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

REPLY BRIEF FOR THE SECRETARY OF LABOR

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INTRODUCTION

The Committee does not dispute that it was primarily responsible for the administration of the Severstal Plans ("Plans") as the named fiduciary and plan administrator. Nor does it dispute that it allowed Ronald LaBow to transfer $31.4 million in plan assets to the Severstal Trust without knowing until nearly two months later that the assets were undiversified, comprised only of eleven large-cap energy-sector stocks. Instead, the Committee argues it cannot be liable for LaBow's "misadventure" under ERISA section 405(d), 29 U.S.C. § 1105(d), because it appointed LaBow as investment manager and there is no material factual dispute that the Committee properly monitored LaBow.

The Committee's first argument fails because an investment manager is someone who "*has acknowledged* in writing that he is a fiduciary with respect to *the plan*," 29 U.S.C. § 1002(38)(C) (emphasis added). LaBow did not have that status when he transferred the Plans' assets on November 3, 2008, because he did not acknowledge his fiduciary status in writing with respect to the Plans until December 5, 2008. The Committee ignores ERISA's past tense, "has acknowledged" language, instead discussing definitions of "signature" and "acknowledgement," plan documents, ERISA's functional "fiduciary" definition, and commercial backdating practices.

The Secretary's opening brief explained the district court's error in failing to account for the particular facts and circumstances of the case and granting summary judgment to the Committee on the monitoring claim. The Committee repeats these errors by claiming a report it received almost two months after LaBow's "misadventure" excused its failure to set up a separate monitoring procedure for the Plans or to check on the assets after the transfer. The record also contained competing expert evidence on the adequacy of the Committee's monitoring, thereby precluding summary judgment.

ARGUMENT

I. The Committee's Interpretation of Section 405(d) is Unsupportable

A. The Committee's Attempt at Statutory Construction Fails

The issue on appeal is whether the district court properly evaluated whether ERISA section 405(d) absolved the Committee of liability for managing the Plans' assets between November 1 and December 5, 2008. 29 U.S.C. § 1105(d). The liability limitation of section 405(d) is triggered only when an investment manager, as defined by section 3(38), has been duly appointed. Id. § 1002(38). Despite the Committee's contrary assertions, the IM Agreement was not approved by both parties until December 5, 2008, so LaBow was not duly appointed under section 3(38) until then. E.g., JA063-66 ¶¶ 7, 18, 22-23.

The Committee first argues that LaBow was the "investment manager" starting November 1, 2008, because he "acknowledged" his fiduciary role at some point. The Committee purports to launch a textual argument while eliding the language of the statute. Congress intended an ERISA "investment manager" to be a fiduciary who "has acknowledged in writing that he is a fiduciary with respect to the plan." 29 U.S.C. § 1002(38)(C). The Committee ignores the statutory phrase "has acknowledged," instead citing the definition of a different word—"acknowledgement." Br. of Appellees at 19 (Apr. 17, 2020), ECF No. 25 ["Comm.'s Br."]. Then it claims its preferred alternative word ("acknowledgement") "contains no temporal requirement or modifier of any sort" and somehow undermines the Secretary's textual argument that an investment manager's acknowledgement must occur before he is an "investment manager" for ERISA purposes. Comm.'s Br. 19. The Committee also relies on the Dictionary Act's definition of "signature" to suggest that LaBow need not sign the acknowledgment, but "signature" also does not appear in the pertinent provision. 1 U.S.C. § 1. The Committee cannot avoid the simple fact that ERISA requires LaBow to have acknowledged *in writing* that he was a fiduciary to the *Severstal* Trust, which occurred for the first time in the IM Agreement on December 5, 2008. It is not enough for LaBow to acknowledge in writing that he is a fiduciary to the WHX Trust, another entity. 29 U.S.C. § 1002(38)(C).

The language and grammar of section 3(38) plainly provide the temporal element the Committee denies. See Opening Br. for the Sec'y of Labor 33-34 (Mar. 18, 2020), ECF No. 20 ["Sec'y Br."]. By using the past tense—"has acknowledged"—Congress supplied all that is necessary: a fiduciary must acknowledge fiduciary status in writing *before* qualifying as an ERISA "investment manager." 29 U.S.C. § 1002(38); cf. Carr v. United States, 560 U.S. 438, 448 (2010) ("The Dictionary Act also ascribes significance to verb tense."). Similarly, section 405(d)(1) also includes an explicit temporal element, evidenced by Congress's choice of verb tense, with the limitation on liability taking effect only "[i]f an investment manager or managers *have been appointed*." 29 U.S.C. § 1105(d)(1) (emphasis added); see Barrett v. United States, 423 U.S. 212, 216 (1976) ("the present perfect tense . . . denot[es] an act that has been completed"). Nothing could be plainer—ERISA explicitly requires a person to acknowledge fiduciary status in writing to effectuate his appointment as an "investment manager," and that appointment must occur *before* the limitation on liability of section 405(d) takes effect. See Sec'y Br. 31–37. Respondents provide no reasonable construction of the statutory text.

B. The Secretary's Interpretation of Section 405(d) is Consistent with Other ERISA Provisions

The Secretary's interpretation that a named fiduciary cannot be released from liability retroactively is consistent with ERISA's principal objective of protecting plan participants and beneficiaries. See Boggs v. Boggs, 520 U.S. 833, 845 (1997). In deriding the Secretary's adherence to ERISA's requirements for allocating fiduciary duty as "elevat[ing] form over substance," Comm.'s Br. 25, the Committee fails to recognize that Congress enacted ERISA's "substantive regulatory requirements" in order to "protect . . . the interests of participants in employee benefit plans and their beneficiaries." Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004); 29 U.S.C. § 1001(b). ERISA's detailed framework for formal allocations of fiduciary duties among named fiduciaries, trustees, and investment managers is not a technicality and that framework has meaningful purposes and consequences beyond mere formality. See Sec'y Br. 22-27; Self-Ins. Inst. of Am., Inc. v. Snyder, 827 F.3d 549, 554 (6th Cir. 2016).[1] The requirement for writings resonates with other "formal" requirements that undergird ERISA's protections. E.g., Heimeshoff v. Hartford Life & Acc. Ins. Co., 571 U.S. 99, 108 (2013); Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 77 (3d Cir. 1991). Indeed, formality is warranted to provide clear notice to participants and other fiduciaries

[1] The Committee suggests that it would qualify for section 405(d)(1)'s limitation on liability so long as its appointment of LaBow aligned with the Plan documents. Comm.'s Br. 18. But the Committee does not argue that the Plans' documents permitted the retroactive appointment of an investment manager, nor would such a provision be valid. Adherence to Plan documents cannot relieve fiduciary liability when doing so contravenes ERISA. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 568 (1985); see also 29 U.S.C. § 1110(a).

of where responsibility lies and when a fiduciary attempts to release himself from liability over plan assets. Sec'y Br. 27.

Bolstering the Secretary's statutory construction of ERISA sections 3(38) and 405(d) is section 410(a), 29 U.S.C. § 1110(a), which prohibits exculpatory provisions that would "relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations." Sec'y of Labor v. Koresko, 646 F. App'x 230, 244 (3d Cir. 2016); 29 C.F.R. § 2509.75–4. Nothing in sections 410(a) or 405 explicitly provides for backdating. While section 410(a) excepts the *appointment* of investment managers to relieve responsibilities under section 405(d), it does not except the independent act of backdating documents or appointments to relieve responsibilities. 29 U.S.C. § 1110(a). Despite the Committee's efforts to recast its actions, its agreement to backdate the IM Agreement to retroactively trigger the liability limitation of section 405(d) effectively violates the "public policy" underlying section 410(a), and should not be affirmed. See Sec'y Br. 36.

C. LaBow's Functional Fiduciary Status Does Not Trigger Section 405(d)

The Committee criticizes the Secretary's construction by arguing that section 405(d)'s limitation on liability applies because LaBow was a functional fiduciary before December 5, 2008. But the Committee again ignores the text. Throughout its brief, the Committee consistently disregards the textual distinction between a "functional fiduciary" under section 3(21), 29 U.S.C. § 1002(21), and an "investment manager" under section 3(38), id. § 1002(38). This distinction is critical because only the latter triggers the operation of section 405(d).

The Committee's attempt to muddle section 3(21)'s functional fiduciary test with the structure of sections 405(d)(1) and 3(38) contravenes the statutory text. This Court has recognized that ERISA distinguishes between a functional fiduciary and an investment manager, describing them as different types of ERISA fiduciaries. Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Secs., Inc., 93 F.3d 1171, 1179 (3d Cir. 1996). Notwithstanding the Committee's assertions, there is no inconsistency in applying each of these provisions according to its terms.

Section 3(38) defines an "investment manager" as a "fiduciary" who has the power to manage plan assets, is registered as an investment adviser under securities law, and has acknowledged in writing his fiduciary status. 29 U.S.C. § 1002(38). An "investment manager" is thus one who is a functional fiduciary under section 3(21), *and* who meets the additional requirements of section 3(38), including having acknowledged his fiduciary status in writing. The parties do not dispute that LaBow was a functional "fiduciary" to the Plans under section 3(21) from November 1, 2008 onwards. See Sec'y Br. 30; Comm.'s Br. 19-20, 26; see also JA085, 105. He could not, however, be a section 3(38) "investment manager" until

December 5, 2008, when he finally acknowledged his fiduciary status in relation to the Severstal Trust in the IM Agreement.

Section 405(d)(1) limits a named fiduciary's liability in only one circumstance: where the fiduciary has duly appointed an investment manager under section 3(38). 29 U.S.C. § 1105(d)(1). The undisputed fact that LaBow was a functional fiduciary does not resolve the separate question of whether LaBow was also an "investment manager" under section 3(38). Under ERISA, LaBow could not and did not become an "investment manager" and relieve the Committee of liability simply by charging management fees, believing himself to be a fiduciary, or taking any action other than satisfying the requirements of section 3(38).[2]

D. Contract Law Does Not Apply

Despite the Secretary's argument that ERISA controls the resolution of this issue, the Committee continues to resort to common law. See Comm.'s Br. 20-22. Even assuming the statutory text does not resolve the question, the Committee offers no argument to justify retroactive relief from liability based on the common

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[2] The Secretary explained how both LaBow, as a functional fiduciary, and the Committee, as the named fiduciary, had a duty to invest the Plans' assets from November 1 to December 5, 2008. See Sec'y Br. 28-30, 47-48. The Committee was therefore responsible for the assets during and immediately after the transfer, regardless of its assertion that LaBow, not the Committee, decided to transfer the Neuberger Berman account.

law of trusts, which often informs the interpretation of ERISA, e.g., Cent. States, Se. & Sw. Areas Pension Fund, 472 U.S. at 570. The Committee instead turns to contract law. But the IM Agreement was no mere "commercial arrangement" between the Committee and LaBow. Comm.'s Br. 23 n.6. The Committee ignores how the IM Agreement affected the allocation of fiduciary responsibility under ERISA's carefully designed framework that creates the parties' obligations to plan participants and to the Severstal Trust. The parties could not freely limit the Committee's obligations as it saw fit in a "commercial arrangement." See Glaziers & Glassworkers Union Local No. 252 Annuity Fund, 93 F.3d at 1183 (entering into an ERISA fiduciary relationship gives rise to fiduciary duties terminable only according to trust law principles); Sec'y of Labor v. Doyle, 675 F.3d 187, 202 (3d Cir. 2012). As a result, contract law has limited application to the allocation of fiduciary responsibility in the IM Agreement. See George Gleason Bogert, The Law of Trusts and Trustees § 17 (3d ed. 2019) ("The lack of the fiduciary element in contract and the presence of it in trust are often made bases for distinctions with practical results.").

Without addressing the Secretary's authorities, the Committee cites a case it admits goes against its position, Heasley v. Belden & Blake Corp., 2 F.3d 1249 (3d

Cir. 1993).[3] Under Heasley, contract law only applies to an interpretation of the plan's "contractually defined benefits," not ERISA's fiduciary responsibilities. 2 F.3d at 1257. Even for plan interpretation, this Court emphasized that a contract law doctrine may apply only to the extent "consistent with the purposes of ERISA." Id. at 1258. The court thus applied *contra proferentem*, construing an ambiguous provision against the insurer, because it aligned with ERISA's protections of insured participants. Id. at 1257. In contrast, validating the IM Agreement's backdating, as the Committee urges, works *against* ERISA by contravening its text and its express public policy in section 410 (exculpatory clauses are void) by enabling a fiduciary to retroactively relieve its own liability for mismanaging plan assets. See Sec'y Br. 35–37.[4]

The Committee relies on a case which held that state law permitted an insurance company to begin coverage only upon payment of the first premium,

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[3] The out-of-circuit ERISA cases the Committee cites are similarly inapposite. Phillips v. Lincoln Nat. Life Ins. Co., 978 F.2d 302, 313 (7th Cir. 1992), examines the same contract law principle as Heasley. Dyce v. Salaried Emps. Pens. Plan of Allied Corp., 15 F.3d 163, 166 (11th Cir. 1994) addresses compliance with contractually-defined plan terms.

[4] The Committee also posits that the IM Agreement existed in writing as a draft before the parties executed it, and LaBow accepted the IM Agreement through his conduct. However, the general contract rule permitting acceptance through conduct does not apply where, as here, a writing is expressly required by law. Kearney v. JPC Equestrian, Inc., Civil No. 3:11-CV-1419, 2014 WL 6473206, at *7 (M.D. Pa. Nov. 18, 2014); Restatement (Second) of Contracts § 19 cmt. a.

even if the policy listed an earlier effective date, Wise v. Am. Gen. Life Ins. Co., 459 F.3d 443, 451 (3d Cir. 2006). Wise stated in that context that "backdated contracts are not inherently unfair and should be enforced according to their explicit terms." Id. at 449; JA013 (cited by the district court). But Wise did not address ERISA nor did it discuss fiduciary liability generally. See 459 F.3d at 447-52. Thus, Wise is unhelpful in deciding whether the IM Agreement may be backdated to relieve the Committee of fiduciary liability.

Moreover, if the common law of contracts were to play any role, it would undermine the Committee's position. Focusing on the contracts, the Committee asserts that, because LaBow had an investment management agreement to manage the WHX Trust, that agreement also obligated LaBow to manage the Severstal Trust before the IM Agreement was executed on December 5, 2008. First, the agreements themselves belie the Committee's assertions. The original investment management agreement, executed in 2004, was "between WPN Corp. [LaBow] . . . and WHX Corporation . . . on behalf of the WHX Pension Plan Trust." JA123. By its terms, neither the 2004 Agreement nor its first two amendments applied to the Severstal Trust or the Committee. See JA1045-65; 13 Williston on Contracts § 37:1 (4th ed. 2019) (discussing privity of contract). Second, to call the IM Agreement a mere "amendment" downplays the significance of the trust separation. The "amendment" fundamentally altered the

WHX Corporation Investment Consulting Agreement in two ways that go far beyond a "formal and usu[ally] minor revision," Black's Law Dictionary (11th ed. 2019) (cited in Comm.'s Br. 24): it changed the subject trust from the WHX Trust to the Severstal Trust and changed the contracting party from the WHX Corporation to the Committee. JA133-34, 140; compare JA1058 (titled "Second Amendment to the WHX Corporation Investment Consulting Agreement"), with JA1067 (titled "Third Amendment to the Severstal Wheeling, Inc. Investment Management Agreement"). These material changes underscore how LaBow was not duly appointed by the Committee to manage the *Severstal Trust* until he and the Committee executed the IM Agreement on December 5, 2008.

The Committee also emphasizes that LaBow, not the Committee, unilaterally inserted the IM Agreement's effective date of November 1, 2008. But "mutual assent between parties is essential for the formation of a contract." Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp., 786 F.2d 564, 571 (3d Cir. 1986); Restatement (Second) of Contracts § 17 (1981). LaBow could not, as the Committee suggests, unilaterally decide the material terms of the IM Agreement, or there would be no valid contract at all. E.g., Humphrey v. Sec'y Pennsylvania Dep't of Corr., 712 F. App'x 122, 124 (3d Cir. 2017) ("Basic contract law requires an offer and acceptance, and a meeting of the minds on material terms."); Schenley

Distillers Corp. v. Kinsey Distilling Corp., 136 F.2d 350, 351 (3d Cir. 1943).[5] As such, the Committee's argument that LaBow alone backdated the IM Agreement would support the conclusion that LaBow's appointment was *never* effective. Moreover, the Committee's contention that it let LaBow dictate material terms for the Plans' hiring of an investment manager reflects its misunderstanding of its fiduciary duties with regard to important issues such as the allocation of fiduciary liability and responsibilities under ERISA.

E. The Application of Section 405(d) is Properly Before this Court

When the district court rejected the Secretary's interpretation of sections 405(d) and 3(38), the court permitted the Secretary to amend the complaint but foreclosed the Secretary's ability to negate the section 405(d) defense. See JA015.[6] According to the district court, the only way to claim that section 405(d) did not exculpate the Committee was to allege (1) "that Labow and WPN were not acting as investment managers from November 3, 2008 to December 5, 2008," (2) "that the purpose of backdating the investment agreement was to relieve Defendants from liability during a time when they in fact retained control of the

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[5] Indeed, the Committee maintained in the district court that the IM Agreement was properly backdated because it reflected the mutual assent of both LaBow *and* the Committee. See, e.g., JA340; accord Comm.'s Br. 21.

[6] While the Secretary does not have to plead his rebuttal to defenses, the Amended Complaint necessarily discusses the IM agreement in support of his claims against LaBow and the Committee's fiduciary duty to monitor him.

assets of the plans," and (3) "that Defendants violated ERISA by failing to invest properly the Plans' assets." Id. The court cited no authority for this standard. See JA015.

The district court's three limits to the allegations do not accord with section 405(d). First, section 405(d) hinges on LaBow's appointment, not his actions. See Sec'y Br. 33, 47-48. Second, section 405(d) does not depend on the purpose or intent of the backdating.[7] See id. at 40-41. The motivation underlying the backdating is irrelevant, since ERISA's terms categorically prohibit retroactively relieving the Committee of liability under section 405(d), and intent is nowhere in the relevant provisions. See Sec'y Br. 31-37. To the extent this Court considers the Committee's conduct in effectuating the backdating relevant, ERISA's prudent man standard in section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), not the Committee's intent or LaBow's actions, should govern the analysis. See id. at 41-45. The district court's limitations foreclosed any amendment plausibly stating claims for violations based on the correct interpretation of 405(d) and correct standard of prudence.

The district court's erroneous holding on what was necessary to negate the limitation on liability in section 405(d) raises a pure legal question and is

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[7] Regarding the third requirement, the Secretary pled that the Committee failed to manage the assets between November 1 and December 5, 2008. JA065-68 ¶¶11, 18, 31.

appropriately before this Court. Put another way, the Secretary now appeals the district court's effective denial of leave to amend by requiring the Secretary to add allegations beyond what was legally necessary. Cf. Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 169 (2d Cir. 2001) ("A district court 'abuses' or 'exceeds' the discretion accorded to it when . . . its decision rests on an error of law (such as application of the wrong legal principle)."). The Secretary need not move to amend a complaint in ways foreclosed by the district court before appealing the district court's error.

II. The Secretary Presented a Genuine Dispute of Material Fact on the Failure to Monitor Claim

The Committee disparages the Secretary's claim that it violated its duty to prudently monitor LaBow as unfairly imposing a "heightened monitoring standard," Comm.'s Br. 39, but ERISA fiduciary duties are "considered the highest known to the law." Sweda v. Univ. of Pa., 923 F.3d 320, 333 (3d Cir. 2019) (quotation marks omitted). The Secretary does not advocate for more than what ERISA requires, which is to determine what would be prudent under the facts and circumstances of this case. 29 U.S.C. § 1104(a)(1)(B). "A fiduciary's process must bear the marks of loyalty, skill, and diligence expected of an expert in the field." Sweda, 923 F.3d at 329.

Here, the Committee oversaw a transfer of $31.4 million in plan assets to an independent trust, yet failed to prepare for the transfer, failed to examine the assets after the transfer, failed to provide specific guidance for the Plans' investments, and failed to adequately monitor another fiduciary who committed breaches that cost the Plans over $7.8 million in losses. See JA088. At the very least, there is a material dispute of fact as to the Committee's liability as a monitoring fiduciary.

In its defense, the Committee claims that "[q]uarterly review is prudent as a matter of fact and law." See Comm.'s Br. 31-38, 40, 34 n.10. The law of trusts does not support this kind of bright-line rule, nor do any of the cases the Committee cites. In Howell v. Motorola, Inc., for example, the Seventh Circuit concluded that "[n]o single procedure will be appropriate in all cases." 633 F.3d 552, 573 (7th Cir. 2011) (quoting 29 C.F.R. § 2509.75-8 at FR-17). While the Committee may argue otherwise, the Plans' situation—having transferred assets in an undiversified account into a new, smaller trust—was anything but routine. Whatever suffices as monitoring in a routine case does not map neatly with the Plans' needs here.

The Committee's monitoring duties arise from the need to protect the Plans' assets in the Severstal Trust. Indeed, the trust plays a central role in ERISA's operation—it acts as an important guardian of plan assets, which fiduciaries must manage prudently and loyally. 29 U.S.C. §§ 1103(a), (c)(1), 1104(a); see also Nat'l Labor Relations Bd. v. Amax Coal Co., 453 U.S. 322, 333 (1981). The transfer into the Severstal Trust meant the creation of a new fiduciary relationship between the Plans' assets and the Committee—a relationship now independent of the WHX Trust. See 29 U.S.C. § 1103(a); Restatement (Third) of Trusts § 2 (2003) (defining "trust" as "a fiduciary relationship with respect to property"); JA177-78. Any legal obligations that ran to the WHX Trust did not apply to the Plans' assets once placed in the Severstal Trust. See, e.g., Chesemore v. Alliance Holdings, Inc., 770 F. Supp. 2d 950, 964 (W.D. Wis. 2011) ("Once the transferor plan has released the accounts, they become the responsibility of the transferee plan . . ."). Both Michael DiClemente and Dennis Halpin were on the committee overseeing the WHX Trust before joining the Committee for the Severstal Plans. JA041. In monitoring the Severstal Trust and LaBow, however, the Committee could not perform its duties as though they were just a continuation of former obligations to the WHX Trust. See 29 U.S.C. §§ 1103(a), (c)(1), 1104(a).

Practically, the Severstal Trust was only a fraction of the size of the WHX Trust. The Plans' assets consisted of a 10% undivided interest in the WHX Trust's total assets, JA095, and the transfer required selecting a discrete set of investments that were worth the Plans' 10% share of the WHX Trust and moving them to the Severstal Trust. Separating the Plans' assets also meant they no longer benefitted from the sharing of investment risk that usually characterizes pooled trusts. Stinson v. Ironworkers Dist. Council of S. Ohio & Vicinity Ben. Tr., 869 F.2d

1014, 1021–22 (7th Cir. 1989); see also JA178, 185-86. In short, the transfer was a new and significant event in the Plans' life.

The Committee ignores the transfer's significance and mischaracterizes the Severstal Trust as a mere continuation of the WHX Trust, failing to appreciate how the two trusts were distinct. For example, it attempted to hire the same investment manager by amending the WHX Trust investment management agreement, JA042, Comm.'s Br. 2; it continued the identical investment policy for the Severstal Trust, JA185, Comm.'s Br. 23; and it retained the same quarterly reporting schedule that Mercer had for the WHX Trust, JA044, Comm.'s Br. 37. The Committee admits it had several months to prepare for the separation, Comm.'s Br. 3, but other than discussing informally with LaBow, it made minimal efforts to ensure the Plans' share, totaling $31.4 million, was properly transferred and invested. See JA183-84 (describing the Committee's failure to plan ahead in the summer of 2008). This failure to prepare led to the Committee's lack of basic knowledge about the transfer and the assets involved when it undertook to monitor LaBow.

While courts may disagree about the scope of responsibilities for monitoring duties generally, for monitoring investments, courts have at least acknowledged that changed circumstances require more than routine monitoring. See, e.g., Tibble

v. Edison Int'l, 135 S. Ct. 1823, 1827-28 (2015).[8] This is for good reason as the law of trusts and the statutory text reflect how prudence depends on the circumstances. See 29 U.S.C. § 1104 ("under the circumstances then prevailing"); Restatement (Third) of Trusts § 80 (2007) (monitoring includes "supervising or reviewing the agent's performance . . . all in a manner appropriate to the circumstances"); Restatement (Second) of Trusts §§ 171, 225 (1959) (discussing "proper supervision"). None of these authorities suggest a quarterly report suffices as a matter of law. While the Secretary does not suggest that monitoring fiduciaries must review every decision made by an investment manager, see Howell, 633 F.3d at 573, they should at least inquire when circumstances demand it.[9] See Tibble, 135 S. Ct. at 1827-28.

And the circumstances here—the transfer into the standalone Severstal Trust—significantly changed the nature of the Plans' assets from an undivided interest in a larger, combined trust to a single account containing eleven large-cap

[8] The Committee also relies on In re Lehman Brothers Securities and ERISA Litigation, 113 F. Supp. 3d 745, 757 (S.D.N.Y. 2015), to argue that the economic turmoil of 2008-2009 did not require the Committee to monitor LaBow closely. But economic turmoil is a factor intertwined with the assets' transfer into the Severstal Trust, all of which informs the Committee's duty to monitor.

[9] The Committee argues that it "had no reason to suspect that Labow would do anything other than follow the agreed-upon strategy upon the split of the Combined Trust." Comm.'s Br. 41. What the Committee subjectively knew or did not know does not determine prudence, which depends on objective factors, such as the presence of red flags. 29 U.S.C. § 1104(a); Sweda, 923 F.3d at 329.

energy-sector stocks in a smaller, independent trust. Despite the Committee's characterizations to the contrary, the Secretary's expert did not opine that quarterly reporting was sufficient in this case.[10] Rather, Dr. Mangiero explained that the Committee should have checked at the time of the transfer: "Instead of accepting assets without question, it would have been so easy for [the] Committee to check what was being transferred and whether these assets were diversified . . . At that point, [it] should have followed up with LaBow to ask why instructions had not been followed to transfer a proportionate slice and what LaBow was going to do to ensure diversification." JA305-06.

The Committee describes its "monitoring framework," but fails to explain how it was prudent for monitoring LaBow's management of the Severstal Trust in these circumstances. For example, the Committee asserts that it "relied on quarterly reports from Mercer and had 'regular communications' with Mercer." Comm.'s Br. 37 (citing JA1001-103). The Committee cites to Michael DiClemente's affidavit, which makes clear that these reports were procedures used by the committee for the *WHX Trust* for monitoring LaBow's management of the

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[10] The district court improperly discredited the Secretary's expert evidence at the summary judgment stage when the monitoring claim ultimately turned on the facts. See Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 305 (5th Cir. 2000) (reversing summary judgment in part because of conflicting expert evidence on the prudence of a fiduciary's investigation).

WHX Trust. JA1001 at ¶¶ 9-11. Whether a different retirement committee regularly monitored LaBow's management of a different trust has no relevance to whether the Committee properly monitored LaBow's management of the Severstal Trust under the "circumstances then prevailing," 29 U.S.C. § 1104(a).

The Committee claims that the Secretary cannot prevail for failure to identify "alternative monitoring" that would have been prudent. The Committee perfunctorily dismisses the most obvious alternative—checking on the Plans' assets when they were transferred from the WHX Trust, especially when DiClemente himself authorized the transfer. See JA043, 305-06. This simple act would have instantly revealed that the assets were undiversified and LaBow had breached his duty to invest.[11] At the very least, a prudent fiduciary would have learned the lack of diversification early, fired LaBow for retaining an undiversified account without a plan for diversification, and taken over responsibility.[12] Contrary to the Committee's argument, requiring the Committee to check on the assets as part of its monitoring duties is appropriate. Indeed, it is common sense

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[11] Like in Tibble v. Edison International, the facts present an "extreme situation" in that any reasonable monitoring fiduciary would have immediately recognized the breach. CV 07-5359, 2017 WL 3523737, at *12 (C.D. Cal. Aug. 16, 2017).

[12] The Secretary's expert opined that hiring a replacement could be a "very quick turnaround" and the Committee could get assistance from its consultant, Mercer. JA1498 at 196-197. She also explained that, while it may be appropriate under normal market conditions to allow time for an investment manager to correct, exigent circumstances could alter that timeframe. JA887-88.

that one of the ways to review an investment manager's performance is to review the investments themselves.[13]

Prudent monitoring would have also required that the Committee put in place a policy or structure to guide LaBow's performance, based on the Plans' specific needs. See Restatement (Third) of Trusts § 80 cmt. f(1). The Committee admits to using the same investment policies that LaBow used for the WHX Trust, see Comm.'s Br. 23, but whether this was prudent raises a dispute of material fact. The trusts served different plans with different needs, and prudently monitoring the management of each should account for those differences. The Plans and their Trust, as compared to the combined WHX Trust, had a very different character and aim. See, e.g., 29 U.S.C. § 1104 (imposing duties based on "the conduct of an enterprise of a like character and with like aims" (emphasis added)). Dr. Mangiero explained that an investment policy, by which an investment manager is guided and benchmarked, should reflect plan requirements and how the needs of a small plan (such as the Severstal Trust) may differ from the needs of a large plan (such as the WHX Trust). JA186-87, 191-95; see, e.g., Tibble v. Edison Int'l, 729 F.3d 1110, 1137 n.24 (9th Cir. 2013) (common knowledge that investment minimums

[13] The Committee minimizes the significance of the asset transfer, saying it "was no more complicated than an everyday stock sale." Comm.'s Br. 6, 40 n.14. Yet LaBow could not execute the transfer as requested, id. at 5, nor could he reverse the transaction, id. at 7-9.

are waived for large plans), vacated, 135 S. Ct. 1823 (2015). Again, it appears that the Committee failed to do the work of tailoring monitoring procedures related to the WHX Trust to fit the needs of the Severstal Trust. See JA190-91.

The parties also dispute whether the Committee's corrective actions were sufficiently prudent. Here, the breach was both obvious and undisputed—LaBow failed to diversify the Plans' assets in violation of ERISA section 404(a). See JA105-08. The Committee's duty, then, was to correct LaBow's breach or, in other words, to ensure the assets were diversified. Restatement (Third) of Trusts § 80 ("[u]pon discovering a breach of duty by the agent . . . the trustee has a duty to take reasonable steps to remedy it"). It could have better instructed LaBow on what to do, JA141, or it could have replaced LaBow with another investment manager, JA312. The Committee did neither. To be clear, upon discovering LaBow's breach, the Committee's obligation to ensure diversification arose from its own monitoring responsibilities. The limitation on liability in section 405(d) does not shield the Committee from liability for its own actions. 29 U.S.C. § 1105(d)(2) ("Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee."). In sum, at the very least, the Secretary raises a genuine dispute of material fact on his monitoring claim against the Committee. Fed. R. Civ. P. 56(a).

III. The Issue of Loss Causation Is Not a Ground for Affirmance

Finally, the Committee claims that the Secretary's failure to establish that the Committee's breach caused the Plans' losses is an alternate ground for affirmance. A ruling on this ground, however, would be premature. "[T]he causal connection between breach and loss . . . is a fact-intensive inquiry that is not susceptible to summary judgment." Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 919 (8th Cir. 1994). As the Committee discusses, both parties were prepared to present expert testimony and other evidence regarding losses. Comm.'s Br. 51–52. Indeed, the district court determined, in a judgment against LaBow, that the Plans lost over $7.8 million. JA088. And the Committee admits it *eventually* intervened to prevent further losses. Comm.'s Br. 38. The Secretary thus presents material evidence that the Plans suffered losses and the Committee had some control over the extent of those losses. The district court did not, however, review material facts on the issue of loss causation, nor is this Court positioned to do so in the first instance. See Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773, 786 n.12 (3d Cir. 2001). Accordingly, the issue of loss causation is not grounds for affirmance, but for remand.

In addition, the Committee is incorrect that the burden of proof on the issue of loss causation lies with the Secretary. ERISA provides that a breaching fiduciary shall be personally liable for "any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Although the default rule is that the plaintiff bears the burden of proof, this rule "admits of exceptions." Schaffer v. Weast, 546 U.S. 49, 57 (2005). One such exception under trust law provides: "[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." Restatement (Third) of Trusts § 100 cmt. f (2012); see also Bogert, The Law of Trusts and Trustees § 871 ("If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee."). This Court has not directly opined on the issue, but other circuit courts have largely adopted trust law's burden shifting for ERISA cases, holding that once a plaintiff establishes a fiduciary breach and related plan losses, the fiduciary has the burden to prove that the breach did not cause those losses. See Brotherston v. Putnam Investments, LLC, 907 F.3d 17, 39 (1st Cir. 2018), cert. denied, 140 S. Ct. 911 (2020); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 363 (4th Cir. 2014), cert. denied, 135 S. Ct. 2887 (2015); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995), cert. denied, 516 U.S. 1174 (1996); Roth, 16 F.3d at 917.

For the contrary proposition that the plaintiff carries the burden on loss causation, the Committee cites the Tenth Circuit's minority view.[14] See Pioneer Centres Holding Co. v. Alerus Fin., N.A., 858 F.3d 1324, 1336 (10th Cir. 2017). The Committee also mischaracterizes the holdings of Leckey v. Stefano, 501 F.3d 212 (3d Cir. 2007), and Edmonson v. Lincoln Nat. Life Ins. Co., 725 F.3d 406 (3d Cir. 2013). Leckey did not address burden shifting, but focused instead on whether a loss to one participant's account was a "loss to the plan." 501 F.3d at 225-26. And Edmonson discussed loss causation in dicta, determining that an intervening cause for an alleged injury barred the plaintiff's claim. 725 F.3d at 424. Edmonson relied, in turn, on an Eleventh Circuit case, which denied summary judgment because it found a genuine issue of material fact regarding loss causation and noted that "the burden of proof on the issue of causation will rest on the beneficiaries" on remand, without specifically addressing burden shifting. Willett v. Blue Cross & Blue Shield of Alabama, 953 F.2d 1335, 1339 (11th Cir. 1992).

[14] In Silverman v. Mut. Ben. Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998), the court declined to apply burden shifting regarding a new fiduciary's liability for failing to remedy a prior fiduciary's breach. The Second Circuit has applied burden shifting in other cases. See, e.g., New York State Teamsters Council Health & Hosp. Fund v. Estate of DePerno, 18 F.3d 179, 182 (2d Cir. 1994). In Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004) and Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995), the courts applied a presumption subsequently rejected in Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 418 (2014). Peabody v. Davis, 636 F.3d 368, 373 (7th Cir. 2011) did not directly address burden shifting.

Further, this Court recognized this question but expressly declined to resolve it in In re Unisys Sav. Plan Litigation, 173 F.3d 145, 160 (3d Cir. 1999). Even so, the Court understood the burden question as applying "*after* the plaintiff has proved that the defendant breached a fiduciary duty" and "damages result[ed] from a breach of fiduciary duty." Id. (emphasis added); see also Nedd v. United Mine Workers of Am., 556 F.2d 190, 211 (3d Cir. 1977) (applying trust law's burden shifting framework). Here, a remand should first let the district court consider the scope of the breach before addressing burden shifting on loss causation.

CONCLUSION

The Court should reverse the district court's grant of the Committee's motion to dismiss and summary judgment in favor of the Committee.

Dated: May 8, 2020

Respectfully submitted,

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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 6,474 words. In accordance with Local Appellate Rule 31.1(c), I further certify that a virus scan was performed on the document 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: May 8, 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).