No. 19-3837

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EUGENE SCALIA, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellant,

v.

WPN CORPORATION, RONALD LABOW, SEVERSTAL WHEELING, INC. RETIREMENT COMMITTEE, MICHAEL DICLEMENTE, DENNIS HALPIN, WHEELING CORRUGATING COMPANY RETIREMENT SECURITY PLAN, and SALARIED EMPLOYEES' PENSION PLAN OF SEVERSTAL WHEELING, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Pennsylvania

OPENING BRIEF FOR THE SECRETARY OF LABOR

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JURISDICTIONAL STATEMENT

This case arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (“ERISA”). The district court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment on October 17, 2019. The Secretary timely filed a notice of appeal on December 6, 2019. Fed. R. App. P. 4(a)(1)(B); JA001.

STATEMENT OF THE ISSUES

This case is an action by the Secretary of Labor alleging violations of ERISA by the named fiduciaries of the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employees' Pension Plan of Severstal Wheeling, Inc. ("Plans"). The issues presented are:

1. Whether the district court erred in concluding that the Plans' named fiduciaries—Severstal Wheeling, Inc. Retirement Committee, Michael DiClemente, and Dennis Halpin—could not be held liable for mismanaging plan assets between November 1 and December 5, 2008, because of the limitation on liability in ERISA section 405(d)(1), 29 U.S.C. § 1105(d)(1). JA014.
2. Whether the district court erred in concluding that the named fiduciaries did not breach their fiduciary duties to monitor Ronald LaBow and WPN Corporation from November 1, 2008 until May 19, 2009, when a dispute of material fact existed as to whether their attempted monitoring and corrective actions were prudent. JA052-53.

STATEMENT OF RELATED CASES

This case has not been before this Court previously. A related case in the U.S. District Court for the Southern District of New York involved the Severstal Wheeling, Inc. Retirement Committee, who sued WPN Corporation and Ronald LaBow for substantially the same ERISA violations the Secretary alleged against WPN Corporation and Ronald LaBow in this case. Severstal Wheeling, Inc. Retirement Committee v. WPN Corporation, 119 F. Supp. 3d 240 (S.D.N.Y. 2015); JA090-110. The related case, in which the district court found WPN Corporation and Ronald LaBow liable under ERISA, was affirmed by the U.S. Court of Appeals for the Second Circuit. Severstal Wheeling, Inc. Retirement Committee v. WPN Corporation, 659 F. App'x 24 (2d Cir. 2016).

STATEMENT OF THE CASE

I. Relevant Factual Background

A. The Pension Plans and Their Assets

Severstal Wheeling, Inc., which is no longer in business, sponsored the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employees' Pension Plan of Severstal Wheeling, Inc.[1] ("Plans"), which are pension plans for the company's employees. JA006. The Severstal Wheeling, Inc. Retirement Committee served as plan administrator for both Plans. Id. That committee and its individual members, Michael DiClemente and Dennis Halpin (collectively, "Committee"), also served as named fiduciaries. Id. As a named fiduciary, the Committee was responsible for controlling and managing the administration and operation of the Plans and their assets. JA116, 118, 122.

Prior to November 3, 2008, the Plans' assets were held in a trust containing the assets of several related pension plans ("WHX Trust") and the trustee was Citibank, N.A. ("Citibank"). JA007. The WHX Trust held an investment portfolio consisting of twenty-one separate accounts, including an account managed by Neuberger Berman, LLC ("Neuberger Berman account"). JA095. The Plans' assets consisted of an interest equal to approximately 10% of the WHX Trust

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[1] The Salaried Employees' Pension Plan of Severstal Wheeling, Inc. is sometimes called the Salaried Employees' Pension Plan of Wheeling-Pittsburgh Steel Corporation.

assets. Id. Beginning in 2004, WPN Corporation ("WPN"), owned by Ronald LaBow (collectively, "LaBow"), managed the WHX Trust with complete authority over the investment of all its assets. JA041.

B. The Transfer of the Plans' Assets to the Severstal Trust

In June 2008, Citibank announced it would no longer serve as the trustee for the WHX Trust after 2008. JA041. This prompted a decision to separate the Plans' assets from the WHX Trust and to place them into a new, independent trust ("Severstal Trust") to hold just the assets of the Plans. Id. Prior to the separation, DiClemente approached LaBow about LaBow becoming the investment manager for the Severstal Trust. JA042. LaBow was still the investment manager for the WHX Trust at the time. JA092. LaBow responded to DiClemente's inquiry with interest, but they did not then sign an agreement for investment manager services nor did LaBow acknowledge in writing that he was a fiduciary of the Severstal Trust. JA042.

The Committee decided to transfer to the Severstal Trust the Plans' interest in the form of a proportional share of each of the investments and to maintain the same percentage allocations among the investments as in the WHX Trust. JA094. The Committee arranged for the transfer with the separate committee overseeing the entire WHX Trust, and LaBow was required to adhere to the committees' plan. Id.

After the decision to separate the Plans' assets into the Severstal Trust, DiClemente originally wanted LaBow to transfer the assets on September 30, 2008. JA042. LaBow did not comply. Id. Not until three weeks later did DiClemente ask why the transfer had not taken place. Id. LaBow responded that he did not transfer the assets because of market volatility and he would attempt to make the transfer on November 3, 2008. Id.

On November 3, 2008, LaBow transferred the Plans' assets from the WHX Trust to the Severstal Trust. JA043. The Plans held an undivided interest in approximately 10% of the WHX Trust assets. JA095. Instead of transferring 10% of each investment account in the WHX Trust portfolio, LaBow transferred only the $31.4 million Neuberger Berman account.[2] JA043, 095. The Neuberger Berman account was not diversified: approximately 97% of the account was invested in eleven large cap energy stocks. Id.

To consummate the transfer, Citibank, trustee for the WHX Trust and the Severstal Trust, requested that DiClemente, not LaBow, send a letter authorizing Citibank to accept the Neuberger Berman account into the Severstal Trust. JA043, 096. DiClemente accepted the transfer in writing on November 4, 2008, assuming

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[2] The Neuberger Berman account did not make up the full 10% share of the WHX Trust to which the Plans were entitled. The remainder of the value of the Plans' share was distributed as cash to the Severstal Trust on March 31, 2009, after the WHX Trust conducted a final accounting. JA110.

that the Neuberger Berman account represented the proportional allocation he had discussed with LaBow. JA043. He did not, however, review the assets himself and he did not know Neuberger Berman would cease managing the account after the transfer. Id. At the time of the transfer, the Committee did not have a contract with Neuberger Berman to manage the transferred account. JA096-97. DiClemente did not understand why the Committee had to contract separately with Neuberger Berman to manage the account when he believed LaBow should have been primarily responsible. JA146-51.

The Committee failed to realize that the transferred assets in the Neuberger Berman account were undiversified. JA043-44. Conceding that he did not check on the value or type of assets transferred into the Severstal Trust, DiClemente stated, "I don't recall why we didn't check. All I know is that we—we trusted Ron [LaBow]." JA158-59. Halpin explained that he did not see a need to check whether the assets had been transferred as instructed. JA166. DiClemente admitted he could have inspected the assets in the Severstal Trust at any time after the transfer. JA157.

C. The Committee Appointed LaBow a Month After the Transfer but Neither the Committee nor LaBow Diversified the Plans' Assets

From November 3 to December 4, 2008, the Committee did not have any written investment management agreement with LaBow, even though the assets were now in the Severstal Trust. JA042. On December 5, 2008, over a month

after the transfer, the Committee and LaBow entered into a written investment management agreement ("IM Agreement") that gave LaBow discretionary control over the Plans' assets and acknowledged LaBow's fiduciary status with respect to those assets. JA125, 136. LaBow backdated the agreement to be effective on November 1, 2008. JA042, 133. LaBow testified that the agreement memorialized the ongoing relationship he had with respect to the Plans and that he had been performing services as an investment manager since November 1, 2008. JA042. The IM Agreement was fashioned as the third amendment to the WHX Corporation Investment Consulting Agreement, an agreement that applied to the WHX Trust, but not to the Severstal Trust. JA123, 133.

Meanwhile, the Plans' assets remained undiversified. JA046. On December 12, 2008, the Committee learned that Neuberger Berman had not been managing the account since its transfer from the WHX Trust. JA043. The Committee did not then hire Neuberger Berman to manage the account nor direct LaBow to do so. JA152-56.

On December 29, 2008, Mercer Investment Consulting, Inc. ("Mercer"), the Plans' investment consultant, presented a quarterly report to the Committee indicating that the Plans had not acquired their proportionate share of the WHX Trust portfolio and the Plans' assets were undiversified. JA044. This report, nearly two months after the transfer, finally alerted the Committee that the Plans'

assets were undiversified. Id. Now concerned, DiClemente contacted LaBow and Sally King, attorney for the Committee, to help resolve the problem. Id. King proposed a plan to get more information, including the most recent account statement and an audit report, and she recommended that LaBow negotiate a fee agreement for Neuberger Berman to resume management of the account. Id.

Initially, the Committee attempted to reverse the transaction by having LaBow reallocate the assets between the Severstal and WHX Trusts to recreate the portfolio of the WHX Trust as it existed prior to the transfer. JA098-99. When this proved infeasible, the Committee asked LaBow to develop a new plan to redistribute the assets between the trusts to create a diversified portfolio in the Severstal Trust. JA044-45. LaBow provided a list of funds that he could reallocate but later backtracked and said some funds could not be used. Id. The Committee emphasized that LaBow was not to take any action with regard to the assets until he provided a formal plan for reinvesting the assets to the Committee. JA099. Throughout January and February 2009, the Committee repeatedly requested a detailed, written investment plan from LaBow, but LaBow never delivered to the Committee's satisfaction. JA045-46, 099-100.

By March 2009, the Plans' assets were still undiversified while the Committee continued trying to get LaBow to take action. JA046. Halpin eventually offered to assist LaBow in liquidating the account if necessary. Id. On

March 24, 2009, LaBow sold the Neuberger Berman account for cash. Id. After the liquidation, the Plans' assets remained undiversified, now as cash, until LaBow was fired on May 19, 2009, after new members replaced DiClemente and Halpin on the Committee. Id. From the time of the assets' transfer to LaBow's termination, the Plans suffered losses of over $7.8 million. JA088.

II. Procedural History

A. The Secretary's Allegations

The Secretary filed his Complaint in the U.S. District Court for the Western District of Pennsylvania on October 31, 2014, and an Amended Complaint on March 27, 2015. The district court stayed the case pending resolution of a lawsuit filed by the Committee against LaBow and WPN in the U.S. District Court for the Southern District of New York ("New York litigation"). After a bench trial, the district court in New York held that WPN and LaBow breached their fiduciary duties to manage the Plans prudently and to diversify investments and entered judgment for $15 million. JA106-08, 110. On August 30, 2016, the Second Circuit affirmed on appeal. Severstal Wheeling, Inc. Retirement Committee v. WPN Corp., 659 Fed. App'x 24 (2d Cir. 2016). The district court in this case then lifted the stay.

The Secretary's First Amended Complaint alleged that the Committee, DiClemente, and Halpin were named fiduciaries to the Plans and LaBow was a

functional fiduciary under ERISA section 3(21), 29 U.S.C. § 1002(21), and, from December 5, 2009, investment manager for the Plans under ERISA section 3(38), 29 U.S.C. § 1002(38). JA062-64. The Secretary claimed that LaBow failed to invest the Plans' assets prudently from December 5, 2008, to his termination as investment manager on May 19, 2009. JA064-65. The Secretary alleged that the Committee failed to manage the assets prudently from the time of the transfer on November 3, 2008, to December 5, 2008, when it signed the IM Agreement with LaBow. Id. The Secretary further alleged that the Committee failed to monitor LaBow's performance adequately after LaBow's appointment on December 5, 2008. Id. Finally, the Secretary alleged that the Committee, DiClemente, and Halpin were liable as co-fiduciaries for LaBow's fiduciary breaches under ERISA section 405(a), 29 U.S.C. § 1105(a). JA069-70.

B. Expert Opinions

To support his monitoring claim against the Committee, the Secretary proffered the expert opinion of Dr. Susan Mangiero, whose opinion the district court explicitly found admissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). JA316. Dr. Mangiero opined that the Committee did not act with the care, skill, and diligence expected of an ERISA fiduciary under fiduciary standards prevailing in 2008 and 2009. JA176-77. Dr. Mangiero emphasized that careful monitoring by fiduciaries is always important, but

especially so when a plan undergoes a major change and when financial markets are in chaos. JA177. With the creation of the Severstal Trust, a completely new trust for the Plans, the named fiduciaries should have established contracts with a trustee and an investment manager while also ensuring that internal and external operations reflected the existence of the new trust and that ERISA requirements, such as diversification, were met. JA177-78. Dr. Mangiero also described how economic circumstances, including upheaval of the financial markets, should have prompted close monitoring by the Committee. JA178. She concluded that the Committee failed to adequately monitor LaBow, ignoring "red flags" and failing to terminate LaBow despite serious concerns. JA179. As a result of the Committee's insufficient monitoring, which allowed the Plans' assets to remain undiversified for months, Dr. Mangiero estimated the Plans lost between $6.7 and $7.8 million. JA202.

In response, the Committee provided expert evidence from Dr. Bruce Stangle. He concluded that the Committee acted in accordance with industry norms in fulfilling its duty to monitor. JA241. He opined that the Committee made a good decision by consulting with Mercer and Sally King once it learned of LaBow's misadventure. JA242-43. He thought it was proper for the Committee to give LaBow time to "regain [his] footing" and it was not necessary to terminate LaBow sooner than it did. JA243, 251. Stangle also conceded that, had LaBow

transferred a proportionate share of assets from the WHX Trust to the Severstal Trust, the Severstal Trust would have outperformed the S&P 500 by over 15%. JA291.

III. Rulings to Be Reviewed

A. The Motion to Dismiss

The Committee filed a motion to dismiss, which the district court granted in part and denied in part on June 7, 2017. The Committee argued that it was not liable for the acts or omissions of LaBow because ERISA section 405(d)(1) limits liability for trustees after proper appointment of an investment manager:

> If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then . . . no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

29 U.S.C. § 1105(d)(1). The district court agreed, holding that ERISA section 405(d)(1), 29 U.S.C. § 1105(d)(1), applied to the Committee and insulated the Committee from liability for the acts or omissions of LaBow, whom it had appointed investment manager for the Plans and who was solely responsible for the investments. JA012. The court's application of this provision was in two parts. First, the court gave effect to the backdating of the IM Agreement under the common law of contracts and found that LaBow's appointment as investment manager for the Plans was effective on November 1, 2008, instead of December 5,

2008. JA013-14. Second, the court analyzed the text of section 405(d)(1), 29 U.S.C. § 1105(d)(1), to determine that it can protect a named fiduciary, even though the statute only references a "trustee," when the named fiduciary has control of plan assets and it properly appointed an investment manager to manage those assets. JA017. The court concluded that, because the backdated IM Agreement and LaBow's appointment was effective before the transfer, the Committee did not have a duty to invest the Plans' assets during or after the transfer and it could not be liable for the assets' undiversified state. JA013-14.

The court rejected the Secretary's arguments that LaBow's appointment was not effective for purposes of ERISA until December 5, 2008, when the IM Agreement was signed. JA014. It reasoned that backdating is ineffective only on a showing that LaBow did not act as investment manager from November 1 to December 5, 2008 or that the Committee intended to relieve itself by backdating the IM Agreement. Id. Because neither circumstance applied, the court had no reason to disallow the backdating. Id. The court accordingly dismissed the Secretary's claims against the Committee for failure to directly manage the Plans' assets from November 1 to December 5, 2008. JA015.

The district court denied the motion to dismiss in part by allowing the Secretary's duty to monitor claim to proceed. The court explained that, because the Committee had the power to appoint and dismiss LaBow, it had the

corresponding duty to monitor LaBow and to take corrective action when required. JA028-31. Accordingly, the Secretary filed a Second Amended Complaint claiming the Committee, DiClemente, and Halpin breached their fiduciary duties to monitor LaBow from on or about November 3, 2008 through May 1, 2009, in violation of ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). JA081.

The Secretary seeks to reverse the district court's partial grant of the Committee's motion to dismiss because the court misapplied ERISA section 405(d), 29 U.S.C. § 1105(d), in reaching the conclusion that the Committee was not directly liable for managing the Plans' assets from November 1, 2008 to December 5, 2008.

B. The Summary Judgment Motions

After discovery, on July 16, 2019, the district court granted the Secretary's motion for summary judgment against LaBow and WPN because they failed to respond to the motion and because they were collaterally estopped from contesting liability by the judgment against them in the New York litigation. JA083. The court awarded damages of $6.36 million against them. JA089. It found that total losses to the Plans were $7.82 million, based on Dr. Mangiero's calculations, but credited $1.47 million that had already been recovered from LaBow pursuant to the New York litigation. JA088-89.

On September 30, 2019, the district court granted summary judgment for the Committee, DiClemente, and Halpin and denied the Secretary's cross-motion against them. First, the court dismissed the Secretary's claim that the Committee breached its duty to ensure that the assets held in the Severstal Trust were properly diversified, relying on its prior opinion at the pleadings stage that ERISA section 405(d)(1) insulated them from liability. JA052. Second, the court reasoned that an ERISA fiduciary's duty to monitor and to take appropriate action is not triggered until the fiduciary has notice of an appointee's misconduct or had information from which misconduct would be apparent. JA056.

The district court held that the Committee did not have actual notice of LaBow's failure to diversify Plan assets until December 29, 2008, when it received a routine quarterly report from Mercer, and it acted appropriately thereafter. JA057. It rejected the Secretary's arguments that the Committee should have known to monitor LaBow more closely when LaBow delayed transferring the assets or when it learned that Neuberger Berman was not managing the account. JA058. The court found that, even in changing market conditions, it was standard to give an investor time to correct a mistake. Id. According to the court, it was "pure speculation" that the outcome would have been different had the Committee acted sooner. Id. The Secretary now appeals the district court's grant of summary judgment and dismissal of his failure to monitor claim against the Committee.

SUMMARY OF THE ARGUMENT

1. The district court's dismissal of the Secretary's mismanagement claim against the Committee based on the backdated IM Agreement is inconsistent with ERISA's statutory language and structure. ERISA imposes strict duties of prudence and loyalty on fiduciaries charged with the management and administration of employee benefit plans and their assets. 29 U.S.C. § 1104(a)(1)(A), (B). Under ERISA's detailed framework, Congress vests the plan's named fiduciary or trustee with exclusive authority to manage and invest the plan's assets, unless and until that authority is properly and timely delegated to an appointed investment manager. Id. § 1103(a)(2). The named fiduciary or trustee is not relieved of direct responsibility for the plan's assets *until* the investment manager or managers "have been appointed," id. § 1105(d)(1), and the investment manager "has acknowledged in writing that he is a fiduciary with respect to the plan," id. § 1002(38)(C). ERISA's plain text does not permit the backdating of the appointment of an investment manager to give retroactive relief for the named fiduciary or trustee from already-incurred liability for mishandling plan assets.

The Committee and its two members were named fiduciaries and the plan administrator charged with protecting the Plans' over $32 million in assets. On November 3, 2008, the Committee oversaw a major change in asset management by withdrawing the Plans' 10% share from the combined trust and transferring it to

a smaller trust that would hold just the Plans' assets. The Committee had to decide what assets to transfer and whether and how to reinvest them after the transfer. Instead of overseeing the transfer and the establishment of the new trust with the care and attention required, the Committee neglected to check on the assets at all. The Committee instead left their responsibilities to an investment company and its owner, WPN Corporation and LaBow, who indisputably breached their fiduciary duties in carrying out those responsibilities without guidance or oversight. The Committee took no action when the Plans' assets sat in an undiversified account of large cap energy stocks after the transfer, causing the Plans to lose several million dollars over the course of several months.

The district court erred in relieving the Committee of all liability for the mismanagement of the Plans' assets from November 3 to December 5, 2008, on grounds that the Committee had appointed LaBow as the Plans' "investment manager," 29 U.S.C. § 1002(38), and relieving the Committee from liability pursuant to ERISA section 405(d)(1), 29 U.S.C. § 1105(d)(1). The appointment did not occur until December 5, 2008, but the parties backdated the appointment to November 1, 2008, which predated the transfer. The district court gave effect to the backdating, but ERISA does not permit backdating of an investment manager's appointment to retroactively relieve a fiduciary of liability. The statute plainly states that a person is not an investment manager under ERISA until he "has

acknowledged in writing that he is a fiduciary with respect to the plan." 29 U.S.C. § 1002(38). The statute is equally clear that the limitation on the fiduciary's liability for managing plan assets only applies after an investment manager or managers "have been appointed," not before that appointment. 29 U.S.C. § 1105(d)(1). The logical conclusion, then, is that an investment manager must be appointed and his fiduciary status acknowledged in writing before a fiduciary can take advantage of the limit on liability granted by section 405(d)(1), 29 U.S.C. § 1105(d)(1). Enforcing a backdated investment management agreement to relieve a fiduciary's already-incurred liability simply is not permitted by ERISA's plain text.

This conclusion comports with ERISA's overall structure, which explicitly circumscribes the procedures under which a named fiduciary may delegate and allocate fiduciary duties. ERISA leaves no room for post hoc redistributions of fiduciary duty. Retroactive absolution of fiduciary duty runs afoul of ERISA's public policy against exculpatory clauses in general. 29 U.S.C. § 1110(a). The law of trusts, which informs the application of ERISA principles, is in accord. When seeking to shed or transfer its duties, a trustee must ensure it has a suitable replacement and its discharge from liability is always prospective once an appointment is fully complete—the discharge is never retroactive.

While the district court improperly ignored ERISA's prohibition of backdating in these circumstances, the court acknowledged that backdating might

be void under other circumstances. The court erred, however, in limiting those circumstances to situations involving wrongful intent when, under ERISA, prudence is the standard for all fiduciary actions, including backdating appointments. The Secretary had grounds to claim the backdating here was not only barred by ERISA, but also imprudent in these circumstances. Accordingly, the district court erred in dismissing the Secretary's claim that the Committee was liable for failing to manage the Plans' assets before LaBow's appointment as investment manager on December 5, 2008.

2. The district court also erred by concluding on motions for summary judgment that the Committee committed no fiduciary breach in monitoring LaBow. Even after LaBow's appointment on December 5, 2008, the Committee remained responsible for monitoring its appointee to assess whether he should remain the Plans' investment manager. The Secretary presented evidence that, in light of the circumstances surrounding a newly-formed trust, the Committee's monitoring required much more than routine quarterly reports, the first of which was not presented until nearly two months after the transfer. Prudence requires a monitoring procedure designed to detect potential breaches by an investment manager and, once misconduct is uncovered, prudence further requires corrective action. For nearly two months, the Committee failed to detect that LaBow was not managing the assets or that the assets were undiversified. Even after LaBow's

complete dereliction became apparent, the Committee continued to enable LaBow's inaction and failed to intervene or otherwise ensure that the assets were diversified.

3. This Court should reverse on the issue of whether the Committee can rely on a backdated appointment to dodge liability and remand because disputed material facts precluded summary judgment on whether the Committee prudently monitored LaBow.

ARGUMENT

I. The District Court Erred in Concluding as a Matter of Law that the Committee was not Responsible for Managing the Plans' Assets Before LaBow was Appointed as Investment Manager

A. Standard of Review

The standard of review of a district court's decision to grant a motion to dismiss is de novo. Phillips v. Cnty. of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008). A court deciding whether to dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) is to "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Id. at 233 (quotation marks omitted).

B. Statutory Framework Governing the Allocation of ERISA Fiduciary Duties

In enacting ERISA, Congress endeavored to curb abuses and create safeguards with respect to the establishment, operation, and administration of employee benefit plans and their assets by imposing standards of conduct, responsibilities, and obligations on plan fiduciaries. 29 U.S.C. § 1001(a), (b); see Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 81 (3d Cir. 2012) (describing ERISA as "[c]rafted to bring order and accountability to a system of employee benefit plans plagued by mismanagement"). ERISA codified, among other things, fiduciary

duties of loyalty and care for those charged with the management and administration of employee benefit plans and their assets. 29 U.S.C. § 1104(a)(1)(A), (B). A person may be an ERISA fiduciary in three ways:

> (1) being named as the fiduciary in the instrument establishing the employee benefit plan, 29 U.S.C. § 1102(a)(2); (2) being named as a fiduciary pursuant to a procedure specified in the plan instrument, e.g., being appointed an investment manager who has fiduciary duties toward the plan, 29 U.S.C. § 1102(a)(2); 29 U.S.C. § 1002(38); and (3) being a fiduciary under the provisions of 29 U.S.C. § 1002(21)(A).

Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Secs., Inc., 93 F.3d 1171, 1179 (3d Cir. 1996). In turn, ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), provides that 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.

Notably, this provision "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties." Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (citation omitted).

Congress provided a detailed framework for allocating and delegating fiduciary responsibility so that the scope of each fiduciary's responsibility is clear

and Congress declared void any agreement to relieve a fiduciary of those responsibilities. That structure is critical to the issues in this case. ERISA specifically addresses the allocation and delegation of responsibility among particular types of fiduciaries: named fiduciaries, trustees, and investment managers. Any allocation begins with the plan instrument, which must be in writing. 29 U.S.C. § 1102(a)(1). Foremost, plans must provide for at least one named fiduciary who has primary authority to control and manage the operation and administration of the plan. Id. The named fiduciaries may be either named in the plan instrument or chosen, through a procedure specified in the plan, by the plan sponsor. Id. § 1102(a)(2). A named fiduciary is important so that fiduciary responsibilities "are focused with a degree of certainty." Birmingham v. SoGen-Swiss Int'l Corp. Ret. Plan, 718 F.2d 515, 522 (2d Cir. 1983).

ERISA requires plans to describe any procedure for allocating or delegating responsibilities for the operation or administration of the plan, including any procedure for named fiduciaries to designate other persons to carry out fiduciary responsibilities. Id. § 1102(b)(2) (referring to 29 U.S.C. § 1105(c)(1)). The designee thereby becomes a fiduciary for ERISA purposes. See id. § 1002(21)(A). Generally, once a designation is made, the named fiduciary is not liable for the designee's conduct as long as the named fiduciary did not violate his duties of prudence and loyalty in making or continuing the designation and in monitoring

the designee's performance. Id. §§ 1104(a)(1)(A)-(B), 1105(c)(2). The named fiduciary may also be liable as a co-fiduciary for the designee's fiduciary breaches under ERISA section 405(a). Id. § 1105(a), (c)(2)(B).

Along with named fiduciaries, trustees play an important role under ERISA. ERISA requires that all plan assets be held in trust by one or more trustees who are either named in the trust instrument, named in the plan, or appointed by a named fiduciary. 29 U.S.C. § 1103(a). ERISA charges trustees with exclusive authority and discretion to manage and control plan assets, except in two instances. Id. First, to the extent the trustee is subject to a named fiduciary's directions, the trustee must follow the directions unless they violate plan terms or ERISA. Id. § 1103(a)(1). Second, the trustee does not have exclusive authority over plan assets to the extent that authority has been properly delegated to an investment manager. Id. § 1103(a)(2).

Named fiduciaries may appoint investment managers to share in trustee responsibilities if provided for in the plan instrument. 29 U.S.C. § 1102(c)(3). "Investment manager" is a defined term in ERISA and its meaning is limited to any fiduciary (other than a trustee or named fiduciary) "[w]ho has the power to manage, acquire, or dispose of any asset of a plan," "is registered as an investment advisor" under securities laws, and "has acknowledged in writing that he is a fiduciary with respect to the plan." Id. § 1002(38). Notably, the statute has formal

requirements to be an "investment manager," which contrasts with the functional fiduciary definition of section 3(21), 29 U.S.C. § 1002(21).

If an investment manager who satisfies the statutory definition has been appointed, no trustee is liable for the acts or omissions of the investment manager. Id. § 1105(d). The investment manager has exclusive authority to manage plan assets and the trustee is not responsible for investing or otherwise managing those assets. Id. This limitation on liability, at issue in this case, is especially significant because it allows a fiduciary to be shielded from direct liability for the management of plan assets, including from co-fiduciary liability, as long as the appointing fiduciary did not knowingly participate in, enable, or conceal the investment manager's breach. See 29 U.S.C. §§ 1105(a), (d)(1). A named fiduciary who appoints an investment manager must do so prudently and, after the appointment, must prudently monitor the manager and remove him if necessary. JA031; see also 29 U.S.C. § 1104(a)(1)(A), (B); Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996).

Lastly, ERISA section 410(a), 29 U.S.C. § 1110(a), invalidates any provision in an "agreement or instrument which purports to relieve a fiduciary from responsibility or liability for" any fiduciary duty under ERISA, except as provided by the allocation and appointment provisions of sections 405(b)(1) or (d), 29 U.S.C. § 1105(b)(1) or (d). 29 U.S.C. § 1110(a).

In sum, these detailed, coordinated provisions emphasize ERISA's focus on written, formal allocation of responsibility between named fiduciaries, trustees, and investment managers. "ERISA was deliberately structured so that legal responsibility for management of ERISA plans would be clearly located." Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1218 (2d Cir. 1987). The statute makes clear that allocation of fiduciary duty is a weighty matter. Before any delegation may occur, the plan instrument must delineate a process for such delegation and the named fiduciary must adhere to the process for the delegation to be valid. 29 U.S.C. § 1102(b)(2). Particularly when delegating responsibility to an investment manager, even if provided for by the plan, named fiduciaries must uphold their stringent responsibilities of prudence and care under ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1). See Restatement (Third) of Trusts § 80 cmt. d(2) (2007) (fiduciary must exercise prudence in establishing the terms of delegation). The investment manager must also explicitly agree in writing to the allocation to be a proper investment manager under ERISA. 29 U.S.C. § 1002(38). Written instruments are especially important because they ensure that plan participants have notice of the persons responsible for the plan and its assets. See 29 U.S.C. § 1024(b)(2), (b)(4) (requiring that any "contract, or other instrument under which the plan is established or operated" be made available to plan participants and beneficiaries).

C. The Committee was Primarily Responsible for the Plans' Assets

It is undisputed that the Committee and its members, DiClemente and Halpin, were named fiduciaries for the relevant time period, beginning on November 1, 2008. JA041. The named fiduciaries had the right to direct the Plans' custodial trustee, which is a "directed" trustee, 29 U.S.C. § 1103(a)(1). JA041, 092. The Committee also served as Plan Administrator for both Plans. JA116, 122. Being named fiduciaries carries special significance, because the Committee members "jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1); see also Jordan v. Fed. Express Corp., 116 F.3d 1005, 1014 n.16 (3d Cir. 1997). Indeed, certain offices or positions of an employee benefit plan, such as a plan administrator, "'by their very nature require persons who hold them to perform one or more [of the] functions' described in ERISA's definition of a 'fiduciary,' provided in section 1002(21)(A)." Dawson-Murdock v. Nat'l Counseling Grp., Inc., 931 F.3d 269, 276 (4th Cir. 2019) (quoting 29 C.F.R. § 2509.75-8, D-3); see also 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).

As the named fiduciary, the Committee had an especially important role because the Plans were undergoing a major change as assets were transferred from the WHX Trust, where they had always been held, to a newly-established

independent trust. Such a separation is significant in the life of the Plans. When their assets were in the WHX Trust, the Plans, along with all the other pension plans with assets in the trust, held a percentage interest in the trust's undivided assets. JA095. After the transfer, the value of the assets depended entirely on the performance of the Severstal Trust. The Committee had to determine precisely how to transfer the assets, verify that the transferred assets equaled the Plans' 10% share in the WHX Trust, and ensure that the assets were properly invested going forward. Cf. Opinion No. 82-31A, Letter to Mr. Brent R. Armstrong, Esq., 1982 WL 21214, at *4 (July 14, 1982) (describing when a benefit plan participates in a group trust, "the assets of the plan include an undivided interest in each of the underlying assets of [the group trust]"). Indeed, here, Citibank turned to the Committee, not to LaBow, for directions to transfer the Neuberger Berman account. JA043. The Department has observed, in analogous circumstances, that transfer of a plan's interest required the fiduciaries to "fully understand the mechanics" of the transaction and the "risks" involved, based on "the disclosure of all relevant information." See Opinion No. 98-06A, Letter to Mr. Donald J. Myers, 1998 WL 441031, at *3 (July 30, 1998). It was paramount that the Plans here undergo this transition to a new trust under thoughtful, prudent management. See generally George Gleason Bogert, The Law of Trusts and Trustees § 512 (3d ed. 2019).

Importantly, the Committee had fiduciary status regardless of whether LaBow was also a fiduciary to the Plans. By the time the district court adjudicated the case below, the court in the New York litigation had already found LaBow to be a functional fiduciary under ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii), because he had responsibility for providing investment advice for a fee with respect to the Plans from before November 3, 2008, to May 19, 2009. JA105. The district court in this case recognized LaBow's fiduciary status. JA085. Notably, that status stemmed from his meeting the functional test under section 3(21)(A), 29 U.S.C. § 1002(21)(A), *not* from a duly-executed appointment as an ERISA investment manager under section 3(38), 29 U.S.C. § 1002(38), or any formal delegation of the named fiduciary's authority. JA105. From November 1 to December 5, 2008, then, the Committee and LaBow were both fiduciaries in their management of the Plans' assets.

D. Backdating of the IM Agreement Is Ineffective

Having established that the Committee was the named fiduciary primarily responsible for the Plans' assets, the next question is whether it was relieved of that responsibility between November 1, the date to which the IM Agreement was backdated, and December 5, 2008, the date the IM Agreement was signed. The district court found at the motion to dismiss stage that the Committee did not have responsibility as a matter of law for the Plans' assets because, under the common

law of contracts, the IM Agreement's backdating was effective and fiduciary responsibilities were allocated retroactively solely to LaBow as an investment manager beginning November 1, 2008. JA015. The court then applied ERISA section 405(d)(1), 29 U.S.C. § 1105(d)(1), to retroactively relieve the Committee from liability for LaBow's fiduciary breaches and from any direct obligation to invest the Plans' assets after November 1, 2008. JA012, 015.

ERISA, however, does not allow for the retroactive appointment of an investment manager nor can the limitation on liability in Section 405(d)(1), 29 U.S.C. § 1105(d)(1), apply retroactively based on such an appointment. To allow the district court's decision to stand would undermine the structure of ERISA, which requires deliberate action and notice when allocating a named fiduciary's or a trustee's duties. Further, while the statutory text controls, the common law of trusts also counsels that backdating to relieve liability is prohibited. And, alternatively, even if backdating the IM Agreement could be tolerated under ERISA, the court should have considered whether the Committee was prudent in agreeing to the backdating.

1. ERISA's Text and Structure Prohibit Backdating of the IM Agreement

ERISA is specific about the application of the limits on liability in section 405(d)(1), 29 U.S.C. § 1105(d)(1), which relieves trustees from their future responsibility over plan asset management after the appointment of an investment

manager. When interpreting ERISA, courts "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) (citation omitted). Based on the statute's plain language and ERISA's structure emphasizing formal, written allocation of fiduciary duties, the most reasonable reading of section 405(d)(1), 29 U.S.C. § 1105(d)(1), rejects the possibility that its limitation on liability applies to retroactive appointments of an investment manager. The provision states:

> If an investment manager or managers have been appointed . . . no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan . . . .

29 U.S.C. § 1105(d)(1) (emphasis added). Two phrases play an important role in this case—"investment manager" and "have been appointed"—each of which will be discussed in turn.[3]

First, "investment manager" is a defined term under the statute and does not encompass everyone performing investment management services for an employee benefit plan. See Glaziers & Glassworkers Union Local No. 252 Annuity Fund, 93 F.3d at 1179 (listing fiduciaries who are appointed as investment managers under

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[3] The Secretary's argument is not about backdating generally, but about backdating as it relates to a fiduciary's status as an "investment manager" under section 3(38), 29 U.S.C. § 1002(38), and the application of the liability limits of section 405(d), 29 U.S.C. § 1105(d).

29 U.S.C. §§ 1002(38) and 1102(a)(2) separately from functional fiduciaries under 29 U.S.C. § 1002(21)(A)). A fiduciary is only an ERISA investment manager when he, among other requirements, "*has acknowledged* in writing that he is a fiduciary with respect to the plan." 29 U.S.C. § 1002(38) (emphasis added). The use of the past tense—"has acknowledged"—requires that a fiduciary's written acknowledgement of fiduciary status take place before that fiduciary qualifies as an investment manager under ERISA section 3(38), 29 U.S.C. § 1002(38). Cf. United States v. Atiyeh, 402 F.3d 354, 364 (3d Cir. 2005) ("Congress knew how to use the past tense."). Put simply, a fiduciary is not an "investment manager" for ERISA purposes unless and until he acknowledges his fiduciary status in writing.

Second, Congress's use of the present perfect tense in section 405(d)(1)'s antecedent clause ("If an investment manager or managers *have been appointed*") indicates the appointment must be completed before the consequent follows ("no trustee shall be liable"). 29 U.S.C. § 1105(d)(1); see, e.g., United States v. Wilson, 503 U.S. 329, 333 (1992); Richmond Med. Ctr. For Women v. Herring, 570 F.3d 165, 179 (4th Cir. 2009) (en banc). "The present-perfect tense refers to an action that is now completed, or continues up to the present." Santos-Reyes v. Attorney Gen. of U.S., 660 F.3d 196, 199 (3d Cir. 2011) (quotation marks omitted). Indeed, "the present perfect tense . . . denot[es] an act that has been completed." Barrett v. United States, 423 U.S. 212, 216 (1976). Here, the use of the present perfect tense

("have been appointed") was deliberate given Congress's use of other tenses in the same sentence ("shall be" and "be under"). See Wilson, 503 U.S. at 333 ("Congress' use of a verb tense is significant in construing statutes."); In re Restivo Auto Body, Inc., 772 F.3d 168, 174-75 (4th Cir. 2014) (the present perfect tense means something was already in existence in contrast to use of other tenses); Reuther v. Trustees of Trucking Emp. of Passaic & Bergen Cnty. Welfare Fund, 575 F.2d 1074, 1077 (3d Cir. 1978) (declining to expand on the verb tense chosen by Congress). Based on the text of section 405(d)(1), the appointment of the investment manager must precede the acts or omissions for which no trustee "shall" (starting now) be liable. 29 U.S.C. § 1105(d)(1).

Taking these provisions together, the most logical reading of ERISA is that the investment manager must be properly appointed, in writing and in real time, before triggering the limitation on liability in section 405(d)(1), 29 U.S.C. § 1105(d)(1). The statute does not allow for backdating an investment manager's appointment so that other fiduciaries can escape liability after the commission of culpable acts or omissions. See Restivo, 772 F.3d at 176 (explaining that an antecedent requirement described in the present perfect tense cannot be satisfied by "retroactive" application). LaBow was not an "investment manager" for the Severstal Trust under ERISA until December 5, 2008, when he signed the IM Agreement acknowledging his fiduciary status. Likewise, his appointment as

"investment manager" did not occur until December 5, 2008, which is when the limitation on liability provided by section 405(d)(1) begins. Because section 405(d)(1)'s limitation on liability did not begin until the actual signing of the IM Agreement on December 5, 2008, the Committee, as named fiduciary, was responsible for the Plans' assets from November 1, 2008, to December 5, 2008, and may be found directly liable for fiduciary breaches that occurred during that period. See Fink v. Nat'l Sav. & Tr. Co., 772 F.2d 951, 956 (D.C. Cir. 1985) (finding that, where appointment of an investment manager did not occur, the trustee "reserved for itself the full panoply of fiduciary duties under ERISA, as well as the duty to manage the funds' assets prudently").

Construing the statute to prohibit backdated investment management agreements comports with ERISA's purpose and structure. The statute is clear about when and how fiduciary responsibility may be allocated, particularly with regard to the management and control of plan assets because "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 n.8 (1985). The named fiduciary is significant "so that responsibility for managing and operating the Plan—*and liability for mismanagement*—are focused with a degree of certainty." Birmingham, 718 F.2d at 522 (emphasis added). Here, the Committee's failure to secure a properly-executed investment management

agreement with the required written acknowledgement of fiduciary status at the time of the transfer is evidence of the Committee's failure to exercise prudence, not a basis for relief from fiduciary responsibility.

A post hoc redistribution of the named fiduciary responsibility is not valid under ERISA when such redistribution would relieve the named fiduciary from any already-incurred liability regardless of contract law. Cf. Dardaganis v. Grace Capital, Inc., 889 F.2d 1237, 1241 (2d Cir. 1989) ("A rule of state contract law that would effectively vary the terms of the written document or permit trustees to waive the right of beneficiaries to strict adherence by fiduciaries would impair these federal [ERISA] policies."). ERISA section 410(a) provides that agreements to relieve a fiduciary of responsibility are void as against public policy. 29 U.S.C. § 1110(a). Where an explicitly exculpatory provision is banned under ERISA, it follows that backdating, which has the same effect here, would likewise be banned.[4] It is undisputed that, in the time prior to signing the IM Agreement, the Plans' assets were undiversified and a co-fiduciary, LaBow, had committed fiduciary breaches in failing to manage the assets. JA043, 105-108. To allow the

[4] ERISA section 410(a)'s prohibition has a limited exception where ERISA section 405(d) "provides," but section 405(d) does not "provide" for retroactive release of responsibility. 29 U.S.C. §§ 1110(a), 1105(d). Given the public policy against absolution of ERISA fiduciary liability, courts must read any exception to section 410(a), 29 U.S.C. § 1110(a), narrowly. See, e.g., Commissioner v. Clark, 489 U.S. 726, 739 (1989).

named fiduciary, the Committee, to then shirk responsibility for these breaches by backdating the IM Agreement would run afoul of ERISA.

2. The Common Law of Trusts Does Not Support Backdating of the IM Agreement

When the statute is dispositive, as it is here, the Court need not examine common law to determine whether backdating the IM Agreement is permissible. See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 12 (2004). The district court erred in this regard by relying on the common law of contracts to determine whether backdating was effective. JA048. Even if common law was relevant here, the district court further erred by examining contract law because, when considering fiduciary status and responsibility under ERISA, courts must look to the law of trusts. E.g., Cent. States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570 (1985) (interpreting trust documents using the law of trusts, because "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility"); Glaziers & Glassworkers Union Local No. 252 Annuity Fund, 93 F.3d at 1182 (looking to law of trusts when determining the duration of a fiduciary relationship established by contract). One important reason to look at the law of trusts in this context is that the IM Agreement implicates not only the contractual relations between LaBow and the Committee, but also relations with plan participants and the trust. See, e.g., Secretary of Labor v. Doyle, 675 F.3d 187, 202 (3d Cir. 2012) ("[A] trustee

must also take prudent precautions, such as by providing for a 'suitable and trustworthy replacement,' to ensure that his resignation does not harm the Fund or its beneficiaries"); 2 Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts §§ 106.1 at 99-100 (4th ed. 1987).

Under the law of trusts, the answer is clear: the IM Agreement's backdating has no effect in relieving the Committee of responsibility. When a trustee resigns and attempts to transfer responsibility (and liability) to another person, trust law may impose several requirements, which parallel ERISA provisions. Not surprisingly, transfers of fiduciary duty are treated like resignations, because a transfer necessarily includes a resignation. "From the general rule that a trustee cannot resign by the trustee's own act alone follows the corollary that the trustee cannot accomplish the equivalent of resignation by transferring the trust to another." Bogert, The Law of Trusts and Trustees § 512 ("Trustee attempts to be freed from the trust by transferring it to another"); see also id. § 511 n.26 ("An attempted transfer of the trust has been held to be a resignation."). Here, the IM Agreement attempts to transfer responsibility from the named fiduciary, the Committee, to LaBow.

Four features of trust law are relevant to the ERISA analysis here. First, "[u]nder traditional trust law, a trustee is permitted to resign in accordance with the terms of the trust, with the consent of the beneficiaries, or with a court's

permission." Ream v. Frey, 107 F.3d 147, 154 (3d Cir. 1997). The first two options neatly align with ERISA's emphasis on following plan procedures for allocating fiduciary responsibilities, 29 U.S.C. §§ 1102(b)(2), 1105(c), and the importance of notice to plan participants about the reallocation, Ream, 107 F.3d at 154; see also Allison v. Bank One-Denver, 289 F.3d 1223, 1237 (10th Cir. 2002) (faulting ERISA fiduciary for failing to provide sufficient notice to plan participants).

Second, a resigning trustee or fiduciary must ensure the trust has a suitable replacement, which accords with ERISA's statutory requirement that a named fiduciary must satisfy his fiduciary duties of prudence when appointing investment managers. 29 U.S.C. § 1105(c)(2); Ream, 107 F.3d at 154. "Under the traditional law of trusts, a trustee cannot relieve himself or herself of duties under the trust simply by conveying the trust assets to another willing to serve." Glaziers & Glassworkers Union Local No. 252 Annuity Fund, 93 F.3d at 1183. Rather, a resigning fiduciary must continue to exercise prudence in, for example, advising beneficiaries of information needed for their own protection, at least until a proper successor is in place. Id.

Third, the law of trusts may add formal requirements to provide adequate notice that the successor trustee accepted its fiduciary responsibility. Many states codified written notice or other formal resignation requirements for trustees to

transfer their responsibilities. E.g., Bogert, The Law of Trusts and Trustees § 511 n.4. A writing requirement comports with ERISA's and the trust law's concern that fiduciary duties be memorialized to prevent corruption and to promote honest bargaining. See, e.g., Lowen, 829 F.2d at 1219 (describing the enduring quality of fiduciary status, and how "[u]nder ERISA, an investment manager's fiduciary obligations may not be turned on and off like running water"). A writing requirement is particularly appropriate when a transfer of responsibilities includes dominion over trust assets. E.g., Bogert, The Law of Trusts and Trustees § 149 (recording required for transfer of trust), but see id. § 150 (noting variations on how trustees can accept trustee status, and statutes or trust documents may designate methods of acceptance, including written, oral or inferred from conduct).

Fourth, and most important, trust law does not allow a resigning trustee to escape liability retroactively. A "trustee cannot simply resign from the office of trustee and thereby avoid the responsibilities attached to the office." Bogert, The Law of Trusts and Trustees § 511; accord Restatement (Second) of Trusts § 106 cmt. b (1959) ("The resignation of the trustee does not, of course, relieve him from liability for breaches of trust committed prior to his resignation."); Scott, The Law of Trusts §§ 106.1-106.2. "When a trustee resigns, the resignation does not discharge any liability for acts that occur before the resignation." Bogert, The Law of Trusts and Trustees § 511 at 12. The common law of trusts did not examine the

trustees' "intent." Id. n.27 (citing statutes setting a categorical rule); see generally Scott, The Law of Trusts § 106 ("The mere fact that he wishes to resign is not sufficient; it is not enough that he conveys the trust property to another who is willing to accept the trust and perform the duties of the trustee.").

Accordingly, the trustee cannot "backdate" a resignation, which would purport to avoid responsibility for periods when he already served as trustee. The trust law has stringent requirements to provide notice, to comply with fiduciary duties in transferring power, and to adhere to applicable formalities before a transfer of responsibility over trust assets is effective. Consequently, while the Court need not look past the plain text of ERISA to determine that the backdating here was invalid, interpreting the text in light of trust law yields the same result. The Committee could not, under ERISA or trust law, backdate its transfer of fiduciary responsibilities to LaBow to avoid liability for its past actions or omissions.

3. Alternatively, the Committee Is Liable for Imprudently Appointing LaBow by Backdating an IM Agreement

Though giving effect to the backdating, the district court posited that backdating may be rendered void upon a showing that the Committee *intended* to exculpate itself of its investment management by backdating the IM Agreement. JA015. The district court granted the Secretary's request for leave to file a second amended complaint and, specifically, permitted the Secretary to reassert and restate

his failure to invest claim by pleading that the purpose of backdating the IM Agreement was to relieve the Committee from liability during a time when it, in fact, retained control over the assets. Id. Limiting the Secretary's failure-to-invest claim to an allegation that the Committee purposefully or intentionally relieved itself of liability was erroneous because the standard to judge fiduciary conduct, including backdating, should be prudence and loyalty, not just intent. See 29 U.S.C. § 1104(a); Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) ("[A] pure heart and an empty head are not enough"); see also Pension Benefit Guar. Corp. v. Findlay Indus., Inc., 902 F.3d 597, 606-07 (6th Cir. 2018) (applying a categorical test to prevent employer from dissipating assets by certain means, even if employer did not intend to escape ERISA liability). Under ERISA section 405(c)(2), the named fiduciary must exercise his duty of care when allocating fiduciary responsibility to another. 29 U.S.C. § 1105(c)(2). "[A]n ERISA fiduciary's obligations to a plan are extinguished only when adequate provision has been made for the continued prudent management of plan assets." Glaziers & Glassworkers Union Local No. 252 Annuity Fund, 93 F.3d at 1183 (citations omitted). The standard under ERISA requires fiduciaries to act, even when allocating responsibilities, "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . . ." 29 U.S.C. § 1104(a)(1)(A), (B).

Prudence, not wrongful intent alone, dictates the propriety of allocations of fiduciary responsibilities here.

There is ample evidence that backdating LaBow's appointment to include a period when LaBow committed fiduciary breaches was imprudent. Prior to his appointment on December 5, 2008, LaBow had already allowed the Plans' assets to sit for a month in an undiversified account that he himself chose for the Severstal Trust. He had taken no action to diversify or otherwise manage the Plans' assets. JA043, 097. Moreover, LaBow had a known structural conflict of interest in the transaction between the WHX Trust and Severstal Trust because both trusts presumably had an interest in keeping or acquiring the best investment portfolio and LaBow acted for both.[5] The Committee undeniably knew that LaBow served as investment manager to the WHX Trust, JA041-42, yet it hired LaBow to determine which assets of the WHX Trust to transfer to the Severstal Trust without taking any steps to ensure that LaBow was acting solely in the interest of the Plans. Indeed, in late December 2008 and into 2009, the Committee had to work with LaBow, who also managed the WHX assets, in an attempt to reallocate the assets between the two trusts. JA044, 098.

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[5] ERISA section 404 requires fiduciaries to act "solely in the interest of the participants and beneficiaries . . ." 29 U.S.C. § 1104(a)(1). Section 406(b)(2) also states that a fiduciary must not "in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan . . . ." 29 U.S.C. § 1106(b)(2).

The Committee wholly failed to inspect the assets under LaBow's care or to otherwise investigate LaBow's fitness for the role. Such actions and omissions demonstrate that the Committee was imprudent in backdating LaBow's appointment, based on what it knew or should have known as a prudent named fiduciary when it signed the IM Agreement. See Doyle, 675 F.3d at 202 ("Finally, when confronted with suspicious circumstances, a trustee may be required to investigate potential risks to a plan."); Bd. of Trustees of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assocs., Inc., 237 F.3d 270, 273 (3d Cir. 2001) (recognizing "the high standard of care trust law imposes upon those who handle money or other assets on behalf of another" (citation omitted)); Whitfield v. Cohen, 682 F. Supp. 188, 196 (S.D.N.Y. 1988) (finding that, where appointment of an investment manager was faulty, the named fiduciary cannot shield himself from liability for the investment manager's acts or omissions with respect to the plan assets). At the very least, even if this Court does not reverse the district court's decision effectuating the IM Agreement's backdating based on ERISA's statutory provisions, a remand is appropriate to allow the Secretary to plead that backdating of the IM Agreement is ineffective because the Committee imprudently appointed LaBow through an agreement backdated to November 1, 2008. The court erroneously limited amendment to allegations of wrongful intent. See, e.g., Bascuñán v. Elsaca, 874 F.3d 806, 819 n.53 (2d Cir. 2017) (vacating

district court's denial of a motion to amend the complaint because it was based on legal error).

E. The Committee Is Liable for Breaches Between November 1 and December 5, 2008

Because the backdating was invalid, the fiduciary duty to manage the Plans' assets during and immediately after the transfer rested squarely on the Committee's shoulders. The Committee breached this duty by failing to investigate the composition of the portfolio, JA043, and failing to take any action to diversify the assets, JA044. "A fiduciary must prudently select investments, and failure to 'monitor . . . investments and remove imprudent ones' may constitute a breach." Sweda v. Univ. of Penn., 923 F.3d 320, 328 (3d Cir. 2019) (quoting Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828-29 (2015)); accord Restatement (Third) of Trusts § 92. Indeed, this Court has described "the most basic of ERISA's investment fiduciary duties [to be] the duty to conduct an independent investigation into the merits of a particular investment." In re Unisys Sav. Plan Litig., 74 F.3d 420, 435 (3d Cir. 1996).

Here, the district court found that "[DiClemente] relied on LaBow's representations rather than review the assets being transferred." JA043. A fiduciary's belief that the Plans' assets were sufficiently diversified, without confirmation, is not enough when "[t]he law expects more than good intentions." Sweda, 923 F.3d at 329. Such a dereliction violated ERISA's prudence

requirements and resulted in significant losses to the Plans as their assets sat undiversified in an unmonitored account for over a month. See In re Unisys, 74 F.3d at 434 (explaining that a prudent fiduciary employs the "appropriate methods to investigate and determine the merits of a particular investment"). Additionally, even after its appointment of LaBow on December 5, 2008, the Committee remained under an obligation to correct its initial failure to diversify the assets. See, e.g., In re Unisys Corp. Retiree Med. Benefit ERISA Litig., 242 F.3d 497, 513 (3d Cir. 2001) (Mansmann, J., concurring) (recognizing an ongoing duty to correct prior misstatements by the fiduciary); cf. 29 U.S.C. § 1105 (duty to correct co-fiduciary breaches).

Because the Committee was directly responsible for the Plans' assets from November 1 to December 5, 2008, it is also subject to co-fiduciary liability under ERISA sections 405(a)(2) and (a)(3), 29 U.S.C. § 1105(a)(2), (a)(3). Section 405(a) imposes liability on one fiduciary for another's breach

> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach.

29 U.S.C. § 1105(a)(2). Because the Committee abdicated its role in managing the Plans' assets, thus enabling LaBow to breach his duties as a functional fiduciary who was giving investment advice for a fee, the Committee may be held liable as a co-fiduciary under section 405(a)(2), 29 U.S.C. § 1105(a)(2). The Secretary has

alleged a plausible claim that the Committee was directly responsible for the investments from November 3 to December 5, 2008 and had breached their duties as both fiduciary and co-fiduciary.

As the fiduciary responsible for the initial period of the investments in the new trust, the Committee was liable for all losses "resulting from" its breaches from November 1 to December 5, 2008, 29 U.S.C. § 1109, and any losses incurred in subsequent periods that resulted from its mismanagement of the original investments. Moreover, as co-fiduciary, the Committee is liable for LaBow's breaches if it had "knowledge of a breach" from November 3 to December 5, 2008, and, at any time, failed to make "reasonable efforts under the circumstances to remedy the breach," 29 U.S.C. § 1105(a)(3).

Despite the district court's reasoning to the contrary, JA015, the Committee's liability does not depend on whether LaBow was also acting as a fiduciary for the Plans. In defining "fiduciary," ERISA "expand[ed] the universe of persons subject to fiduciary duties" to include all those with functional control and authority over the plan. Mertens, 508 U.S. at 262; 29 U.S.C. § 1002(21). Indeed, by providing for co-fiduciary liability, ERISA contemplates that multiple fiduciaries may have overlapping responsibilities. 29 U.S.C. § 1105(a); see id. §1105(b) (joint trustees). Such is the case here, where *both* the Committee and LaBow had the fiduciary responsibility to manage the Plans' assets from

November 1 to December 5, 2008. The Committee served as the Plans' named fiduciary charged with "general administration of the Plan[s] and the responsibility for carrying out the provisions of the Plan[s]." JA116, 122. At the same time, LaBow was a fiduciary under ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii), because he rendered investment advice for a fee (though not as an "investment manager" as defined in ERISA section 3(38)). JA085, 105.

Accordingly, this Court should reverse the district court's decision dismissing the Secretary's claims against the Committee for its failure to invest the Plans' assets prudently from November 1 to December 5, 2008 and for co-fiduciary liability based on LaBow's fiduciary breaches.

II. The District Court Erred in Finding that the Committee Satisfied its Duty to Monitor when Disputes of Material Fact Exist

A. Standard of Review

The standard of review for a district court's grant of summary judgment is plenary. Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993). The reviewing court "is required to apply the same test the district court should have utilized initially." Id. (citation omitted). Under Federal Rule of Civil Procedure 56, a court is to grant summary judgment on a showing "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

B. Material Factual Disputes Precluded Summary Judgment on the Duty to Monitor Claims

The parties do not dispute that, once the Committee appointed LaBow, it assumed a duty to monitor LaBow's performance, JA030, or that LaBow committed fiduciary breaches while under the Committee's watch, JA053, 085. On cross motions for summary judgment, the district court ruled that the Committee sufficiently fulfilled its duty to monitor LaBow prudently. The district court erred because it started its analysis with the procedure in place—quarterly reports from Mercer—and did not consider the "other facts and circumstances relevant to the choice of the procedure." Howell v. Motorola, Inc., 633 F.3d 552, 573 (7th Cir. 2011) (quoting 29 C.F.R. § 2509.75-8, FR-17). The court ignored the Secretary's material expert, documentary, and testimonial evidence that the monitoring was woefully inadequate and the facts and circumstances required more than just routine quarterly reports.

ERISA's prudence standard turns on the fiduciary's diligent process, not on its subjective beliefs. See Sweda, 923 F.3d at 329 ("[A] court assesses a fiduciary's performance by looking at process rather than results . . ."); see also Graden v. Conexant Sys., Inc., 574 F. Supp. 2d 456, 467 (D. N.J. 2008); Restatement (Third) of Trusts § 80. The statute's objective standard demands that fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and

familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Where a fiduciary has the power to appoint, retain, and remove plan fiduciaries, the fiduciary also has the duty to "monitor appropriately" those subject to removal. Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996); accord Leigh v. Engle, 727 F.2d 113, 134–35 (7th Cir. 1984). "The duty exists so that a plan administrator or sponsor cannot escape liability by passing the buck to another person and then turning a blind eye." Howell, 633 F.3d at 573. In interpreting prudent monitoring under section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), both Howell and Coyne reached the same conclusion as the Department of Labor in guidance stating that appointing fiduciaries should, at a minimum, review the performance of appointed fiduciaries at reasonable intervals "in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and *satisfies the needs of the plan*." 29 C.F.R. § 2509.75-8, FR-17 (interpretive bulletin) (emphasis added); see Coyne, 98 F.3d at 1465-66; Howell, 633 F.3d at 573.

A review of the evidence demonstrates that the "needs" of the Plans were unique: the Plans' assets had to be transferred to a new trust and invested in a way that enabled the Plans to continue operations with a smaller trust, all while the financial markets were in chaos. See JA177-78. In granting summary judgment,

the district court focused on when the Committee had actual notice of LaBow's misconduct. JA057. Instead, the inquiry should be on whether the Committee's monitoring procedure properly considered the Plans' unique circumstances such that the Committee should have received notice of misconduct much earlier and prevented harm to the Plans. See Leigh, 727 F.2d at 136 (examining whether the fiduciaries "took steps either to insure that [plan administrators] were fulfilling their fiduciary obligations or to remedy any violations which might have already occurred"); 29 C.F.R. § 2509.75-8, FR-17 ("No single procedure will be appropriate in all cases."). The parties' experts disputed the factual circumstances and the knowledge of red flags that inform the duty to monitor and the actions required. "A court may not, therefore, resolve 'disputed and relevant factual issues on conflicting affidavits of qualified experts[.]'" Fed. Labs., Inc. v. Barringer Research Ltd., 696 F.2d 271, 274 (3d Cir. 1982) (citation omitted). Here, the Secretary presented sufficient factual and expert evidence that the Committee's monitoring was woefully inadequate, putting material facts in dispute that precluded summary judgment.

First, the Committee had reasons to suspect that LaBow needed close monitoring to ensure he was doing his job. DiClemente wanted LaBow to execute the transfer for the Severstal Trust on September 30, 2008. JA042. LaBow did not comply nor did he tell the Committee of his omission until the Committee asked

three weeks later. Id. Later, when the transfer finally took place, LaBow needed DiClemente to direct the transfer of the Neuberger Berman account into the Severstal Trust because he could not authorize it himself. JA043. DiClemente sent directions for transferring the account, which he believed contained a proportionate share of every asset in the WHX Trust, but which was in fact undiversified. Id. Additionally, LaBow told the Committee to establish a contract with Neuberger Berman for management of the account but failed to explain adequately why he himself was not managing the account. JA148-49. Such actions and omissions by LaBow should have prompted the Committee to probe further into whether LaBow was in fact taking his investment duties seriously.

Second, the creation of the Severstal Trust was a significant change for the Plans that warranted closer monitoring to ensure the Plans' assets were properly transferred and then diversified. JA188, 190, 197, 200.[6] It was incumbent on the

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[6] Near the end of its opinion, the district court signaled that it would "likely give greater weight to" the Defendants' expert over the Secretary's if the case went to trial, citing In re Unisys Savings Plan Litigation, 173 F.3d 145, 157-58 (3d Cir. 1999). JA058 n.21. The circumstances in In re Unisys, however, were distinguishable in that the expert there fell short of the "qualifications, reliability, and fit" required of experts. 173 F.3d at 156. By contrast here, in denying a Daubert challenge, the district court, after listening to Dr. Mangiero testify at a hearing, explicitly qualified her to present expert testimony: "In this Court's estimation, Dr. Mangiero's opinions are appropriately set forth based on her education, experience, and her review of the materials cited in her report." JA327. The court gives no explanation why, after permitting Dr. Mangiero to testify, it would nevertheless find her future testimony less credible than the Defendants' expert, whose testimony the district court never heard.

Committee, as the named fiduciary and the one responsible to direct the trustee, to shepherd the Plans through this transition and ensure the assets in the new trust were prudently invested and diversified. See Cent. States, Se. and Sw. Areas Pension Fund, 472 U.S. at 571 ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries . . ."); Restatement (Third) of Trusts § 76 cmt. d ("The trustee's duty to administer the trust includes a duty, at the outset of administration, to take reasonable steps to ascertain the assets of the trust estate."). The duty to monitor LaBow's performance and to review the Plans' performance required, at a minimum, confirming that the assets, totaling over $31 million, were placed in the new trust as instructed and knowing, in broad terms, the composition of the Plans' assets. Had the Committee made any rudimentary or even cursory inquiry into LaBow's performance, it would have been starkly clear that the assets placed in the new trust were not what the Committee requested. They were in the Neuberger Berman account and not diversified. In fact, the Retirement Committee did not even know whether Neuberger Berman managed the account for a period of time. JA043 n.5. If the Committee delegated to LaBow the task of transferring assets to the Severstal Trust and ensuring they were diversified, the Committee is responsible for timely reviewing whether LaBow adequately executed his duties. Whether a prudent person would rely on a

quarterly report from Mercer to assess LaBow's performance, when the report did not come until nearly two months after the trust's creation, is a question of material fact that should have precluded summary judgment.

Third, the Secretary presented expert testimony that the volatile market conditions of the time should have prompted the Committee to check that LaBow was managing the investments as required. JA177, 181. Both DiClemente and Halpin had sophisticated knowledge of financial affairs: DiClemente had experience as an "institutional investment advisor," and had dealt with trust separations in the past, JA145, 160-61; Halpin was a CPA, JA165. They therefore should have known that the market conditions then prevailing could have a significant impact on the Plans' investments. Indeed, the investment policy statement adopted for the Plans explicitly enumerated the Committee's obligations, such as "[e]nsure the Plan's assets are managed in compliance with [ERISA] and other applicable laws and regulations," "[e]nsure that the Plan's assets are invested such that funds are available to meet benefit obligations when due," and "[r]eview regularly the performance of the Trust's assets and service providers . . ." JA141; JA098. Having agreed to this policy statement, the Committee surely understood its role included checking on the Plans' assets to ensure LaBow was adequately managing and investing them. By failing to protect the Plans' assets and to ensure that LaBow was properly performing, especially given the unpredictable economic

landscape, the Committee was merely "passing the buck to another person and then turning a blind eye" in breach of its fiduciary obligations. Howell, 633 F.3d at 573; see also Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984) (holding liable fiduciaries who relied exclusively on the representations of a conflicted party to a plan transaction without any adequate or reasonable investigation). Based on the foregoing, the district court erred in ruling as a matter of law that the Committee's exclusive reliance on Mercer's report was sufficient to satisfy the Committee's duty to monitor LaBow. See, e.g., S.E.C. v. Dain Rauscher, Inc., 254 F.3d 852, 859 (9th Cir. 2001) ("[T]here are genuine issues of material fact as to what is the appropriate industry standard, whether [the defendant] complied with that standard and, more importantly, whether he complied with the more expansive and controlling standard of reasonable prudence[.]").

The Secretary also presented evidence that even after learning that the Plans' assets were undiversified, the Committee failed to take sufficient corrective action to best protect the Plans. See Liss v. Smith, 991 F. Supp. 278, 311 (S.D.N.Y. 1998) (duty to monitor includes duty to take action when the appointed fiduciaries are not performing properly). From December 29, 2008, to March 24, 2009, the Committee left the account untouched, even though it knew the assets were undiversified and it told LaBow not to take any action without approval. JA057-58, 099. The court recognized that "there was an inherent danger in leaving the

funds unmanaged" and "during this time the market was extremely volatile." JA058. As named fiduciaries, the Committee was under a duty to put the Plans' assets to productive use. See Restatement (Second) of Trusts § 181 ("The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive."). DiClemente testified that LaBow was not responsive to the Committee's requests, but the Committee did not act immediately to remove him. JA164. When the Neuberger Berman account was eventually liquidated on March 24, 2009, the cash proceeds then sat in the trust, uninvested and undiversified, and the Committee still took no action until new members replaced DiClemente and Halpin. JA167-68.

Given these circumstances, whether the Committee was prudent to give LaBow several months to correct his mismanagement of the undiversified account and to allow the Plans' assets to sit undiversified and unproductive was, at the very least, a question of disputed material fact. Granting summary judgment against the Secretary on the duty to monitor claim was therefore erroneous. Indeed, the district court's response that things may have turned out the same irrespective of the duty to monitor undermines the principle that "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." In re Beck Indus., Inc., 605 F.2d 624, 636 (2d Cir. 1979).

CONCLUSION

Based on the foregoing, the Secretary respectfully requests this Court reverse the district court's dismissal of the Secretary's claim against the Committee for failure to manage the Plans' assets between November 1, 2008, and December 5, 2008. The Secretary also seeks reversal of the district court's summary judgment that the Committee is not liable for a failure to monitor LaBow prudently.

Dated: March 18, 2020

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COMBINED CERTIFICATIONS[*]

I hereby certify that the attached brief complies with Fed R. App. P. 32(a)(5)-(7) because it has been prepared in proportionately-spaced typeface using Microsoft Word in 14-point Times New Roman, and excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,954 words. In accordance with Local Appellate Rule 31.1(c), I further certify that a virus scan was performed on the document and accompanying appendices using McAfee, and that no viruses were detected. I also certify that I am an attorney for a federal government agency permitted to appear before this Court.

Dated: March 18, 2020

s/ Katrina T. Liu
KATRINA T. LIU

[*] Because the filing of paper copies of briefs and appendices is deferred under this Court's Notice Regarding Operations to Address the COVID-19 Pandemic (Mar. 17, 2020), this does not include a certification that electronic and paper copies are identical, which would normally be required under 3d Cir. L.A.R. 31.1(c) (2011).