15-2725-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEVERSTAL WHEELING, INC. RETIREMENT COMMITTEE, TIMOTHY S. ROGERS, MELVIN BAGGETT, WILLIAM DREW LANDON, as named fiduciaries of the Wheeling Corrugating Company Retirement Security Plan, THE SALARIED EMPLOYEE'S PENSION PLAN OF SEVERSTAL WHEELING, INC., RICHARD CARUSO, THE WHEELING CORRUGATING COMPANY RETIREMENT SECURITY PLAN, THE SALARIED EMPLOYEES' PENSION PLAN OF SEVERSTAL WHEELING,

Plaintiffs-Appellees,

(*For Continuation of Caption, See Inside Cover)*

On Appeal from the United States District Court
for the Southern District of New York

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

M. PATRICIA SMITH
Solicitor of Labor

THOMAS TSO
Counsel for Appellate and Special Litigation

G. WILLIAM SCOTT
Associate Solicitor for Plan Benefits Security

D. MARC SARATA
Attorney, U.S. Dep't of Labor
Washington, D.C. 20210
200 Constitution Ave., N.W., N-4611
(202) 693-5637

VINCENT D. ASSETTA, SEVERSTAL WHEELING, INC. as named fiduciary of the Severstal Wheeling, Inc. Pension Plan,

Plaintiffs,

v.

WPN CORPORATION, in its own capacity and as named fiduciary of the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employee's Pension Plan of Severstal Wheeling, Inc., RONALD LABOW, in his individual capacity and as named fiduciary of the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employee's Pension Plan of Severstal Wheeling, Inc.,

Defendants-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases-(continued):

Federal Cases-(continued):

Federal Statutes:

Employee Retirement Income Security Act of 1974, (Title I),
as amended, 29 U.S.C. 1001 et seq.:

Statutes-(continued):

Miscellaneous:

QUESTION PRESENTED

Whether defendants were the pension plans' fiduciaries with respect to the investments at issue under ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A).

THE SECRETARY'S INTEREST

The Secretary of Labor has filed a similar lawsuit in another district court (the United States District Court for the Western District of Pennsylvania) against both WPN Corporation ("WPN") and Ronald LaBow ("LaBow"), the defendants-appellants, as well as the the Severstal Wheeling, Inc. Retirement Committee, a plaintiff-appellee in this case. Perez v. WPN Corp., et al., Case No. 2:14-cv-01494 (W.D. Pa.). The Secretary's ERISA claims against WPN and LaBow are based on similar theories of fiduciary status and breach as those asserted by the private plaintiffs in this appeal. An adverse decision in this appeal of the parallel private action could affect the Secretary's case still pending before the district court.

The Secretary of Labor bears primary responsibility for interpreting and enforcing Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 698 (7th Cir. 1986) (en banc). In this capacity, he also has a strong interest in ensuring that courts correctly apply ERISA's "fiduciary" definition. In prior decisions concerning fiduciary status under ERISA, this Court has considered the

Secretary's views as expressed in amicus briefs. E.g., LoPresti v. Terwilliger, 126 F.3d 34, 38 (2d Cir. 1997).

STATEMENT OF THE CASE

Plaintiffs-appellees are the Wheeling Corrugating Company Retirement Security Plan of Severstal Wheeling, Inc. and the Salaried Employees' Pension Plan of Severstal Wheeling, Inc. (the "Plans"), the Severstal Wheeling, Inc. Retirement Committee ("Severstal Committee"), which is the Plans' plan administrator and fiduciary, and the Severstal Committee's current individual members, who are also fiduciaries.

Until late 2008, the Plans were funded and maintained through a trust sponsored by the WHX Corporation ("Combined Trust"), Severstal Wheeling Inc.'s former parent company. SPA-18.[1] The Combined Trust pooled the Plans' assets with assets from other employee benefit plans sponsored by the WHX Corporation ("WHX"). SPA-18. "The [Plans] owned a percentage interest in each investment held in the Combined Trust." Id. The Plans' holdings constituted approximately ten percent (10%) of the Combined Trust assets. SPA-6. The Combined Trust "contained a portfolio of twenty-one separate accounts," including one account managed by Neuberger Berman, LLC ("NB"). SPA-17.

[1] SPA refers to the Special Appendix filed by defendants-appellants on December 8, 2015, with their brief [Dkt. 59].

Defendant LaBow founded corporate defendant WPN in 1987. SPA-7. LaBow was WPN's President and WPN's sole employee with investment management responsibility during the relevant time period. JA-117 at ¶ 20. WHX entered into an Investment Consulting Agreement (the "WHX Agreement") with WPN in 2004, under which WHX "authoriz[ed] and direct[ed]" WPN to "exercise complete, unlimited and unrestricted management authority" over the Combined Trust. SPA-7; JA-1196 at ¶ 7. As a practical matter, defendants advised the WHX Committee on investment decisions for the Combined Trust, which were then implemented by WHX employees. SPA-8. The district court found no evidence of any investment decision of the Combined Trust during the relevant period "that was not the product of a recommendation by LaBow, WPN, or both." SPA-8, 11.

LaBow and WHX then executed an amendment to the agreement, effective August 1, 2008, that expanded LaBow and WPN's role. SPA-9. WPN's title was then changed from Investment Consultant to the Investment Manager of the Combined Trust. SPA-9. WPN received increased fees for this new role, which included accepting full authority for investment selection without the need to gain approval from the WHX Committee. Id.

Pursuant to an agreement with WHX, Citibank acted as the Combined Trust's directed trustee, subject to direction by the "Investment Manager." SPA-11. By June 2008, however, Citibank intended to withdraw as custodial trustee of

the Combined Trust. SPA-11. Consequently, both LaBow and WHX told the Severstal Committee in June 2008 that the Plans' assets needed to be separated from the Combined Trust by September 30, 2008. Id. In an email dated September 15, 2008, WHX informed LaBow of the Severstal Committee's request that the Plans' assets be transferred, in cash, from the Combined Trust to a new trust for the Severstal Plans. SPA-15. Instead, on September 30, 2008, WHX and the Severstal Committee signed an agreement to transfer the Severstal Plan assets to a new trust "in the same percentage allocations as existed in the WHX Pension Trust . . . on or about September 30, 2008." Id. LaBow was aware of the agreement and understood the Severstal Plans had expected a "proportional allocation," or "slice" of the Combined Trust portfolio. SPA-16. At the time, LaBow advised both the Severstal and WHX Committees that the Combined Trust "should transfer assets that had no minimum capital requirements and that could be liquidated right away." Id. No transfer was made on September 30, 2008, but LaBow promised a transfer by November 3, 2008. SPA-17.

On October 31, 2008, LaBow, based on his own criteria, selected the NB account and instructed WHX to transfer the NB account from the Combined Trust to the Plans (also referred to as the "Severstal Trust"). SPA-16, 18, 26, 30. The NB account was "composed of thirteen large-capitalization equity securities, eleven of which were energy-sector stocks, comprising approximately 97 percent

of the value of assets in the account." SPA-17. WHX, in turn, instructed Citibank to transfer the account and Citibank carried out the instruction on November 3, 2008. Id. "Although LaBow could have had the NB account liquidated prior to the transfer, so that Severstal Trust would receive cash, he did not do so." SPA-19.

Prior to these events, starting from the summer of 2008, LaBow had initiated conversations with the Severstal Committee about continuing to function as the Plans' investment manager after the separation of the Plans' assets from the Combined Trust. SPA-12. LaBow eventually signed an agreement on behalf of WPN to serve as the Plans' investment manager on December 5, 2008 (the "December 2008 Agreement"), backdating the agreement to November 1, 2008. SPA-13. The December 2008 Agreement contained provisions that provided WPN with "unlimited and unrestricted management authority with respect to the investment of the [Plans'] Investment Fund." SPA-14. In the December 2008 Agreement, WPN also acknowledged that it "was a fiduciary acting within the scope of section 3(38) of ERISA," 29 U.S.C. § 1002(38), the section defining an "investment manager" under ERISA. SPA-14-15.

From November 3, 2008 (the date of transfer), to March 24, 2009, the only investments held by the Plans were the undiversified NB account assets. During this period, on January 2, 2009, National City Bank became the new directed trustee that held the Plan's assets and was subject to defendants' direction with

respect to the investment of plan assets. SPA-23. Despite back-and-forth discussions with the Severstal Committee, LaBow did not provide any plan for reinvesting or diversifying the Plans' assets until February 2009. SPA-30. Moreover, LaBow's statements to the Severstal Committee during February 2009, concerning the available investment options, were inconsistent. SPA-31.

On March 24, 2009, without direct instruction from the Severstal Committee, LaBow instructed NB to liquidate the NB account and hold the proceeds in cash and cash equivalents. SPA-34-36. At trial, LaBow disclaimed any responsibility for the Plans' undiversified portfolio. SPA-21 (quoting testimony). The trial court, however, discounted LaBow's excuses for failing to diversify the Plans' assets held in the NB account before March 24, 2009, because the "preponderance of the credible evidence proves that LaBow gave the instruction to liquidate the Severstal Plans' Neuberger Berman Account assets on March 24, 2009, and that he understood at all relevant times that he had sole investment authority and responsibility for the [Plans'] assets." SPA-32-34.

On May 5, 2009, a Severstal Committee member wrote to LaBow expressing concern that the Plans now held only cash and cash equivalents, and renewing the request for a proposal to diversify the Plans' assets. SPA-37. LaBow replied to the Severstal Committee that he intended to invest the Plans' assets entirely in mortgage-backed securities. SPA-37. In response, the Plans terminated

their contract with defendants on May 19, 2009. SPA-38; JA-1450. After another investment consultant was hired, the Plans finally implemented a diversified investment strategy for its assets on July 16, 2009. SPA-38.

On May 10, 2013, plaintiffs filed the operative complaint against defendants, alleging defendants breached their fiduciary duties "by failing to loyally manage plan assets in violation of ERISA sections 404(a)(1)(A) and 406(b)" and "by failing to adequately diversify plan assets in violation of ERISA section 404(a)(1)(C)."[2] JA-40-41, 100, 103.

After a bench trial, the district court issued a decision on August 10, 2015. First, the district court concluded that LaBow and WPN were the Plans' fiduciaries, before, during and after the November 3, 2008, asset transfer from the Combined Trust. SPA-42. The court found that LaBow and WPN were fiduciaries under ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii), because they had "provided investment advice for a fee" to the Plans. ERISA's definition of "fiduciary" is located at ERISA section 3(21)(A), 29 U.S.C. § 1002 (21)(A), and includes three subsections:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting

[2] Plaintiffs also sued WHX. Plaintiffs' claims against WHX were dismissed by the district court. Plaintiffs separately appeal that dismissal, which is proceeding in this Court as case no. 15-2866-cv. The Secretary takes no position in that appeal.

> management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

Id.

Plaintiffs had raised all three subsections, ERISA sections 3(21)(A)(i)-(iii), as bases for defendants' fiduciary status.[3] SPA-42. While the court stated that it was not necessary to reach fiduciary status under subsections (i) and (iii) of ERISA Section 3(21)(A), SPA-42, the court made substantial factual findings to support fiduciary status under those subsections. On appeal, defendants concede the court held defendants were fiduciaries under ERISA section 3(21)(A), subsection (iii). App. Br. 1, 37.

[3] Before the bench trial, plaintiffs had moved for summary judgment on fiduciary status arguing that defendants were fiduciaries solely by virtue of their role as ERISA section 3(38) investment managers to the Plans. 29 U.S.C. § 1002(38). The court rejected this argument, holding that

> Section 3(38) of ERISA does not, by its terms, create a path to fiduciary status independent of the functional definitions set forth in section 3(21)(A). Rather, to come within section 3(38)'s definition of investment manager, one must be a fiduciary *and* meet the criteria of that provision.

Severstal Wheeling, Inc. v. WPN Corp., No. 10 CIV. 954 LTS GWG, 2014 WL 2959014, at *4 (S.D.N.Y. Apr. 11, 2014) (emphasis in original). Plaintiffs did not cross-appeal this summary judgment decision, so this issue is not currently before this Court and the Secretary does not address it.

Supporting a finding under subsection (i), the court made factual findings that defendants had "exercise[d] [ ] authority or control respecting management or disposition of [the Plans'] assets." See, e.g., SPA-46 ("Defendants selected the Neuberger Berman Account, rather than a proportional portfolio of Combined Trust assets or cash, for transfer to the Severstal Trust and directed that transfer to occur"); SPA-34 ("The preponderance of the credible evidence proves that LaBow gave the instruction to liquidate the Severstal Plans' Neuberger Berman Account assets on March 24, 2009, and that he understood at all relevant times that he had sole investment authority and responsibility for the Severstal Trust assets"); id. ("LaBow instructed Neuberger Berman to sell the assets and the Neuberger Berman Account assets were finally converted to cash and cash equivalents.").

Supporting a finding under subsection (iii), the court also made findings that defendants had "discretionary authority or discretionary responsibility in the administration of" the Plans. The district court stated that LaBow and WPN "had, but did not fulfill investment management authority and responsibilities." SPA-42. The court elaborated its finding by stating that "[t]he credible evidence at trial demonstrated that Defendants had management authority, as granted by the Severstal Trust Agreement, to direct the investments with respect to the Severstal Trust." SPA-48. The court further found that defendants “continued to have investment management responsibility and liability pursuant to the Severstal Trust

Agreement until they were terminated by the Severstal Committee in May 2009," SPA-51, and "retained authority and responsibility for the prudent management of a diversified Severstal Trust through May 2009." SPA-52.

After concluding that defendants were fiduciaries, the court went on to hold that defendants breached their fiduciary duties to the Plans in two main respects: (1) by advising the Severstal Committee which plan assets to transfer and then transferring the Plans' assets from the Combined Trust into an undiversified portfolio, and (2) by failing to recommend and implement a strategy to diversify the Plans' portfolio before and after the transfer. SPA-45-52. The court found defendants liable to the Plans for a total of $15,016,327.74, comprised of the Plans' losses, prejudgment interest , and the disgorgement of defendants' fees. SPA-56. Defendants appealed raising two contentions: (1) defendants challenge the courts' factual findings supporting their breach of duties as ERISA fiduciaries under ERISA section 3(21)(ii), App. Br. 1, and (2) defendants challenge the legal conclusion that they were fiduciaries under ERISA section 3(21)(iii), id.

SUMMARY OF THE ARGUMENT

Under ERISA's broad definition of a fiduciary, a person is a fiduciary:

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A).

The court explicitly found that defendants were investment managers and fiduciaries to the Plans under the second prong of the definition, subsection (ii). However, as argued by plaintiffs on appeal, the court's factual findings were also sufficient to establish that defendants were fiduciaries to the Plans pursuant to subsections (i) and (iii), and these subsections are therefore alternative grounds for affirmance.

1. Defendants were fiduciaries to the Plans under ERISA section 3(21)(A)(i) because they agreed to be the investment manager for the Plans, selected undiversified assets to be transferred to the Plans, delayed their liquidation of the undiversified investment, and then failed to diversify the Plans' assets despite promising to do so, thereby exercising authority or control respecting

management or disposition of the Plans' assets. The district court's factual findings support this alternative ground for affirmance.

2. Defendants do not actually contest their fiduciary status under ERISA section 3(21)(A)(ii),[4] but raise several factual disputes that contest their breach of fiduciary duties flowing from their fiduciary status under subsection (ii). Because defendants only raise factual issues, the district court's factual findings should be upheld under a clearly erroneous standard.

3. Defendants were also fiduciaries under ERISA section 3(21)(A)(iii) because the contracts between defendants and the Plans explicitly granted defendants "complete, unlimited and unrestricted management authority with respect to the investment of [the Plans' assets]," including the "authority to invest and reinvest the [Plans' assets]," JA-1194-1203, thereby vesting defendants with discretionary authority and discretionary responsibility in the administration of the Plans. Accordingly, the district court's holding that defendants were fiduciaries to the Plans should be upheld.

[4] Defendants concede fiduciary status under ERISA section 3(21)(ii) from December 5, 2008 through May 19, 2009. App. Br. 38.

ARGUMENT

A. STANDARD OF REVIEW

The district court's legal conclusions are reviewed de novo, United States v. McCombs, 30 F.3d 310, 316 (2d Cir. 1994), and its findings of fact "shall not be set aside unless clearly erroneous." Fed.R.Civ.P. 52(a); see generally Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985).

This Court may also affirm a district court decision "on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887 (2d Cir. 1987) (citing Railway Labor Executives' Ass'n v. Staten Island R.R., 792 F.2d 7, 12 (2d Cir. 1986), cert. denied, 479 U.S. 1054 (1987)); United States v. Catoggio, 698 F.3d 64, 69 n.3 (2d Cir. 2012) ("we are free to affirm on any legal basis for which there is sufficient support in the record").

B. DEFENDANTS PERFORMED FIDUCIARY FUNCTIONS AS THE PLANS' INVESTMENT MANAGER

Congress "intended ERISA's definition of fiduciary 'to be broadly construed.'" LoPresti, 126 F.3d at 40 (citation omitted); accord Olson v. E.F. Hutton & Co., 957 F.2d 622, 625 (8th Cir. 1992); Arizona State Carpenters Pension Trust Fund v. Citibank, (Arizona), 125 F.3d 715, 720 (9th Cir. 1997) ("Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives.").

The district court found defendants were "investment managers" to the Plans under ERISA section 3(38), 29 U.S.C. § 1002(38). SPA-13-15, 23-24, 44. Under ERISA section 3(38), an "investment manager" has the "the power to manage, acquire, or dispose of any asset of a plan" and must acknowledge responsibility as fiduciaries to the plan in writing. See 29 U.S.C. § 1002(38). ERISA also grants investment managers the exclusive responsibility for managing plan assets in their control. See 29 U.S.C. § 1105(d)(1) (focusing liability on ERISA "investment managers" for plan investments in their control); see also Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 719 n.15 (2d Cir. 2013) ("[u]nder ERISA, a plan administrator is generally not 'under an obligation to invest or otherwise manage any asset of the plan which is subject to the management' of an 'investment manager' appointed under § 1102(c)(3)") (citing 29 U.S.C. § 1105(d)(1)).

The title of ERISA section 3(38) "investment manager" thus has "special significance" under ERISA. Cf. Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 65 (2d Cir. 2006) (plan administrator is a "formal title" with "special significance" under ERISA). The Secretary's regulations observe that certain offices or positions of an employee benefit plan "by their very nature require persons who hold them to perform one or more of the [fiduciary] functions described in section 3(21)(A) of the Act." 29 C.F.R. § 2509.75-8, D-3. Like other

titles named in the statute, the responsibilities of persons, such as the defendants, who hold the title of section 3(38) investment manager, must perform fiduciary functions described in section 3(21)(A) by the very nature of their position. As the Supreme Court has observed, the management of plan assets is generally accompanied by fiduciary status. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 89 (1993).

As this Court has stated, "ERISA contemplates that after management authority over Plan assets is delegated to an investment manager under Section 402(c)(3), [29 U.S.C. § 1102(c)(3),] the manager becomes a fiduciary to the plan . . . ." Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1219 (2d Cir. 1987); see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 242-43 (2000) ("an investment manager to which [the plan administrator] had delegated investment discretion over a portion of the plan's assets [is thus] a fiduciary") (citing 29 U.S.C. § 1002(21)(A)(i)). This conclusion accords with ERISA Section 3(38), which provides that investment managers to whom the "power to manage, acquire, or dispose of any asset of a plan" is delegated must "acknowledge[] in writing that he is a fiduciary with respect to the plan." 29 U.S.C. § 1002(38)(C).

Consistent with these principles, the district court made extensive factual findings supporting defendants' "perform[ance of] one or more of the [fiduciary] functions described in section 3(21)(A) of the Act" in their role as ERISA section

3(38) investment managers to the Plans. 29 C.F.R. § 2509.75-8, D-3. While the district court only explicitly found that defendants were fiduciaries under ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii), SPA-43, the court's factual findings clearly support a legal conclusion that defendants were also performing fiduciary functions and had fiduciary authority under ERISA sections 3(21)(A)(i) and (iii), as explained below. Even though subsections (i)-(iii) have different requirements, a person can become an ERISA fiduciary under multiple prongs. E.g., Fin. Institutions Ret. Fund v. Office of Thrift Supervision, 964 F.2d 142, 148 (2d Cir. 1992) (recognizing a party could be a fiduciary under both subsections (i) and (iii)).

C. DEFENDANTS BECAME FIDUCIARIES UNDER ERISA SECTION 3(21)(A)(i) BY EXERCISING AUTHORITY OR CONTROL RESPECTING MANAGEMENT OF PLAN ASSETS

ERISA section 3(21)(A)(i) confers fiduciary status on those who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i).

Here, the court made factual findings that defendants undertook their statutory responsibilities as the Plans' investment manager and exercised authority and control over the management and disposition of the Plans' assets. Specifically, defendants set the criteria and timing for how and which assets were to be

transferred from the Combined Trust to the Severstal Plans. See, e.g., SPA-16 ("LaBow testified that, after Defendants determined that a 'slice' was impossible, they advised the [Severstal Committee] and [WHX Committee] that the Combined Trust should transfer assets that had no minimum capital requirements and that could be liquidated right away"); SPA-16-17 (LaBow e-mailed the WHX Committee that he was "working on" identif[ying] assets to move to a separate trust for the Plans); SPA-17 (when explaining why defendants did not transfer the assets to the Plans on the planned date, Labow "did not explain the true cause of the delay"); SPA-17 (Labow stating that "I intend to direct the transfer of most of the assets of the plans to the [Severstal] Trust."). Defendants then chose the undiversified NB fund as the sole investment to be transferred to the Severstal Plans, and "instructed" WHX to make the transfer. SPA-18; SPA-19 ("Although LaBow could have had the [NB] account liquidated prior to the transfer, so that the Severstal Trust would receive cash, he did not do so"); SPA-25 ("In response, LaBow told the [Severstal] Committee that he had transferred only the [NB] Account assets because they were stocks that he could watch and liquidate easily"); SPA-26 ("LaBow admitted on the January 7, 2009, call that he was the one who had chosen which assets to transfer to the Severstal Plans").

After the transfer, Labow attempted to open accounts for the assets. SPA-22. Furthermore, the district court found that it was LaBow who eventually

instructed that the Plans' holdings in the NB fund finally be liquidated in March 2009, after LaBow had delayed any action on the Plans' assets. SPA-34 ("The preponderance of the credible evidence proves that LaBow gave the instruction to liquidate the Severstal Plans' Neuberger Berman Account assets on March 24, 2009, and that he understood at all relevant times that he had sole investment authority and responsibility for the Severstal Trust assets"); see also SPA-24-34 (describing LaBow's failures and delays in providing a plan to liquidate and diversify the Plans' assets).

Here, defendants instructed the Severstal Plans to receive the NB account and controlled the Plans' assets, including choosing to finally liquidate the NB account after several months of internal discussions and delay. Defendants clearly "exercise[d]" "any authority or control respecting management or disposition" of the Severstal Plans' assets. This Court's decision in Blatt v. Marshall & Lassman, 812 F.2d 810, 813 (2d Cir. 1987) is analogous. In Blatt, the Court found that the defendants were fiduciaries under ERISA section 3(21)(A)(i), because they "exercised actual control over fund assets" when they ignored and delayed a participant's request for returning his vested contributions "by failing to deliver a notice of change form reflecting the fact that [he] had left the firm's employ." Id.; United States v. Glick, 142 F.3d 520, 527 (2d Cir. 1998) (citing Blatt, 812 F.2d at 813). Likewise, defendants here received and accepted exclusive control over the

Severstal Plans' assets in the form of the NB account, promised the Severstal Committee they would liquidate and reinvest those assets, but then continued to delay its eventual liquidation and reinvestment. As in Blatt, defendants exercised control over plan assets by postponing action despite their duty to act; their failure to act was an exercise of control and discretion within the meaning of Section 3(21)(A)(i). E.g., SPA-36 ("While WPN remained investment manager, Defendants were responsible for the protection and diversified investment of the Severstal Plans' assets. The governing documents did not give Defendants the option of abdicating responsibility to the [Severstal Committee]"). Defendants are fiduciaries under ERISA section 3(21)(A)(i). The Court may affirm on this alternate ground.

D. DEFENDANTS' CHALLENGES TO FACTUAL FINDINGS SUPPORTING FIDUCIARY STATUS UNDER ERISA SECTION 3(21)(A)(ii) DO NOT DEMONSTRATE CLEAR ERROR

Defendants' first issue on appeal, App. Br. 1, 37-51, confuses the inquiry into their fiduciary status under ERISA section 3(21)(A)(ii), 29 U.S.C. § 1102(21)(A)(ii), with factual disputes about whether defendants had breached duties once defendants became ERISA section 3(21)(A)(ii) fiduciaries. App. Br. 39. Defendants raise only three, purely factual, arguments concerning their breach as ERISA section 3(21)(A)(ii) fiduciaries: (1) they could not have breached their fiduciary duties because the Severstal Committee actually ignored defendants'

investment advice, (2) there is no evidence that their investment advice was "improper," and (3) there is no evidence of a causal connection between the defendants' investment advice and the Plans' losses. App. Br. 37. As purely factual disputes, defendants incorrectly assert that the district court's ruling on subsection (ii) is subject to de novo review. Id. It is axiomatic that the factual findings of a trial court must not be set aside unless "clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. Pro. 52(a)(6).[5]

The appellants' brief establishes the factual findings challenged by defendants are supported by the record, not in clear error, and therefore should not be disturbed by this Court.

E. DEFENDANTS BECAME FIDUCIARIES UNDER ERISA SECTION 3(21)(A)(iii) BY RECEIVING DISCRETIONARY AUTHORITY AND CONTROL OVER THE MANAGEMENT OF THE PLANS' ASSETS

While there is some ambiguity as to whether the district court explicitly held that defendants were also fiduciaries under ERISA section 3(21)(A)(iii), SPA-43-

[5] Because defendants fail to raise and address any legal issues subject to plenary review with respect to subsection (ii) in their opening brief, these issues are ordinarily precluded from consideration on appeal, see, e.g., Frank v. U.S., 78 F.3d 815, 833 (2d Cir. 1996); United States v. Restrepo, 986 F.2d 1462 (2d Cir.1993), cert. denied, 510 U.S. 843 (1993).

45, 48, 51, defendants concede it did, App. Br. 37, 52-57. The court's factual findings overwhelmingly support that conclusion.[6]

Subsection (iii) states that a person is a fiduciary to an ERISA plan if that person "has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(iii). While ERISA does not define "plan administration" in relation to subsection (iii), the Supreme Court considered the definition of "plan administration" for ERISA section 3(21)(A) in Varity Corp. v. Howe, 516 U.S. 489, 502 (1996). Looking to trust law, the Court concluded that the "[t]he ordinary trust law understanding of fiduciary 'administration' of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents." Id. The Court further explained that a trust document implicitly confers powers that "are necessary and appropriate for carrying out the purposes" of the trust. Id.

As the Varity Court went on to observe, the basic purpose of ERISA generally is "to protect . . . the interests of participants ... and ... beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies ... and ready access to the Federal

[6] If this Court accepts defendants' concession that the district court found fiduciary status under subsection (iii), the Court can affirm the district court's holding. The Court may also affirm on the alternative basis that the district court's factual findings clearly demonstrate that defendants were fiduciaries under ERISA section 3(21)(A)(iii).

courts." Id. at 513. ERISA's fiduciary obligations relate to "the plan's financial integrity" and reflect "special congressional concern about plan asset management." Id. at 511-12. The management of plan assets is thus both necessary and appropriate to carry out the purpose of a plan: to provide benefits to participants and beneficiaries. "The principal statutory duties imposed on fiduciaries by [ERISA Title I] 'relate to the proper management, administration, and investment of fund assets,' with an eye toward ensuring that 'the benefits authorized by the plan' are ultimately paid to participants and beneficiaries." LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 253 (2008) (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985)). Moreover, the management of plan assets is a duty that would have typically fallen within the administrative duties of a plan trustee under common law. See Pegram v. Herdrich, 530 U.S. 211, 231 (2000) ("At common law, fiduciary duties characteristically attach to decisions about managing assets.").

In furtherance of these aims, ERISA contemplates that the management of plan assets is a function that can be explicitly delegated by a plan's named fiduciary, as part of a plan's features, and is considered a critical part of plan administration.[7] See 29 U.S.C. § 1102(c)(3) (as part of a plan's "features," "a person who is a named fiduciary with respect to control or management of the

[7] A "named fiduciary" has the "authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1).

assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan"); Russell, 473 U.S. at 140 n.8 ("the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future") (emphasis added). As ERISA's legislative history indicates, "'the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets.'" Russell, 473 U.S. at 140 n.8 (quoting remarks of Sen. Williams, reprinted in 3 Leg. Hist. 4743; 120 Cong. Rec. 29951 (1974)) (emphasis added). ERISA section 3(38) investment managers, like defendants, clearly have the "responsibility respecting the management, handling, or disposition of pension or welfare plan assets," and, therefore, must undertake fiduciary obligations by virtue of accepting such "discretionary responsibility" for the plan. Id.; 29 U.S.C. § 1002(38).

This discretionary responsibility over plan assets, including the responsibility conferred on ERISA section 3(38) investment managers, is thus part of the "administration of the plan" under subsection (iii). Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co., 961 F. Supp. 2d 393, 399-401 (D. Conn. 2013); cf. Fin. Institutions Ret. Fund, 964 F.2d at 148 (including within the

"administration of the plan" under section (iii), the decision to dispose an investment surplus in the plan accounts).

In this case, defendants were the Plans' section 3(38) investment manager. SPA-13-15, 23-24, 44. Their agreement with the Plans clearly grants defendants discretionary authority and responsibility to invest the Plans' assets. JA-1218 at § 2. The December 2008 Agreement explicitly grants WPN "unlimited and unrestricted" authority to manage the Plans' assets as the investment manager:

> Subject to the investment policies established by the [Plans] with respect to the Investment Fund and timely communicated to [WPN] and the standards set forth in Section 404(a) of ERISA, the [Plans] hereby authorizes and directs the [WPN] to exercise complete, unlimited and unrestricted management authority with respect to the investment of the Investment Fund, including the authority:
>
> (a) To invest and reinvest the Investment Fund at such time in such manner as the [WPN] in the complete and unlimited exercise of its discretion shall determine;
>
> (b) To purchase and sell securities for the Investment Fund in the name of the [Plans], for the account of the [Plans] . . .
>
> (d) In effecting any such investments, reinvestments, purchases and sales, to use and obtain the assistance and services of such brokers, dealers, investment bankers, underwriters and other firms, enterprises and services as the [WPN] in its discretion shall designate or select . . .

JA-1218 at § 7. The December 2008 Agreement also clearly grants LaBow responsibility as the individual with primary authority to discharge WPN's duties as an "investment manager" on the Plans' behalf:

> Ron LaBow has the primary responsibility for performing the services of [WPN] with respect to the Investment Fund and [WPN] shall notify the Committee if there is any change with respect to LaBow's responsibilities with respect to the Investment Fund or [WPN], or if there is any change with respect to the [WPN]'s directors, officers or employees with responsibility for decisions regarding the Investment Fund or a material change in the control of [WPN].

JA-1218 at § 2(l).

The Plans paid defendants to assume broad unlimited authority over the Plans' investments and assets. SPA-15, 44. Like the December 2008 Agreement with defendants here, the agreements in Lowen explicitly stated that the investment manager was a fiduciary and an investment manager for the plan under ERISA. Lowen, 829 F.2d at 1218. This Court found the status of the investment manager as a fiduciary "simply beyond doubt" based on the delegation of investment authority in the contract. Id. at 1218 ("[t]hat [the investment manager] held a position as an ERISA fiduciary is simply beyond doubt"). Likewise, defendants' contractual responsibility to manage plan assets is exactly the type of grant of discretionary authority or responsibility over the administration of the plan that creates fiduciary status under subsection (iii).

Defendants nevertheless argue against fiduciary status under subsection (iii) by alleging that they could not exercise control or authority over the Plans' investments and thus could not exercise any investment management responsibilities. App. Br. 1, 52-57 ("Appellants had no authority to make any investments themselves, they made no investments . . ."); App. Br. 15-18 (noting that the inability to provide investment direction meant defendants could not "exercise" their investment authority). Specifically, defendants contend that the Plans' directed trustees and NB would not take investment directions from defendants because they did not consider defendants authorized to provide such directions. App. Br. 52-57. Defendants also allege the Severstal Committee failed to notify these entities that defendants had investment management responsibilities. App. Br. 12-13, 15-18. In short, they could only act as advisors but not investment managers. Id. at 54 ("[NB] considered Appellants investment consultants rather than control persons").

To the contrary, the district court made detailed factual findings that nothing prevented defendants from exercising investment authority over the Plans' assets. SPA-33-35. Even assuming defendants correctly identify some impediments to exercising their investment authority, App. Br. 53-57, defendants fail to challenge the district court's extensive factual findings that defendants did nothing to remove those impediments or undertake their contracted fiduciary responsibilities. SPA-

32-36. This Court is clear that "'[s]ubsection three [of 29 U.S.C. § 1002(21)(A)] describes those individuals who have actually been granted discretionary authority, regardless of whether such authority is ever exercised.'" Bouboulis, 442 F.3d at 63) (quoting E.F. Hutton & Co., Inc., 957 F.2d at 625); accord L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cty., Inc., 710 F.3d 57, 69 (2d Cir. 2013); App. Br. 52 (citing Mahoney v. J. J. Weiser & Co., Inc., 564 F. Supp.2d 248 (S.D.N.Y. 2008)). In Bouboulis, 442 F.3d at 63, and L.I. Head Start Child Dev. Servs., Inc., 710 F.3d at 69, this Court rejected the argument that plan administrators could not be considered ERISA fiduciaries because their role was "'limited to purely ministerial functions.'" Such a limitation does not excuse plan administrators from their failure to exercise the plan administration responsibilities they had assumed. Bouboulis, 442 F.3d at 63; L.I. Head Start Child Dev. Servs., Inc., 710 F.3d at 69. Likewise, even accepting the defendants' alleged facts, they did not attempt to exercise their investment management role until March 24, 2009, defendants had assumed fiduciary responsibilities as the Plans' investment manager prior to that date "regardless of whether such authority is ever exercised." Bouboulis, 442 F.3d at 63; L.I. Head Start Child Dev. Servs., Inc., 710 F.3d at 69.

This Court also previously rejected a similar argument by an investment manager in Lowen. In Lowen, one of the defendants was hired by a plan trustee as

an investment manager. 829 F.2d at 1212. The Lowen investment manager argued that it was not an ERISA fiduciary, despite the clear language of the written contracts, because the contracts had been orally modified to remove its discretionary authority for the prohibited transactions at issue. Id. The Lowen investment manager argued that it could not exercise any discretionary authority because the plan trustee had orally ordered the manager to carry out the trustee's instructions for those transactions without discretion. Id. at 1219.

This Court flatly rejected the argument, stating that "[e]ven if true, this argument is without legal merit." Id. at 1218. This Court observed that ERISA was "deliberately structured so that legal responsibility for management of ERISA plans would be clearly located." Id. This Court further observed that plans are required to designate a named fiduciary, with power to control and manage the plan, "'so that responsibility for managing and operating the Plan -- and liability for mismanagement -- are focused with a degree of certainty.'" Id. at 1218-19 (quoting Birmingham v. Sogen-Swiss Int'l Corp. Retirement Plan, 718 F.2d 515, 522 (2d Cir. 1983)). Applying this rule to ERISA section (38) investment managers appointed by the named fiduciaries, the Court went on to observe that "ERISA's purpose of clearly locating legal obligations will be vitiated if plaintiffs are required to engage in an after-the-fact sorting-out of actions, statements and states

of minds among possible fiduciaries to determine which is legally responsible." Id. at 1219.

Defendants' arguments rely on trial testimony from employees of the directed trustee and NB purporting to establish that the trustees and NB would not have accepted defendants' investment directions if defendants had attempted to direct them. App. Br. 4 (citing A. 117, 559-60). In fact, defendants never attempted to direct them until March 24, 2009, at which time the district court found that defendants successfully directed the liquidation of the NB account. SPA-34. However, even if true, defendants' argument is utterly without merit and is exactly the type of "engag[ing] in an after-the-fact sorting-out of actions, statements and states of minds" rejected in Lowen, 829 F.2d at 1219. The clear contractual grant of discretionary investment authority and fiduciary responsibility to defendants would likewise "be vitiated." Id.

Furthermore, defendants ignore that any improper action by a co-fiduciary does not remove their own fiduciary duties. ERISA Section 405(a) provides that a fiduciary is liable for a breach of duty by a co-fiduciary if his failure to carry out his own fiduciary duties enabled the breach by the co-fiduciary or if he has knowledge of the breach of duty and does not make reasonable efforts to remedy the breach. ERISA § 405(a)(2), (3), 29 U.S.C. § 1105(a)(2), (3). While the directed trustees and other co-fiduciaries, like the Severstal Committee, may be

jointly and severally liable for defendants' breaches if defendants' allegations are true, the district court correctly observed that "any fault on [the Severstal Committee's] part does not relieve Defendants of legal responsibility for losses caused by their own breaches of duties imposed by ERISA. . . . Ensuring the prudent management of a properly diversified portfolio was Defendants' responsibility, regardless of the [Severstal Committee's] actions in this case." SPA-50 (citing Koch v. Dwyer, No. 98 Civ. 5519, 1999 WL 528181, at *10 (E.D.N.Y. Jul. 22, 1999)). As defendants recognize, they "cannot avoid liability by virtue of" their co-fiduciaries' "improper acts." App. Br. 57 (noting that they "never made such an argument" to contest this "principle"); see 29 U.S.C. §1105; see also Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 241 (2d Cir. 2002); LaScala v. Scrufari, 479 F.3d 213, 220 (2d Cir. 2007).

In this matter, defendants were clearly fiduciaries. Even if it were true that co-fiduciaries made it more difficult for defendants to exercise the authority explicitly granted to them, that fact alone does not obviate their own fiduciary duties to protect the Plans' assets, to diversify the Plans' investments, and to take steps to remedy any impediments to their ability to exercise their investment authority in service of protecting the Plans' assets.

CONCLUSION

For the reasons set forth above, the Secretary respectfully requests that this Court affirm the district court's ruling that defendants are liable to the Plans for breaches of defendants' fiduciary duties under ERISA.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor

THOMAS TSO
Counsel for Appellate Litigation

/s/ D. Marc Sarata
D.Marc Sarata
Attorney
U.S. Department of Labor
Office of the Solicitor
Plans Benefits Security Division
P.O. Box 1914
Washington, DC 20013
(202) 693-5682

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B)-(C), I certify that this amicus contains 6,874 words.

Dated: March 15, 2015

/s/ D. Marc Sarata

D. Marc Sarata
Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210

CERTIFICATE OF SERVICE

I hereby certify that on this day, March 15, 2016, I electronically filed the foregoing Brief of The Secretary, United States Department of Labor, as Amicus Curiae, in Support of Plaintiffs-Appellees, with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ D. Marc Sarata

D. Marc Sarata
Attorney
United States Department of Labor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210