and fiduciary capacities, plaintiffs should be subject to the same limitation: they should not be permitted to use information that a fiduciary obtained in a non-fiduciary capacity to require the individual (when later wearing a fiduciary hat) to take action.

That approach is consistent with the objective standard of prudence set out in ERISA. A fiduciary must act "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)(B). The statute thus asks how individuals—when acting in their fiduciary roles—would process the information available to them as fiduciaries. There is no statutory obligation for fiduciaries to acquire inside information unavailable to the market; so there should be no obligation for fiduciaries to leverage non-fiduciary information for fiduciary purposes.

The division between fiduciary and non-fiduciary activities reflects Congress's intent to allow individuals to wear multiple hats. When acting as fiduciaries, individuals must act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). But when wearing a different hat, fiduciaries may well have obligations to advance others' interests.

B. ERISA should not be interpreted to create its own system of securities law.

1. The Complaint fails because fiduciaries cannot be liable under ERISA for disclosure failures that are not actionable under federal securities laws.

Although ERISA identifies specific disclosures that fiduciaries must make to plan participants, *see* 29 U.S.C. §§ 1022, 1024(b)(1), 1025(a), those disclosures do not include the types of public statements about future stock performance that are at issue here. Plaintiffs' view

would open the door to a new regime of quasi-securities enforcement by implying additional disclosure requirements within ERISA's duty of prudence, requirements that Congress chose not to enact. Rather than taking that approach, the Court should adopt a simple rule: If an ERISA claim for breach of fiduciary duty is based on a theory of securities fraud from public disclosures to the market, but is not actionable under federal securities laws, then it is not actionable under ERISA, either.

2. The securities laws should govern securities disclosures, not ERISA. ERISA's duty of prudence is part of the "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 56 (1987). The Supreme Court has sometimes resorted to trust law to understand the contours of fiduciary responsibility. *Firestone*, 489 U.S. at 110. But trust-law fiduciary-duty precedents will not inform Congress's intent here, because the question presented—whether a fiduciary wearing two hats has the obligation to make disclosures based on information acquired in a non-fiduciary capacity—could not have arisen under the common law of trusts. *See Pegram*, 530 U.S. at 225 ("[T]he analogy between ERISA fiduciary and common law trustee becomes problematic . . . because the trustee at common law characteristically wears only his fiduciary hat when he takes action to affect a beneficiary, whereas the trustee under ERISA may wear different hats.").

Congress has elsewhere established an intricate system of disclosures specifically tailored to securities laws, coupled with a civil enforcement regime that balances the interests of investors against the systemic costs of incentivizing meritless lawsuits. Those laws resolve this case.

ERISA itself says so. Congress provided within the text of ERISA that, except where expressly indicated, the statute should not be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under such law." 29 U.S.C. § 1144(d). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). The "commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (internal quotation marks omitted).

Here, it is sensible for the securities laws to govern securities violations. Corporate executives make statements about corporate performance in their corporate capacities—not in their fiduciary capacities. The securities laws properly govern those disclosures.

3. Congress has determined that securities should be regulated by an expert agency. Since 1934, the SEC has had primary responsibility for enforcing the federal securities laws.

The SEC enforces a robust disclosure system, under which public companies must make annual (10-K), quarterly (10-Q), and intermediate (8-K) disclosures of financial results, with additional disclosures governing shareholder meetings, executive compensation, insider transactions, beneficial ownership, and business combinations—not to mention the disclosures (such as a registration statement and prospectus) that accompany the issuance of a security in the first instance. Violations of these disclosure requirements can be enforced through criminal or civil sanctions or through private rights of action. *See, e.g.*, 15 U.S.C. §§ 77x, 78ff(a), 80a-48, 80b-17 (criminal sanctions); 15 U.S.C. §§ 78o(b)(4) and (6), 78o-4 to 7, 78q-1 (civil sanctions); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (private right of action).

When Congress has deemed the securities laws to be insufficiently tailored to the needs of the marketplace, it has amended the securities laws. *See, e.g.*, Securities Acts Amendments of 1964, 78 Stat. 565; Securities Acts Amendments of 1975, 89 Stat. 97; Private Securities Litigation Reform Act of 1995, 109 Stat. 737; Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227. The SEC has pursued a robust regulatory and enforcement agenda. *See generally* 17 C.F.R. parts 200-301.

The SEC's robust regulation in this area makes clear that courts should not impose new requirements on ERISA fiduciaries in the securities context. As the Supreme Court has warned, "the scope of permissible judicial innovation is narrower in areas where other federal actors are engaged." *Fifth Third*, 573 U.S. at 429.

4. Because Congress intended for the SEC and federal securities laws to dictate federal securities policy, ERISA should not be interpreted to imply a cause of action where the securities laws offer none.

ERISA nevertheless retains an important role. Although a breach of federal securities laws would not necessarily mean that fiduciaries had breached their duties, if there were a circumstance in which both the securities laws and ERISA were violated, then ERISA would provide access to additional remedies that arise under the law of equity. For example, as remedies for fiduciary breach, ERISA permits the disqualification of plan fiduciaries, *see Chao v. Malkani*, 452 F.3d 290 (4th Cir. 2006), or the reformation of a plan's terms, *see U.S. Airways, Inc. v. McCutchen*, 663 F.3d 671, 678-79 (3d Cir. 2011).

In any event, allowing ERISA to exceed the footprint of the securities laws would be disruptive and costly to regulated parties—and all in the name of permitting securities lawsuits that Congress has deemed undesirable.

C. The plaintiffs did not plausibly allege a breach of the standard of care.

1. In *Fifth Third*, the Supreme Court held that an ERISA stock-drop plaintiff must plausibly allege "that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases" of employer stock would do more harm than good. 573 U.S. at 429-30. Under that rule, it is not sufficient for a plaintiff to allege that an alternative fiduciary *would not* have reached the same conclusion.

The distinction between what a fiduciary *could* reasonably have done and what the fiduciary *would* ultimately have done goes to the essence of ERISA's fiduciary responsibility. A fiduciary will rarely be presented with a binary decision in which one option is only virtue while the other is only vice. Courts therefore regularly recognize that multiple fiduciaries can decide similar questions differently without either fiduciary violating ERISA. *See, e.g.*, *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006). A rule of law that imposes liability for fiduciaries who acted contrary to how some alternative fiduciary "would" have acted would divest fiduciaries of the discretion to use their judgment to do what they actually think is best. They would instead be forced to guess how other fiduciaries would act. *See, e.g.*, *Renfro v. Unisys Corp.*, 671 F.3d 314, 322 (3d Cir. 2011).

In *Fifth Third*, the Supreme Court decided that the appropriate question is whether a prudent individual *could* have reached the same

decision. 573 U.S. at 429-30. *Twombly* confirms the correct inquiry is what a reasonable fiduciary "could" do. A plaintiff cannot state a claim merely by alleging conduct that is consistent with either lawful or unlawful conduct. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). The same principle applies here. If any prudent fiduciary could have concluded that taking action on IBM stock would have been a net negative, then the plaintiffs necessarily cannot use the defendants' failure to take action as a basis for "divid[ing] the plausible sheep from the meritless goats." *Fifth Third*, 573 U.S. at 425.

2. Plaintiffs also cannot proceed under a generic theory of liability. Plaintiffs seek to rely on the theory that a firm suffers an ever-increasing reputational burden by delaying corrective disclosures. *Jander v. Ret. Plans Comm. of IBM,* 910 F.3d 620, 629-30 (2d Cir. 2018). At most, such a phenomenon may exist in the aggregate, when averaged across many corporate disclosures. But that hardly suffices to plead how IBM's particular stock would have responded to an earlier disclosure led by the fiduciary committee. And even if Plaintiffs' allusion to academic research could readily be applied to IBM stock, it would not dictate that IBM's plan—a net seller of IBM stock, *Jander v. Ret. Plans Comm. of IBM*, 272 F. Supp. 3d 444, 450 (S.D.N.Y. 2017)—would have benefited from an earlier depreciation of the security.

A superficial reference to an academic theory should give this Court little comfort that Plaintiffs have identified the rare circumstance in

which 401(k) plan fiduciaries should be making extraordinary disclosures of inside corporate information. After all, ERISA's "fiduciary duty of care . . . requires prudence, not prescience." *DeBruyne v. Equitable Life Assurance Soc'y of the U.S.*, 920 F.2d 457, 465 (7th Cir. 1990). Unless the plaintiffs can explain how, in the particular case of IBM, an extraordinary disclosure was so clearly beneficial that every reasonable fiduciary would have made one, then the plaintiffs have not plausibly alleged a fiduciary breach.

D. A permissive pleading standard would imperil employee stock ownership.

1. Unless this Court applies the standards identified above, ERISA stock-drop lawsuits can be expected to proliferate. "[T]he prospect of discovery in a suit claiming breach of fiduciary duty is ominous, potentially exposing the ERISA fiduciary to probing and costly inquiries and document requests about its methods and knowledge at the relevant times." *Pension Ben. Guar. Corp. ex rel. Saint Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013). That burden brings with it high risks that ESOP offerors will submit to *in terrorem* settlements. Those settlements would then set into motion a vicious cycle of the filing and settling of meritless claims.

The Supreme Court has acknowledged, from ERISA's early days, that the statute reflects a balance between protecting the interests of plan participants and "encouraging the formation of employee benefit

plans." *Pilot Life*, 481 U.S. at 54. Indeed, in adopting ERISA, Congress "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. Increasing the risks of operating an ESOP will naturally prompt employers to drop them.

2. Discouraging the formation and retention of ESOPs would be exactly the opposite of what Congress intended. When ERISA was under development by Congress, ESOPs were viewed as a win-win proposition because they provide "low-cost capital for the employer" and "[e]nrichment for each employee in the form of a reasonable capital holding," which was believed to "generate labor-management harmony" and to curtail "the structurally inevitable inflation" that results from employees whose interests fall out of alignment with their employers. 119 CONG. REC. 40,754 (Dec. 11, 1973) (statement of Sen. Russell B. Long, Chairman, S. Comm. on Fin.). In practice, those lofty objectives are frequently met. When businesses take steps to encourage employee ownership, they tend to see increased productivity and better employee relations. *See* Corey M. Rosen, *Employee Ownership and Corporate Performance*, *in* 1 EMPLOYEE STOCK OWNERSHIP PLANS 2-1 to 2-3 (Robert W. Smiley, Jr. et al. eds., 2006).

Instead of prompting wholesale abandonments of ESOPs, contrary to Congress's design, this Court should adhere to the path articulated by *Fifth Third*—a path that prompts fiduciaries to act thoughtfully in the

interests of participants, not out of fear that they will be targeted with a cookie-cutter lawsuit.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: June 1, 2020

Respectfully submitted,

/s/ Brian D. Netter

Nicole A. Saharsky
Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Nancy G. Ross
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Amici Curiae

Daryl Joseffer
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
Counsel for the Chamber of Commerce of the United States of America

Kevin M. Carroll
Securities Industry and Financial Markets Association
1101 New York Avenue, NW
Washington, DC 20005
Counsel for the Securities Industry and Financial Markets Ass'n

Aliya Robinson
ERISA Industry Committee
701 Eighth Street, NW, Suite 610
Washington, DC 20001
Counsel for The ERISA Industry Committee

Janet M. Jacobson
American Benefits Council
1501 M Street, NW, Suite 600
Washington, DC 20005
Counsel for the American Benefits Council

CERTIFICATE OF COMPLIANCE

I, Brian D. Netter, counsel for *amici curiae*, pursuant to Fed. R. App. P. 32(g), that the brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,649 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f).

Dated: June 1, 2020

Respectfully submitted,
/s/Brian D. Netter
Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system, which will send notice to all users registered with CM/ECF.

Dated: June 1, 2020

Respectfully submitted,
/s/ Brian D. Netter
Brian D. Netter
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000