13-50344

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ERIC TIBLIER, as Trustee of and on Behalf of the Dr. Eric Tiblier, P.A. Cash Balance Plan; SUSANNE TETZLAFF, as Trustee of and on Behalf of the Dr. Eric Tiblier, P.A. 401(K) Profit Sharing Plan,

Plaintiffs-Appellants,

v.

PAUL DLABAL; CACH CAPITAL MANAGEMENT, L.L.C.,

Defendants-Appellees.

On Appeal from the United States District Court
Western District of Texas, Austin Division

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING APPELLANTS

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<u>TABLE OF CONTENTS</u>

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. Dlabal is Liable For His Failure To Comply With ERISA's Standards, Regardless of Whether Plaintiff-Trustee Tiblier Also Breached His Fiduciary Obligations 7

II. The Prohibited Transaction Claims Against Dlabal Should Not Have Been Summarily Dismissed 22

CONCLUSION 28

CERTIFICATE OF SERVICE 29

CERTIFICATE OF COMPLIANCE 30

TABLE OF AUTHORITIES

Federal Cases .... **Page**

Alexander v. Gardner-Denver,
415 U.S. 36 (1974).. 19

Barrentine v. Arkansas-Best Freight System, Inc.,
450 U.S. 728 (1981).. 19

Braden v. Wal-Mart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009) 24

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 (1945).. 19

Bussian v. RJR Nabisco, Inc.,
223 F.3d 286 (5th Cir. 2000) .... passim

Cange v. Stotler & Co.,
826 F.2d 581 (7th Cir. 1987) 20

Carr v. Cigna Securities, Inc.,
95 F.3d 544 (7th Cir. 1996) 9

Chaplin v. NationsCredit Corp.,
307 F.3d 368 (5th Cir. 2002) 20, 21

Chicago Bd. Of Options Exch. v. Connecticut Life Ins. Co.,
713 F.2d 254 (7th Cir. 1983) 18

Commissioner v. Keystone Consol. Industries, Inc.,
508 U.S. 152 (1993).. 23

Concha v. London,
62 F.3d 1439 (9th Cir. 1995) 18

Dodds v. Cigna Securities, Inc.,
12 F.3d 346 (2d Cir. 1993) 9

Federal Cases--Continued .... Page

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983) .... passim

Dudley Supermarket, Inc. v. Transamerica Life Ins. and Annuity Co.,
302 F.3d 1 (1st Cir. 2002)..9-10

Faris v. Williams WPC-I, Inc.,
332 F.3d 316 (5th Cir. 2003) 19

Freund v. Marshall & Ilsley Bank,
485 F.Supp. 629 (W.D. Wis. 1979) 23

Gochnauer v. A.G. Edwards & Sons, Inc.,
810 F.2d 1042 (7th Cir. 1987) 10

Green v. Fund Asset Management, L.P.
147 F. Supp. 2d 318 (D.N.J. 2001)... 11

Harris v. Amgen, Inc.,
2013 WL 2397404 (9th Cir. June 4, 2013)................................... 24

Harzewski v. Guidant Corp.,
489 F.3d 799 (7th Cir. 2007) 10

HECI Exploration Co. v. HECI Exploration Co. Employees' Profit Sharing Plan,
862 F.2d 513 (5th Cir. 1988) 21

Herman v. NationsBank Trust Co.,
126 F.3d 1354 (11th Cir. 1997) 8

Hughes Aircraft Co. v. Jacobson,
432 U.S. 432 (1999)... 15

In re Masters Mates & Pilots Pension Plan & IRAP Litig.,
957 F.2d 1020 (2d Cir. 1992) 13

Iron Workers Local No. 272 v. Bowen,
624 F.2d 1255 (5th Cir. 1980) 23

Federal Cases--Continued .... Page

IT Corp. v. General Am. Life Ins. Co.,
107 F.3d 1415 (9th Cir. 1997) 18

Kramer v. Smith Barney,
80 F.3d 1080 (5th Cir. 1996) 18

Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisor's Inc.,
173 F.3d 313 (5th Cir. 1999) 8, 11, 16

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984) 12, 22 n.7, 23

Leister v. Dovetail, Inc.,
546 F.3d 875 (7th Cir. 2008) 13

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 22

Lowen v. Tower Asset Management, Inc.,
829 F.2d 1209 (2d Cir. 1987) 12, 23, 24

Martin v. Consultants & Administrators, Inc.,
966 F.2d 1078 (7th Cir. 1992) 11-12, 20

Martinez Tapia v. Chase Manhattan Bank, N.A.,
149 F.3d 404 (5th Cir. 1998) 9

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 8

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 27

McLemore v. Regions Bank,
682 F.3d 414 (6th Cir. 2012) 17

Morrissey v. Curran,
567 F.2d 546 (2d Cir. 1997) 12

Federal Cases--Continued .... Page

Nachman Corp. v. PBGC,
446 U.S. 359 (1980)... 15

Patelco Credit Union v. Sahni,
262 F.3d 897 (9th Cir. 2001) 23

Pegram v. Herdrich,
530 U.S. 211 (2000)... 12

Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co.,
698 F.2d 320 (7th Cir. 1983 10

Rodriquez-Abreu v. Chase Manhattan Bank, N.A.,
986 F.3d 580 (1st Cir. 1993).. 20

Rosser v. Raytheon Excess Pension Plan,
2008 WL 4791494 (N.D. Tex. Nov. 4, 2008) 21

Rogers v. Baxter Int'l Inc.,
521 F.3d 702 (7th Cir. 2008) 10, 20

Rogers v. Gen. Elec. Co.,
781 F.2d 452 (5th Cir. 1986) 10

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) 1

State Street Bank and Trust Co. Fixed Income Funds Inv. Litig.,
772 F. Supp. 2d 519 (S.D.N.Y. 2011) 15

Trustees of Local 464A United Foods and Commercial Workers Union Pension Fund v. Wachovia Bank,
2009 WL 4138516 (D. N.J. 2009) 15

Varity Corp. v. Howe,
516 U.S. 489 (1996).. 9

Federal Cases--Continued .... Page

Wolin v. Smith Barney Inc.,
83 F.3d 847 (7th Cir. 1996) 11 n.6

Federal Statutes:

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

Section 3(14)(A), 29 U.S.C. § 1002(14)(A) 22 n.7

Section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii) 9

Section 404, 29 U.S.C. § 1104 .... 6, 9

Section 404(a)(1), 29 U.S.C. § 1104(a)(1) 8, 16

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) 4, 6

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) 4, 6, 9

Section 405, 29 U.S.C. § 1105 7

Section 405(a), 29 U.S.C. § 1105(a) 16, 17

Section 405(a)(2), 29 U.S.C. § 1105(a)(2) 13

Section 405(d), 29 U.S.C. § 1105(d) 15, 17

Section 406, 29 U.S.C. § 1106 .... passim

Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) 4, 22 n.7, 25

Section 406(b), 29 U.S.C. § 1106(b) .... passim

Section 406(b)(1), 29 U.S.C. § 1106(b)(1) 22 n.7, 23, 26

Section 408(a), 29 U.S.C. § 1108(a) 24

Section 408(g), 29 U.S.C. § 1108(g) 25

Federal Statutes—Continued

Section 409(a), 29 U.S.C. § 1109(a) 8, 16

Section 410, 29 U.S.C. § 1110 .... 18, 19

Section 410(a), 29 U.S.C. § 1110(a) 16, 18

Section 502(a), 29 U.S.C. § 1132(a) 8

Federal Regulations:

29 C.F.R. § 2550.408b-2(e)(1) 23

Other Authorities:

Fed.R.App.P. 29(a) 2

Miscellaneous:

49 Fed. Reg. 13208 (Apr. 3, 1984) 25 n.8

Department of Labor Advisory Opinion No. 97-15A, (May 22, 1997)
http://www.dol.gov/ebs/programs/ori/advisory 97/97-15A.htm 5, 26

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that the investment adviser to an employee benefit plan could not have violated his duty of prudence regarding plan investments because the investment documents received and signed by the plan's trustee adequately described the riskiness of the investments.

2. Whether the district court erred in holding that the investment adviser could not have violated ERISA's prohibited transaction provisions because the investment documents disclosed his conflict of interest in accepting compensation from the investment's promoters, which was offset against (but appears to have exceeded) the fees charged to the plan.

STATEMENT OF INTEREST

The Secretary of Labor has primary responsibility for enforcing Title I of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. ("ERISA"), and has a strong interest in ensuring that courts correctly interpret ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc) (the Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets); Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983) (the Secretary protects the public interest by ensuring fiduciaries' compliance with ERISA). Here, ERISA's stringent fiduciary standards and safeguards against conflicts of interest are undermined by the district court's holdings that the investment adviser to a plan, even if acting as a fiduciary, was excused from his responsibility to act prudently because of another fiduciary's acquiescence in the investment; and that the investment could not have violated ERISA's prohibited transaction rules if the adviser disclosed that he had a conflict of interest with respect to the advice and offset his charges to the plan against what appears to be the even larger commissions that he received from the investment's promoters.

The Secretary submits this amicus brief seeking reversal of the court's decision pursuant to F.R.A.P. 29(a).

STATEMENT OF THE CASE[1]

The Appellant Trustees represent two different plans (collectively, the "Plans"), the Dr. Eric Tiblier, P.A. Cash Balance Plan (the "Plan" or "Cash Balance Plan") for which Dr. Tiblier is the trustee (the "Trustee"), and the 401(k) Profit Sharing Plan for which Susan Tetzlaff, Tiblier's wife and office manager, is the trustee. Both Plans are sponsored by Dr. Eric Tiblier, P.A., and both are governed by ERISA. Tiblier v. Dlabal, Case No. 12-CA-073-SS (W.D. Tex. December 6,

[1] Unless otherwise noted (e.g., by citation to the Complaint), the following facts are taken from the district court's decisions on summary judgment and reconsideration and thus assumed to be true and undisputed.

2012), Judgment and Order ("Order"), R. at 482.[2] The Cash Balance Plan at issue in this case authorized only conservative investments. R. at 482 & (Complaint) at 134-135.

Beginning in 2008, Appellee Dr. Paul Dlabal provided investment advice to the Plans. Dlabal advised the Cash Balance Plan to invest $100,000 of Plan assets in speculative bonds issued by an oil-and-gas start-up company, Adageo Energy Partners, L.P., which was created to purchase under-producing oil and gas leases with an eye toward increasing their profitability. R. at 482-483. According to Tiblier, Dlabal orally assured him that Adageo would provide "a safe return … unless the oil market ′completely crashed′ to below thirty or forty dollars per barrel." R. at 483. In fact, Adageo had no assets at the time Dlabal recommended the investment, was under investigation by the SEC as a possible Ponzi scheme, and was a risky, speculative, and illiquid investment. Id. Moreover, at the time of his investment recommendations, Diabal had a financial relationship with Adageo that entitled him to additional compensation if the Plans invested in Adageo. Id.

Notwithstanding Dlabal's oral representations about the relative safety of the investment, Tiblier also received a written private placement memorandum and related documents (collectively, the "Disclosure Documents"). These documents stated that the investment was highly speculative and risky, warned investors not to

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[2] References to the Record on Appeal are designated as ″R. at _____.″

purchase the Adageo bonds unless they could afford the loss of the entire investment, and indicated that the company had not yet acquired any oil and gas leases. R. at 492-493. Tiblier signed a statement certifying that he had "′read and understood″' the documents, and, following Dlabal's recommendations, had the Cash Balance Plan purchase Adageo bonds in two separate $50,000 increments in July and December 2009.[3] R. at 483. Less than a year later, Adageo collapsed and stopped paying interest on the bonds. R. at 484.

The Trustees sued Dlabal and a related entity, CACH Capital Management, LLC, on January 24, 2012.[4] In addition to asserting since-abandoned securities law claims, the Trustees alleged that Dlabal breached his ERISA fiduciary duties under 29 U.S.C. § 1104(a)(1)(A) and §1104(a)(1)(B) by giving advice that was imprudent, disloyal, inconsistent with the Plans' conservative investment philosophy, and aimed at promoting Dlabal's own financial interests in receiving additional fees from Adageo. R. at 484. Additionally, the Trustees alleged that Dlabal violated ERISA's prohibitions on self-dealing (29 U.S.C. § 1106(b)) and the transfer of plan assets to a party in interest (29 U.S.C. § 1106(a)(1)(D)). See Id.

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[3] While the Trustees for each of the Plans brought the action, the Cash Balance Plan alone appears to have made the Adageo investment. R. at 383.

[4] CACH was the investment advisory firm for which Dlabal worked and in whose name the Investment Management Agreement was entered into. CACH is defunct and no longer a party to the case. R. at 481.

On December 6, 2012, the district court granted summary judgment to Dlabal. The court, without resolving the factual dispute about whether Dlabal was a fiduciary, held that the Disclosure Documents warned Tiblier of the risks of the investment in Adageo and adequately disclosed the commissions that Dlabal would receive from Adageo as a result of such investment. Relying primarily on securities law cases, the court ruled that the Disclosure Documents, which Tiblier had certified having read and understood, absolved Dlabal of any liability, irrespective of his fiduciary status. R. at 494-495.

On March 4, 2013, the district court issued an order (the "2013 Order"), R. at 628-632, denying Dlabal's motion for attorney's fees and the Trustees' motion to vacate the court's prior order. In denying attorney's fees, the court stated that Dlabal "at the least did a very poor job of advising his client," R. at 630, and expressed its hope that the burden of shouldering his legal expenses would "be a salutary lesson to Dlabal to take better care of his client's investments, and to also be more circumspect in how he advises clients." Id. In denying vacatur, the court found no basis for altering its prior ruling, and further ruled that Dlabal had not committed a prohibited transaction because Dlabal's commission on the Plans' investment in the Adageo bonds was offset by a reduction in investment management fees charged against the Plans. R. at 631-632. (citing the Department's May 22, 1997 Advisory Opinion, No. 97-15A ("Frost Letter"). The court additionally stated that Tiblier did not raise this point in his summary judgment response.[5] R. at 632.

SUMMARY OF ARGUMENT

I. To protect workers' retirement funds, ERISA imposes strict fiduciary standards of prudence and loyalty on the managers of, and investment advisers to, these funds. Undisputed material facts support the conclusion that Defendant Dlabal violated section 404 of ERISA by imprudently advising the Cash Balance Plan to invest in Adageo in furtherance of his self-interest rather than the sole interest of the Plan, its participants and their beneficiaries. 29 U.S.C. §§ 1104(a)(1)(A) and (B). Accordingly, the district court erred by granting summary judgment to Dlabal.

Rather than examining whether Dlabal had violated ERISA's fiduciary obligations, the district court borrowed an inapplicable due-diligence doctrine from securities law and determined that Dlabal was free from liability because Tiblier accepted the advice without diligently reviewing the Adageo investment. If Dlabal is ultimately held to be a plan fiduciary, Dlabal had an unqualified obligation to adhere to standards of prudence and loyalty. Dlabal would be bound by these fundamental obligations, regardless of whether co-fiduciary Tiblier also breached his duty to act with prudence when making investment decisions. Indeed, rather

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[5] The Secretary expresses no view on whether Tiblier waived his claims based on ERISA's prohibited transaction provisions.

than allowing one fiduciary to excuse the failure of another, section 405 of ERISA, 29 U.S.C. § 1105, expressly makes fiduciaries liable for their co-fiduciaries' misconduct when they knowingly participate in the misconduct, enable their co-fiduciaries' violations through their own breaches, or fail to make reasonable efforts to remedy their co-fiduciaries' misconduct. The court thus wrongly imported the securities law model of investor due diligence into ERISA, which is built on a different model of fiduciary standards and joint and several liability.

II. The district court also erred by dismissing the Trustee's prohibited transaction claims under ERISA § 406, 29 U.S.C. § 1106. ERISA categorically prohibited Dlabal from using his fiduciary authority to promote an investment in which he had a financial interest, unless he met the terms of a relevant statutory or regulatory exemption. There is no relevant exemption, however, that would have permitted Dlabal to give the conflicted advice at issue in this case, steering the Plan to investments in which he had a financial stake, and the district court pointed to none.

ARGUMENT

I. DLABAL IS LIABLE FOR HIS FAILURE TO COMPLY WITH ERISA's STANDARDS, REGARDLESS OF WHETHER PLAINTIFF-TRUSTEE TIBLIER ALSO FAILED IN HIS FIDUCIARY OBLIGATIONS

The protection of plan assets is a central purpose of ERISA. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141, n.8 (1985). To protect the assets of employee benefit plans, ERISA imposes upon fiduciaries "strict standards of conduct . . . most prominently a standard of loyalty and a standard of prudence." Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisor's, Inc, 173 F.3d 313, 317 (5th Cir. 1999). These standards are set forth in section 404(a)(1) of ERISA, which requires that a fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries with the care, skill and 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). Section 409 of ERISA, 29 U.S.C. §1109(a), enforceable through section 502(a), makes an ERISA fiduciary personally liable for the breach of these duties. See Herman v. NationsBank Trust Co., 126 F.3d 1354, 1366 (11th Cir.1997) ("one of Congress's primary goals was to devise a system whereby plan participants and beneficiaries could hold fiduciaries accountable for their obligations").

1. Although the Trustees alleged that Dlabal violated his fiduciary obligation by giving advice to the Cash Balance Plan that was imprudent and disloyal, the district court failed to examine whether Dlabal had adhered to these fiduciary standards. Instead, relying on a securities law due-diligence principle, it held that it did not matter whether Dlabal had violated his fiduciary duties, so long as Tiblier had acquiesced in the investments at the heart of this case. R. at 494-495, citing Martinez Tapia v. Chase Manhattan Bank, NA., 149 F.3d 404, 409 (5th Cir. 1998) ("The investor who seeks to blame his investment loss on fraud or misrepresentation must himself exercise due diligence to learn the nature of his investment and the associated risks."); Carr v. Cigna Securities, Inc., 95 F.3d 544 (7th Cir. 1996); Dodds v. Cigna Securities, Inc., 12 F. 3d 346 (2nd Cir. 1993).

The district court's analysis, however, is deeply flawed. The Trustee's ERISA claims are predicated on violations of ERISA's broad obligations of prudence and loyalty, not on the distinct securities-law obligation to refrain from fraudulent conduct. The court simply ignored ERISA’s mandate that a fiduciary act in accordance with trust law's strict "prudent man" standard, as set forth in in section 404, 29 U.S.C. § 1104(a)(1)(B). "Section 404 imposes upon fiduciaries a duty of loyalty and a duty of care." Cunningham, 716 F.2d at 1464. "ERISA's duty of loyalty is 'the highest known to the law.'" Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 299 (5th Cir. 2000) (citation omitted).

ERISA, which is largely based on the law of trusts, Varity Corp.v. Howe, 516 U.S. 489, 496-497 (1996), imposes the same stringent trust-law standards of prudence and loyalty on all ERISA plan fiduciaries, including fiduciary investment advisers. See 29 U.S.C. § 1002(21)(A)(ii) (including investment adviser "for a fee or other compensation" within the definition of "fiduciary"); Dudley Supermarket, Inc., v. Transamerica Life Insur. and Annuity Co., 302 F.3d 1, 4 (1st Cir. 2002) ("inadequate investment advice" allegation constitutes claim for breach of ERISA fiduciary duty of prudence); Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co., 698 F.2d 320, 327 (7th Cir. 1983) ("If the pension plan had hired an investment advisor and given him authority to buy and sell securities at his discretion for the plan's account, the advisor would be a fiduciary within the meaning of the act"). The elements, purpose, and trust-law origins of ERISA all depart from securities law claims that are "modeled after the common law actions of fraud and deceit." Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (7th Cir. 1987).

Accordingly, the district court erred by failing to analyze the Trustee's claims based upon ERISA's unique text and statutory provisions, and by instead importing different standards applicable to a different regulatory regime. As the Seventh Circuit has correctly stated: "The burden of proving [securities] fraud is heavier than that of proving a breach of fiduciary duty [under ERISA] . . . Such a breach might consist in imprudent management, . . . mistake, self-dealing and other conflicts of interest … falling short of fraud." Harzewski v. Guidant Corp., 489 F. 3d 799, 805 (7th Cir. 2007); accord, Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 705 (7th Cir. 2008) (rejecting argument that suit brought under ERISA for investment in overvalued company stock was an attempt to avoid limitations on bringing action under securities law).[6] Cf. Green v. Fund Asset Management, L.P., 147 F. Supp.2d 318, 332 (D.N.J. 2001) (comparing fiduciary standards under ERISA and the Investment Company Act and indicating that ERISA sets a higher standard).

2. The district court should thus have analyzed the case by reference to ERISA's standards of prudence and loyalty, which do not begin or end with providing accurate disclosures in written documents. As this Court has recognized, prudence requires "'the fiduciary, at the time of the transaction, [to] utilize[] proper methods to investigate, evaluate and structure the investment; [to] act[] in a manner as would others familiar with such matters; and [to] exercise[] independent judgment when making investment decisions.'" Bussian, 223 F.3d at 299 (quoting Laborers National Pension Fund, 173 F.3d at 317). Thus, Tiblier was entitled to

[6] The only ERISA case cited by the district court in support of this holding, Wolin v. Smith Barney Inc., 83 F.3d 847 (7th Cir. 1996), was an earlier, less apt Seventh Circuit opinion. Wolin dismissed the fiduciary breach claim in that case on statute of limitations grounds, but suggested in dicta that it would not permit ERISA trustees-plaintiffs to rely upon oral representations that contradicted the written disclosures where the ERISA claim was based upon "securities fraud rather than anything special to ERISA." Id. at 851.

advice that reflected Dlabal's sound professional judgment about what was best for the Cash Balance Plan, which expressly utilized a conservative investment policy. R.134-135. Moreover, Dlabal's obligation to act with "independent judgment" did not end with offering the advice, if executing the investment based on this advice was imprudent. Id.; see Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1087-1088 (7th Cir. 1992) (trustee's "duty under ERISA to review plan investments and eliminate imprudent ones" is ongoing); Morrissey v. Curran, 567 F.2d 546 (2d Cir. 1977) (failure by trustees to liquidate prior imprudent investment constitutes separate breach of fiduciary duty under ERISA).

Furthermore – even assuming that it was not flatly prohibited under section 406 of ERISA for Dlabal to steer the Plan to the Adageo investment (see Argument II infra) – Dlabal needed to exercise a heightened standard of care to ensure that his investment recommendations reflected his best professional judgment of what was in the Plan's interest, rather than his own financial interest in receiving Adageo commissions. Bussian, 223 F.3d at 299 ("The presence of conflicting interests imposes on fiduciaries the obligation to take precautions to ensure that their duty of loyalty is not compromised."); Leigh v. Engle, 727 F.2d 113, 136 (7th Cir. 1984) (district court directed to consider whether fiduciaries "acted reasonably and prudently in light of their knowledge of the administrators' conflicting interests"). Indeed, Dlabal had an obligation to act with undivided loyalty to the Plan. Pegram

v. Herdrich, 530 U.S. 211, 224 (2000) (duty of loyalty is "most fundamental duty" owed by a trustee); accord, Bussian, 223 F.3d at 294.

3. Rather than focusing on Dlabal's conduct, however, the district court mistakenly focused exclusively on Tiblier's failure to appreciate the import of the written disclosures that he had received. In particular, the court reduced the Trustee's claims to "Dlabal's alleged oral misrepresentations, and failures to disclose pertinent information," and then rejected those claims because "Tiblier was in fact informed, in writing, of the various facts he claims were concealed from him, or misrepresented to him." R. at 491-492. However, the Trustee's claim was not based solely on Dlabal's failure to disclose relevant facts, but rather primarily upon Dlabal's violation of his own independent obligation to give advice that was prudent, loyal, and consistent with the Plan's stated objectives. The court failed to address whether Dlabal's advice adhered to these fundamental fiduciary standards, and its opinion failed to explain how Tiblier's acquiescence in Dlabal's investment advice could relieve Dlabal of his independent, i.e., joint and several, fiduciary duty under ERISA to render advice with prudence and undivided loyalty. See Leister v. Dovetail, Inc., 546 F.3d 875, 878 (7th Cir. 2008) ("co-fiduciary liability is joint and several under ERISA"); In re Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1023 (2d Cir. 1992) (29 U.S.C. § 1105(a)(2)

imposes joint and several liability). Thus, it is "legally irrelevant" for an adviser's liability if a trustee also breached its fiduciary duties. Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220 (2d Cir. 1987).

The Fifth Circuit has recognized that the court's examination of a fiduciary's conduct requires an assessment both of the wisdom of the investment and the manner in which the fiduciary evaluated and structured the investment. Cunningham, 716 F.2d at 1467. Thus, the courts must examine whether the fiduciary "employed the appropriate methods to investigate the merits of the investment and to structure the investment," Bussian, 223 F.3d at 299 (citation omitted), and assess the soundness of the fiduciaries' actions in light of the "'character and aims'" of the particular type of plan he serves." Cunningham, 716 F.2d at 1467 ("a pure heart and empty head are not enough"). Yet totally absent from the district court's decision is any examination of Dlabal's investigation of the merits of the Adageo investment, or of how his fiduciary recommendations comported with the "character and aims" of this particular plan with its particularly conservative investment policy. Id.

Instead, while absolving Dlabal of any liability for his failure to adhere to the requirements of ERISA, the district court contradictorily appeared to recognize that Dlabal's advice was likely imprudent, taking him to task for "at the least … [doing] a very poor job of advising his client" and, in denying him attorney's fees, admonishing him "to take better care of his client's investments." R. at 630. Similarly, the court treated as undisputed the assertion that Dlabal orally represented to Tiblier that the investment was a "′safe petro bond′" and would be profitable "unless the oil market 'crashed' to thirty or forty dollars per barrel" – poor advice that was directly contrary to the facts and to the Plan's interest in pursuing a conservative investment philosophy. Id.

Thus, the court's own analysis supported the conclusion that Dlabal had violated his fiduciary obligations by giving advice that was imprudent and contrary to the Plan's investment policy. Based upon these findings, and having already determined that there were material facts in dispute on Dlabal's fiduciary status, the court should have at least concluded that there was sufficient evidence to proceed to trial on the question of Dlabal's liability for fiduciary misconduct. Even if it was unreasonable for the Trustee to rely upon Dlabal's advice, it scarcely follows that Dlabal had no independent liability under ERISA for the failure to adhere to his own fiduciary duties of care and undivided loyalty. An investment manager cannot shield itself from liability by claiming the plaintiff fiduciary shared in the breach. 29 U.S.C. § 1105(d); State Street Bank and Trust Co. Fixed Income Funds Investment Litig., 772 F. Supp.2d 519, 540 (S.D.N.Y. 2011); Trustees of Local 464A United Food and Commercial Workers Union Pension Fund v. Wachovia Bank, 2009 WL 4138516, *3-4 (D. N.J. 2009).

4. Although the rationale for the district court's reliance on written disclosures as a complete defense to the imprudence claims is unclear, the court, in effect, treated Tiblier's receipt and signed acknowledgment of the disclosures as an effective waiver of the Plan's right to have Dlabal adhere to ERISA's strict fiduciary standards. No matter how imprudent or disloyal Dlabal's advice, the court treated the disclosures as relieving Dlabal of any responsibility or accountability to the Plan. There is no principle under ERISA, however, that would allow a Trustee to waive the Plan's right to another fiduciary's compliance with ERISA in this manner.

The Supreme Court has repeatedly referred to ERISA as "a comprehensive and reticulated statute" and cautioned the courts not to alter or depart from Congress' carefully-constructed regulatory scheme. E.g., Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) (quoting Nachman Corp. v. PBGC, 446 U.S. 359, 361 (1980). As discussed, ERISA imposes upon fiduciaries "strict standards of conduct …most prominently a standard of loyalty and a standard of prudence." Laborers National Pension Fund, 173 at 317. These standards are set forth in section 404(a) (1) of ERISA, 29 U.S.C. §1104(a)(1). Section 406 of ERISA, 29 U.S.C. §1106, reinforces the fiduciary standards set forth in section 404 by explicitly prohibiting certain transactions that are more likely to be subject to wrongdoing. Cunningham, 716 F.2d at 1464-1465. Section 409 of ERISA, 29

U.S.C. § 1109(a), makes an ERISA fiduciary personally liable for the breach of these duties. Section 410, 29 U.S.C. § 1110(a), prohibits plan provisions that purport "to relieve a fiduciary from [any] responsibility or liability" under the Act.

In furtherance of this carefully constructed regulatory scheme for enforcing fiduciary liability, section 405(a) of ERISA generally makes a co-fiduciary liable for another fiduciary's breach of duty if he knowingly participates in the co-fiduciary's breach, enables the breach by failing to comply with his own fiduciary obligations, or fails to make reasonable efforts to remedy a breach of which he has knowledge. 29 U.S.C. § 1105(a); see, e.g., Cunningham, 716 F.2d at 1474 (successor fiduciary may be liable for concealing or failing to remedy prior fiduciary's breach). Thus, rather than broadly permitting co-fiduciaries to waive each other's responsibility to adhere to ERISA, Congress generally structured ERISA to ensure that all of a plan's fiduciaries could be held liable for misconduct when they failed to meet their shared responsibilities to a plan. In an exception to this general rule, the Act does provide that where a plan has appointed an investment manager, "no trustee shall be liable for the acts or omissions of such investment manager." 29 U.S.C. § 1105(d). By the same token, however, no trustee may, by his acts or omissions, relieve the manager of his independent fiduciary obligations or the liability (including co-fiduciary liability) that arises from his misconduct.

Accordingly, to the extent that the Trustee breached his obligations by relying on Dlabal's unsound advice, Dlabal would not only be directly liable for his own misconduct, but he could also be liable as the Trustee's co-fiduciary; and there was no valid reason to dismiss this suit brought by one fiduciary against another fiduciary for causing losses to the Plan. See McLemore v. Regions Bank, 682 F.3d 414, 421-422 (6th Cir. 2012) (holding doctrines of unclean hands and in pari delicto to be inapplicable to action by ERISA trustee on behalf of plan); Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995) (breaching fiduciaries may bring suit on behalf of the plan even where they would be barred from seeking contribution for their own liability for a fiduciary breach).

Moreover, ERISA does not permit fiduciaries to avoid fiduciary obligations or excuse liability for breach of those obligations by agreement. Thus, if the Disclosure Documents had purported to waive the Plan's entitlement to proper fiduciary conduct, they would have been void under section 410 of ERISA. Accordingly, Tiblier and Dlabal could not have entered into an agreement relieving him of his responsibility to comply with ERISA's provisions even if the Disclosure Documents had purported to do so. IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415, 1418 (9th Cir. 1997) ("a contract exonerating an ERISA fiduciary is void [under section 410(a)] as a matter of law"); Kramer v. Smith Barney, 80 F.3d 1080, 1085 (5th Cir. 1996) (section 410 bars enforcement of arbitration agreement's statute of limitations provision because it would free financial adviser from potentially longer period to be subject to suit under ERISA); Chicago Bd. of Options Exch. v. Connecticut Life. Ins. Co., 713 F.2d 254, 259 (7th Cir. 1983) (410(a) bars a contractual provision which seeks to limit an ERISA fiduciary's liability).

5. Even when Congress has failed to state its policy against liability waivers as clearly as in ERISA section 410, the Supreme Court has broadly recognized the importance of preventing waiver doctrines from interfering with statutory protections conferred upon workers. It has thus long been established that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1945) (Fair Labor Standards Act). Consequently, parties cannot generally contract around statutory obligations in the manner contemplated by the court's order in this case. See Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 740 (1981) ("This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.")

(citation omitted); Alexander v. Gardner-Denver, 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. ... Waiver of these rights would defeat the paramount congressional purpose behind Title VII"); Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321 (5th Cir. 2003) ("an otherwise valid release that waives prospective Title VII rights is invalid as violative of public policy"); accord Rogers v. Gen. Elec. Co., 781 F.2d 452 (5th Cir.1986).

This is not to say that parties cannot settle or waive existing claims for past misconduct, including the release of contested claims in exchange for something of value, such as a severance payment. See Chaplin v. NationsCredit Corp., 307 F.3d at 372-374; Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 586-588 (1st Cir. 1983); cf. Cange v. Stotler & Co., 826 F.2d 581, 594 n.11 (7th Cir. 1987) ("The waiver of substantive statutory rights after the violation has occurred is akin to a settlement of the dispute, but prospective waivers of statutory rights tend to encourage violations of the law by notifying the wrongdoer in advance that he or she can act with impunity; therefore prospective waivers uniquely can violate public policy"). Here, however, the Disclosure Documents did not purport to settle any existing dispute and, therefore, Tiblier's acknowledgment fell well short of the sort of intentional waiver that could be enforced as part of a settlement with respect to known past claims of fiduciary misconduct. Nor could the acknowledgment be enforced as a waiver with respect to the Plan's ongoing right to Dlabal's adherence to fiduciary standards. Martin, 966 F.2d at 1087-1088 (7th Cir. 1992) (trustee has continuous "duty under ERISA to review plan investments and eliminate imprudent ones"). Indeed, this Court has not recognized prospective waivers in ERISA cases and has allowed a general release to waive ERISA claims for past violations only where the waiver is knowing, voluntary and for adequate consideration. Chaplin, 307 F.3d at 372-374; accord, Rosser v. Raytheon Excess Pension Plan, 2008 WL 4791494 (N.D. Tex. Nov. 4, 2008). Before a waiver for past misconduct can be effective, the Fifth Circuit requires that the waiver involve "the intentional relinquishment or abandonment of a known right." HECI Exploration Co. v. HECI Exploration Co.Employees' Profit Sharing Plan, 862 F.2d 513, 523 (5th Cir. 1988).

Tiblier appears to have received the Disclosure Documents before the July 2009 purchase of the Adageo bonds; the Investment Management Agreement was signed almost a year earlier on May 28, 2008. R. at 393. Whether he signed the Non-Liquid Investment Risk & Disclosure Forms sometime before or shortly after the actual investments, he was not settling or compromising an existing, known claim that would make his written acknowledgment of the risks associated with the investments a valid, retrospective waiver. There was no consideration or any of the other hallmarks of an "intentional relinquishment or abandonment of a known right." HECI Exploration Co., 862 F.2d at 523. Consequently, the Disclosure Documents did not act as waivers of the Plan's rights under ERISA. In sum, the district court's decision to free Dlabal from his fiduciary responsibilities is irreconcilable with the structure of ERISA and the case law interpreting ERISA.

II. THE PROHIBITED TRANSACTION CLAIMS AGAINST DLABAL SHOULD NOT HAVE BEEN SUMMARILY DISMISSED

The district court mistakenly held that Dlabal did not violate ERISA's prohibited transaction rules by using his fiduciary authority to steer the Cash Balance Plan to the Adageo investments in which he had a financial interest. Dlabal's receipt of a commission arising from the Plan's purchase of the Adageo bonds should have raised a red flag. Instead, Dlabal's self-dealing was excused and the case dismissed for reasons that find no support in ERISA's text or purposes.

In order to safeguard the assets of ERISA plans, Congress established a strict set of "prohibited transaction" rules in section 406 of ERISA, 29 U.S.C. § 1106. [7] "The object of Section 406 was to make illegal per se the types of transactions that

[7] For instance section 406(a)(1)(D) prohibits transactions involving the "use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106 (a)(1)(D). Section 406(b)(1) prohibits a fiduciary from "deal[ing] with the assets of the plan in his own interest." 29 U.S.C. § 1106 (b)(1). Because section 3(14)(A) of ERISA, 29 U.S.C. § 1002(14)(A), defines a party in interest to include "any fiduciary," a violation of 406(b)(1) generally also results in a violation of 406(a)(1)(D). See, e.g., Leigh, 727 F.2d at 127-128 (fiduciaries' use of plan assets to aid them in a corporate takeover contest in which they were involved constituted a violation of both section 406(a)(1)(D) and 406(b)(1)).

experience had shown to entail a high potential for abuse." Cunningham, 716 F.2d at 1464-1465; accord, Lockheed Corp. v. Spink, 517 U.S. 882, 888 (1996) ("Congress enacted § 406 'to bar categorically a transaction that [is] likely to injure the pension plan.'" (citing Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 160 (1993)).

Section 406(b) specifically prohibits plan fiduciaries from engaging in self-dealing of the sort alleged in the complaint. This is true even if the transaction is fair and reasonable and there is an absence of bad faith. Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001); Lowen, 829 F.2d at 1213 (section 406(b) imposes liability "even where there is 'no taint of scandal . . . [and] no trace of bad faith,'") (citation omitted); Leigh, 727 F.2d at 127 ("The use of plan assets for any interest, financial or nonfinancial, other than an interest of the plan and its beneficiaries" violates § 1106(b)(1), even if the gamble is successful); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1258-59 (5th Cir. 1980); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 637 (W.D. Wis. 1979) (section 406(b) generally prohibits "any fiduciary from acting in a situation in which he has a personal interest which may conflict with the interest of the plan for which he acts"). In explaining this prohibition on self-dealing, longstanding regulations issued by the Department specifically state:

> Nor may a fiduciary use such authority, control or responsibility [that makes such person a fiduciary] to cause a plan to enter into a transaction

> involving plan assets whereby such fiduciary (or a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as fiduciary) will receive consideration from a third party in connection with such transaction.

29 C.F.R. § 2550.408b-2(e)(1) (2012).

Although the prohibited transaction rules are categorical, they must be read together with section 408's grant of conditional statutory exemptions from the prohibitions' reach and in light of the Secretary's authority to write regulatory exemptions, provided that he finds the particular exemption at issue to be "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan." 29 U.S.C. § 1108(a). The burden of establishing compliance with an exemption rests with the fiduciary invoking it as an affirmative defense, and the fiduciary must establish compliance with each of the exemption's conditions. Harris v. Amgen,Inc., --F.3d--, 2013 WL 2397404, *16 (9th Cir. June 4, 2013); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 602 (8th Cir. 2009); Lowen, 829 F.2d at 1215. Thus, unless Dlabal met all of the regulatory conditions for receiving compensation from Adageo under an applicable exemption, he could not use his fiduciary authority to enrich himself by steering the Plan to investments in which he had a financial interest.

In its main opinion, the district court assumed that it sufficed for Dlabal merely to show that he had generally advised Tiblier that he had a financial relationship with Adageo that could entitle him to receive payments from Adageo, but the court pointed to no exemption that permitted such self-dealing based on disclosure alone. In fact, there is no exemption that would have permitted Dlabal to steer the Trustee to the investment at issue here. For example, while section 408(g) of ERISA, creates an exemption for investment advice to individual plan participants, it generally requires that "any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property . ... do not vary depending on the basis of any investment option selected." 29 U.S.C. § 1108(g) Here, however, Dlabal neither rendered his advice to individual participants nor took care to ensure that his fees stayed level irrespective of the particular investment recommended. Instead, he appeared to have a direct financial interest in recommending the Plan's purchase of the Adageo bonds, rather than other investments, as a result of his financial arrangements with Adageo.[8]

Nevertheless, the district court cursorily concluded that "Dlabal is entitled to judgment as a matter of law on all remaining claims," R. at 496, without specifically addressing the separate prohibited transaction claims under sections

[8] There are exemptions for commissions in certain circumstances, but none of those exemptions cover the particular investment at issue in this case. Nor has Dlabal shown compliance with the conditions of these exemptions, even if they otherwise applied to the Adageo investment. See, e.g., Exemption No. 84-24, 49 Fed. Reg. 13208 (Apr. 3, 1984).

406 (a)(1)(D) and (b), 29 U.S.C. § 1106 (a)(1)(D) and (b). Nor did the court point to any applicable statutory or regulatory exemption. Then, in the 2013 Order denying reconsideration, the court provided a new rationale for the dismissal: it stated that Dlabal's receipt of a commission on the purchase of the bonds was not a prohibited transaction, not only because "the undisputed evidence shows this was disclosed to Tiblier," but also because "Dlabal's commission was credited against management fees." R. at 632 (citing Department of Labor, Advisory Opinion 97-15A (May 22, 1997) (Frost Letter)).

Although the district court referred to the Frost Letter as a prohibited transaction exemption, it is not an exemption, but rather an advisory opinion reflecting the Department's interpretation of the prohibited transaction rules as they relate to certain fee arrangements. In it, the Department stated that a bank advising plans to purchase shares of mutual funds that paid the bank a fee would violate section 406(b)(1), unless as proposed by the bank, such fees were fully disclosed in advance to the plan and used to offset investment advisory fees that the plan would otherwise pay the bank. It thus merely states that when a fiduciary passes on the benefits of third-party compensation to the plan, and does not use the compensation to increase its own compensation, he has not engaged in a prohibited transaction and does not need an exemption.

In this case, however, the incomplete factual record should have precluded the district court from concluding that Dlabal had effectively, dollar for dollar, reduced the Plan's fees to reflect the compensation from Adageo and passed the benefits of that compensation on to the Plan. Even assuming that Dlabal forgave the Plan the entire amount of the Plan's direct fees for his services, the Adageo compensation appeared to exceed the amount of those fees – Dlabal's investment fees were based on a 1.5% charge against the Plan's assets under management, whereas Dlabal received "2, 2 and a half percent, something like that" in commissions from Adageo bonds. Dlabal Deposition at p. 88, line 3, R. at 371.

On the basis of the known facts, therefore, it would appear that the Frost Letter conditions are not met insofar as Dlabal gained more from his compensation from Adageo than the Plan's fee reduction; rather, he had a stark conflict of interest with respect to the Adageo investment. Of course, these raw numbers may not convey the whole story, and it is possible that Dlabal and Adageo somehow satisfied the conditions of the Frost Letter. But Dlabal offered no such evidence. On its face, he had a clear conflict of interest and, accordingly, violated ERISA section 406(b), by steering the Plan to an investment that increased his compensation.

The district court erred when it simply assumed that the Plan effectively received the benefit of the Adageo compensation arrangement, even though the only relevant evidence pointed in the opposite direction. Rather than peremptorily dismiss the prohibited transaction claims, the court should have viewed the evidence in the light most favorable to the non-moving plaintiffs, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), analyzed it in light of the statutory text and any exemption invoked by the moving party, and decided to let the Trustees' claims go forward.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the district court's order granting summary judgment and remand the case for further proceedings.

Dated: July 19, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2013, I caused the Brief for Amicus Curiae Secretary of Labor, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered counsel of record at the following addresses:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6,864 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This 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 14-point Times New Roman font, a proportionally spaced typeface, using Microsoft Word 2010.

Dated: July 19, 2013

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