15-20282

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH WHITLEY, ET AL.,
Plaintiffs-Appellees,

v.

BP, P.L.C., ET AL.,
Defendants-Appellants.

On Appeal from United States District Court for the
Southern District of Texas, No. 10-cv-4214

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST

The Securities and Exchange Commission ("SEC" or "Commission") submits this brief as amicus curiae pursuant to Fed. R. App. P. 29(a). Our brief is intended to supplement the amicus brief filed in the case by the Department of Labor ("DoL") which sets forth alternative actions available to managers or administrators (collectively, "managers") of an employee stock ownership plan ("ESOP") who are aware that the employer's publicly traded securities are materially overvalued due to an undisclosed fraud. As discussed in the DoL brief, these actions may satisfy a manager's obligations under the Employee Retirement Income Security Act ("ERISA") in such a situation. In this brief, the SEC, the agency responsible for the administration of the federal securities laws, explains that the alternatives DoL identifies, while not necessarily sufficient to satisfy the manager's obligations under the federal securities laws, are not inconsistent with the federal securities laws or their objectives under certain circumstances. Publicly traded issuers like BP p.l.c. ("BP") who offer a voluntary, contributory ESOP are required to register the ESOP's offers and sales under the Securities Act of 1933 ("Securities Act"), and their ESOP's transactions are subject to the securities laws' antifraud provisions. Such plans are also subject to reporting requirements under the Securities Exchange Act of 1934 ("Exchange Act").

In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014), the Supreme Court indicated that the SEC's views on this subject would be helpful. *Fifth Third* explained that lower courts "should consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws," and noted that the SEC's views on these matters "may well be relevant." *Id.* at 2473. At oral argument, Justice Breyer—who wrote the unanimous decision—stated that he "would like to know directly, not indirectly, what the SEC thinks." Oral Argument Tr. at 46-47, *Fifth Third*.

This case is a good opportunity for the SEC to provide its views about the consistency with the securities laws of the alternatives that DoL identifies as available to a plan manager in the circumstances alleged in the complaint, namely where the plan manager knows that the employer's stock is overvalued because of material false statements or misleading omissions by the company. Here, plaintiffs are employees and participants in BP's employee stock ownership plan who allege that the plan managers breached their ERISA duties by continuing to effect purchases of BP shares even though the plan managers were aware that the stock was artificially inflated by material misrepresentations or omissions. The

complaint alleges that before the explosion of BP's Deepwater Horizon oil platform, the company misrepresented the risk of such an accident, and afterward that it made false and misleading statements concerning the accident's magnitude. Defendants are managers of the ESOP who contend, among other things, that it was impossible for them to have taken any action that would satisfy their ERISA duties without violating the securities laws.[1]

Shortly after the Supreme Court decided *Fifth Third*, this Court remanded this case in light of that decision. Plaintiffs then moved to amend their complaint with respect to their ERISA claims. The district court granted plaintiffs' motion and simultaneously certified for interlocutory appeal under 28 U.S.C. 1292(b) the question of what plausible factual allegations are required to satisfy *Fifth Third*'s pleading standard that the manager's alternative actions not do "more harm than good." 134 S.Ct. at 2473. Whether available alternative actions satisfy *Fifth*

[1] The SEC filed a settled action alleging that BP executives publicly made misrepresentations and omissions in understating the magnitude of the Deepwater Horizon disaster, which is consistent with plaintiffs' allegations in this ERISA matter. *See SEC v. BP p.l.c.*, No. 12-cv-02774 (E.D. La.), Litigation Release No. 22531, 2012 WL 5529425 (Nov. 15, 2012). And in a separate private action under the securities laws, some of the BP investors' claims regarding Deepwater Horizon survived a motion to dismiss, including claims that Anthony Hayward, the CEO of BP, violated his disclosure duties under the securities laws. *See In re BP p.l.c., Sec. Litig.*, 843 F. Supp. 2d 712, 782-84 (S.D.N.Y. 2015). *See also In re BP p.l.c. Sec. Litig.*, No. 10-MD-2185 (S.D. Tex.) (private securities actions transferred to multidistrict litigation). The SEC's brief in this ERISA matter does not discuss those investor claims.

Third's more good than harm standard is a question under ERISA (*id.*) that is addressed by DoL's brief. But the answer also depends on the particulars of how those alternative actions can be taken in a manner that does not conflict with the securities laws, which is addressed in this brief.

SUMMARY OF ARGUMENT

The DoL amicus brief delineates several "alternative action[s]" (*Fifth Third*, 134 S.Ct. at 2472) that an ESOP manager for a publicly traded issuer, who is aware that the issuer and/or its executives made misstatements or omissions that materially inflated the price of the issuer's securities, could take to comply with ERISA. According to DoL's amicus brief, the primary alternatives available to a plan manager in this situation are to disclose the fraud or to suspend ESOP transactions. Also, DoL explains, the ESOP manager may urge the persons responsible for the fraud to disclose the fraud or report the fraud to DoL and the SEC.

As discussed below, while DoL's proposed actions may not satisfy the ESOP manager's own obligations under the securities laws, these alternatives can be implemented in a way that would not be inconsistent with the "complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Fifth Third*, 134 S.Ct. at 2473. DoL's proposed actions would ordinarily prompt public disclosure of the fraud, and the

securities laws are likewise intended to expose fraud and ensure full disclosure to all investors. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986).

Disclose the fraud. One DoL alternative is that an ESOP manager who is aware of the employer's undisclosed fraud can satisfy ERISA's obligations by disclosing the fraud. Under the securities laws, an ESOP manager who made or was responsible for misstatements or omissions constituting the fraud has a duty to make a disclosure that renders the prior statements not misleading. Under the securities laws, a manager who was not responsible for the fraud, but who knew about it, may nevertheless elect to disclose it if possible. Any such disclosure must be public; an ESOP manager of a publicly traded issuer cannot disclose the fraud solely to ESOP participants because that would either cause a violation of the selective disclosure rules under Regulation FD of the Exchange Act or it would constitute an illegal tip under the securities laws' insider trading prohibitions.

Suspend ESOP transactions. The other main alternative that DoL's amicus brief identifies is for the ESOP manager to refrain from effecting both purchases and sales on behalf of plan participants. ERISA may require the ESOP manager to refrain from effecting purchases of additional shares of overvalued employer stock. To avoid violating the securities laws, a plan manager in such circumstances must concurrently refrain from effecting sales of shares on behalf of

plan participants in order to completely abstain from trading on the basis of inside information about the employer's fraud. In the Sarbanes-Oxley Act of 2002, Congress formalized the mechanism to suspend both ESOP purchases and sales. Such a suspension of trading must be promptly and accurately disclosed in a Form 8-K—including the reason for the suspension.

Other alternatives. DoL's amicus brief proposes other measures that, while not required by the securities laws or independently sufficient to meet obligations under the securities laws, would not be inconsistent with the securities laws. The DoL amicus brief's view that an ESOP manager could urge the persons responsible for the fraud to disclose it does not conflict with the securities laws and could lead others to fulfill the disclosure duty they already owe under the securities laws. Such an approach would not satisfy any independent obligation that the ESOP manager might have under the securities laws to correct misstatements or omissions for which the manager was responsible. Similarly, the DoL amicus brief's view that the ESOP could report the fraud to DoL and/or the SEC would not conflict with the securities laws. Indeed, Congress has expressly provided incentives and protections for individuals who report possible violations to the SEC.

ARGUMENT

According to DoL's amicus brief, the ESOP manager who is aware that the employer's publicly traded shares are materially overvalued due to an undisclosed fraud could: (a) disclose the fraud; (b) suspend ESOP transactions; and/or (c) take certain other actions, including urging the persons responsible for the fraud to disclose the fraud or reporting the fraud to DoL and the SEC. Below, the SEC explains that these actions available to the defendants under ERISA, while not necessarily sufficient to meet obligations under the securities laws, are not in themselves inconsistent under certain circumstances with the "insider trading and corporate disclosure requirement imposed by the federal securities laws or with the objectives of those laws." *Fifth Third*, 134 S.Ct. at 2473. Indeed, these alternatives can be implemented in a way—*e.g.*, public disclosure, and suspension of ESOP sales as well as purchases—that would be consistent with the securities laws.[2]

A. An ESOP manager who is aware of the employer's fraud would not violate the securities laws by making a corrective public disclosure.

The DoL amicus brief explains that where the ESOP manager is aware that the employer's securities are overvalued due to an undisclosed fraud, the ESOP

[2] The SEC expresses no opinion as to the sequence in which an ESOP manager in such circumstances should implement the available actions in satisfying the manager's obligations under ERISA.

manager could satisfy his obligations under ERISA by disclosing the fraud. This alternative is harmonious with securities law obligations. Under the securities laws, if the ESOP manager made, or was responsible for, the misstatements or omissions, the manager has a clear duty to make a public disclosure that renders the prior statements not misleading. *See Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990) (en banc); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1430-32 (3d Cir. 1997); *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986).

If the ESOP manager did not make, and was not responsible for, the misstatements or omissions, the manager may nevertheless elect to disclose the fraud outside of the normal controls and procedures for financial reporting. Because the ESOP manager making such disclosure would be potentially subject to liability under the securities laws for such disclosure, the manager would be responsible for ensuring that his or her corrective disclosure is public as well as complete and accurate in all material respects.

To satisfy the securities laws, any corrective disclosure must be public; an ESOP manager for a publicly traded employer cannot disclose the employer's fraud solely to plan participants. Disclosure made exclusively to plan participants in such circumstances would cause the issuer to violate the selective disclosure rules under Regulation FD of the Exchange Act (17 C.F.R. 243.100, *et seq.*), if it is

considered to have been made by the "issuer, or any person acting on its behalf." 17 C.F.R. 243.100(a). Regulation FD governs selective disclosures made by persons who may be ESOP managers, including the "issuer" itself, and others "acting on behalf of an issuer," such as a "senior official" or "other officer, employee, or agent" who regularly communicates with holders of the issuer's securities. 17 C.F.R. 243.101(b), (c). Disclosure to the plan participants alone would be an improper selective disclosure because plan participants are "holder[s] of the issuer's securities," and it is "reasonably foreseeable" that they "will purchase or sell the issuer's securities on the basis of the information." 17 C.F.R. 243.100(b)(1)(iv). Alternatively, if the disclosure to plan participants is not made by the issuer or person acting on its behalf, Regulation FD would not be implicated (17 C.F.R. 243.101(c)), but the disclosure nonetheless could operate as an unlawful tip of inside information if it was made in breach of the ESOP manager's duty of trust or confidence to the issuer. *See Dirks v. SEC*, 463 U.S. 646, 659-61 (1983).[3]

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[3] While the *Fifth Third* line of cases involve publicly traded corporations, in privately held or closely held corporations it might be possible to make a corrective disclosure solely to plan participants. Regulation FD does not apply to such issuers. *See* 17 C.F.R. 243.101(b). And that disclosure would not count as an illegal tip so long as plan participants sign confidentiality agreements and thereby become subject to liability under the federal securities laws should they disclose, tip, or trade on the information. *See* Brief of the SEC as Amicus Curiae, *Finnerty v. Stiefel Laboratories, Inc.*, 756 F.3d 1310 (11th Cir. 2014), 2013 WL 2903651, at *23-*24 (June 5, 2013).

Disclosure is public where it is "effected by a public release through the appropriate public media, designed to achieve a broad dissemination to the investing public generally and without favoring any special person or group." *Dirks*, 463 U.S. at 653 n.12; *see also SEC v. Texas Gulf Sulphur Co*., 401 F.2d 833, 854 (2d Cir. 1968) (en banc) ("[I]nformation must have been effectively disclosed in a manner sufficient to insure its availability to the investing public.").[4] Information can also be considered public for purposes of Exchange Act Section 10(b), 15 U.S.C. 78j(b), where it is "fully impounded into the price of the particular stock." *United States v. Libera*, 989 F.2d 596, 601 (2d Cir. 1993).

The DoL amicus brief's position regarding disclosure obligations under ERISA does not require disclosure of information to the public sooner than when

[4] Regulation FD defines "public disclosure" as "filing with the Commission a Form 8-K disclosing that information," or the issuer's "disseminat[ion of] the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public." 17 C.F.R. 243.101(e). "As a general matter, acceptable methods of public disclosure for purposes of Regulation FD will include press releases distributed through a widely circulated news or wire service, or announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephonic transmission, or by other electronic transmission (including use of the Internet). The public must be given adequate notice of the conference or call and the means for accessing it." *Selective Disclosure and Insider Trading*, Release No. 34-43154, 65 FR 51716-01, at 51723-24 (Aug. 24, 2000).

federal securities laws would require disclosure.[5] The securities law duty to make a corrective disclosure arises at the time that previous statements would be materially misleading absent correction. *See Backman*, 910 F.2d at 16-17; *Burlington*, 114 F.3d at 1430-32; *Rudolph*, 800 F.2d at 1043. The materiality standard under ERISA is essentially identical to the materiality standard under the securities laws. Indeed, when defining materiality, ERISA cases cite seminal securities cases.[6]

B. An ESOP manager aware of the employer's undisclosed fraud does not violate the securities laws by abstaining from both ESOP purchases and sales.

Another principal measure DoL's brief identifies as available to an ESOP manager who is aware the employer's publicly traded securities are materially

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[5] The federal securities laws generally require publicly traded issuers to file reports at specific periodic intervals and after defined triggering events in a Form 8-K, *see* Exchange Act Sections 13 and 15(d), 15 U.S.C. 78m and 78o(d), rather than to file reports on a continuous basis. "Moreover, it bears emphasis that [Exchange Act] § 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309, 1321-22 (2011). But disclosure is "required" under these provisions "'to make ... statements made, in the light of the circumstances under which they were made, not misleading.'" *Id.* (quoting Exchange Act Rule 10b-5(b), 17 C.F.R. 240.10b-5(b)).

[6] *See Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 425-28 (5th Cir. 2003) (discussing *Basic Inc. v. Levison*, 485 U.S. 224 (1988)); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 & n.4 (2d Cir. 1994) (same); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)).

overvalued due to an undisclosed fraud is for the manager to suspend ESOP transactions. ERISA may require the plan manager to refrain from purchasing additional shares of overvalued employer stock on behalf of plan participants. While ERISA may be satisfied if the ESOP manager in these circumstances refrains from effecting purchases, the securities laws also require that the manager refrain from effecting sales,[7] because an ESOP manager who effects trades—either purchases or sales—on the basis of material nonpublic information violates Exchange Act Section 10(b) and Rule 10b-5.[8] Persons who by virtue of their position have been entrusted with confidential corporate information—including an undisclosed fraud at the corporation—have a duty to disclose the information to the public before trading on the basis of it, or to abstain from trading on the basis

[7] As DoL's brief confirms, ESOPs for publicly traded companies engage in concurrent purchases and sales. Plan participants direct plan managers to purchase employer shares or an interest therein for their accounts. In addition to purchases, plan participants direct plan managers to sell employer shares or an interest therein due to participants' death, retirement, resignation, and termination (*see*, *e.g.*, 26 U.S.C. 401(k)(2)(B)), or participants' requests for diversification within the employer's pension plan. In plans such as those at issue here, which involve an ESOP offered to employees by a publicly traded company, ESOP managers in the normal course buy and sell employer shares on the open market to accommodate participant transactions.

[8] A person trades "on the basis" of inside information (*United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997)), where the person making the purchase or sale "was aware of the material nonpublic information when the person made the purchase or sale." Exchange Act Rule 10b5-1(b), 17 C.F.R. 240.10b5-1(b); *see also United States v. Rajaratnam*, 719 F.3d 139, 158-60 (2d Cir. 2013).

of the information until it is publicly disclosed. *See Chiarella v. United States*, 445 U.S. 222, 226-29 (1980); *O'Hagan*, 521 U.S. at 651-52.

The Supreme Court in *Fifth Third* recognized that an ESOP manager who effects sales on the basis of the employer's undisclosed fraud violates Section 10(b) and Rule 10b-5: "ERISA's duty of prudence cannot require an ESOP fiduciary to perform an action—such as divesting the fund's holdings of the employer's stock on the basis of inside information—that would violate the securities laws." *Fifth Third*, 134 S.Ct. at 2472-73 (citing *O'Hagan*). An ESOP manager cannot effect sales on the basis of an undisclosed fraud because those "trades in the securities of his corporation on the basis of material, nonpublic information" would "break the law." *Id.* ERISA cannot require the ESOP manager to protect plan participants while defrauding other market participants because ERISA "cannot require an ESOP fiduciary to perform an action" that "would violate the securities laws." *Fifth Third*, 134 S.Ct. at 2472; *see also id.* at 2473 (quoting 29 U.S.C. 1144(d), "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States ... or any rule or regulation issued under any such law").

In defined circumstances, Rule 10b5-1(c) provides an affirmative defense to an insider trading charge where a trade is made pursuant to a binding contract or written plan adopted before a person became aware of the inside information. That

affirmative defense is available where "it is clear that the information was not a factor in the decision to trade," including where persons "structure securities trading plans and strategies when they are not aware of material nonpublic information, and do not exercise any influence over the transaction once they do become aware of such information." *Selective Disclosure and Insider Trading*, 65 FR 51716-01, at 51716, 51728.

An ESOP may function as a pre-authorized trading plan sufficient to provide an ESOP manager who is aware of the employer's undisclosed fraud with an affirmative defense under Rule 10b5-1(c) to personal liability for an insider trading claim. The availability of that defense would depend on the particular plan's language and whether trading was conducted as provided by the plan.[9] Assuming that many or even most ESOPs could satisfy Rule 10b5-1(c), such a defense would become unavailable to an ESOP manager who deviates from such a plan by suspending ESOP purchases but not sales because the plan manager would thereby

[9] Of course, if by its terms a particular ESOP does not meet the requirements of the affirmative defense, the ESOP managers for such a plan must abide by the "disclose or abstain" rule to avoid liability for insider trading.

be affirmatively exercising influence over how, when, or whether to effect trades on the basis of material nonpublic information. *See* Rule 10b5-1(c).[10]

If an ESOP manager who is aware of the employer's undisclosed fraud were to affirmatively exercise influence to halt only purchases of overvalued employer stock for the benefit of plan participants, that plan manager would impermissibly be exercising influence to permit concurrent sales of overvalued stock to the extent sales were made to investors who are not plan participants. The plan manager who suspends only purchases would thereby revise the pre-authorized trading plan while aware of material nonpublic information. Should that plan manager still effect sales on behalf of plan participants by selling employer stock to investors in the open market, the plan manager would be unlawfully exercising influence to sell overvalued employer shares on the basis of inside information.[11] That would constitute fraud in connection with the sale of securities. And it would violate the

[10] While plan participants are also purchasers and sellers of securities, plan participants who make investment decisions regarding their ESOP while unaware of material nonpublic information can, if the other requirements are met, establish an affirmative defense under Exchange Act Rule 10b5-1(c). *See* Division of Corporation Finance Compliance and Disclosure Exchange Act Rule Interpretations, Questions 120.20 and 120.21, available at http://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm.

[11] Where plan participants' purchases are suspended the plan manager obviously cannot effect plan participants' sales by matching those sales with an equivalent amount of other plan participants' purchases, even if such matching were otherwise possible.

objectives of the insider trading prohibition if the ESOP manager were permitted to leverage his knowledge of the fraud to "tak[e] unfair advantage" of counterparties. *Chiarella*, 445 U.S. at 228-29; *see also O'Hagan*, 521 U.S. at 652 (insider trading prohibitions "address[] efforts to capitalize on nonpublic information through the purchase or sale of securities").[12] Thus, an ESOP manager cannot refrain only from purchasing additional shares of employer stock without violating the securities laws; but the plan manager can satisfy both regulatory regimes by suspending both purchases and sales by the ESOP.[13]

Congress has provided a formal mechanism for plan managers to suspend both ESOP purchases and sales, as DoL's amicus brief confirms. *See* 29 U.S.C.

[12] There have also been instances where the plan managers were aware of misrepresentations or omissions that caused employer securities to be undervalued, such as in *Finnerty v. Stiefel Labs*, where there was an undisclosed tender offer premium being offered to acquire the employer. 756 F.3d 1310, 1314-21 (11th Cir. 2014); *see also SEC v. Stiefel Laboratories, Inc.*, No. 11-cv-24438 (S.D. Fla. filed Dec. 12, 2011). Under the securities laws, an ESOP manager cannot suspend only purchases where he is aware that a fraud is making employer securities overvalued, but suspend only sales where he is aware that a fraud is making employer securities undervalued. That would enable plan managers to ensure that plan participants systematically and unfairly profit from material nonpublic information in connection with the purchase and sale of securities.

[13] A trading suspension would not satisfy any obligation the ESOP manager himself might have to correct misleading statements or omission for which he was responsible.

1021(i).[14] Plan managers can institute such a suspension in order to satisfy their duties under ERISA and/or the securities laws. *See* 29 U.S.C. 1021(i)(2)(C)(i) (ERISA), 1021(i)(7)(B)(i) (securities laws); *see also* 17 C.F.R. 245.100(b)(1) (SEC regulation noting that suspensions can apply to plan managers' ability to "purchase, sell or otherwise acquire or transfer an interest" in a security). Thus an ESOP manager can satisfy his obligations under both ERISA and the securities laws simply by instituting a suspension of both purchases and sales.[15]

The securities laws require such a suspension of ESOP transactions to be publicly disclosed. After Congress formalized this mechanism for suspending

[14] The trading suspension provisions were promulgated as Section 306 of the Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745. Pursuant to Section 306(a), the SEC has adopted Regulation Blackout Trading Restriction regarding the prohibition of insider trading during trading suspensions. *See* 17 C.F.R. 245.100, *et seq*. DoL administers Section 306(b), which concerns the notice requirement to plan participants under ERISA. *See Final Rule Relating to Notice of Blackout Periods to Participants and Beneficiaries*, 68 FR 3716-01, 2003 WL 158515 (Jan. 24, 2003) (DoL rulemaking).

[15] A plan manager who suspends ESOP transactions would lose any pre-authorized trading defense because that suspension would be an affirmative exercise of influence over how, when, or whether to effect securities transactions. *See* Rule 10b5-1(c). But a manager's proper suspension of both plan purchases and sales would constitute an abstention from trading sufficient to avoid insider trading liability. The pre-authorized trading defense may again become available after the suspension is properly lifted and the ESOP manager ceases such influence if the ESOP at that point satisfies all the requirements of Rule 10b5-1(c). *See* Division of Corporation Finance Compliance and Disclosure Exchange Act Rule Interpretations, Question 120.19 (explaining that the exercise of influence over trading would "terminate" the defense, and an entirely "new" defense would have to be established after the cessation of such influence).

ESOP trading, the SEC amended Form 8-K to require any "Temporary Suspension of Trading Under Registrant's Employee Benefit Plans" to be disclosed within four business days. *See* 17 C.F.R. 249.308, Item 5.04; *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date*, Release No. 34-49424, 69 FR 15594-01, at 15609, 15626 (March 25, 2004). A Form 8-K disclosure of an ESOP trading suspension must include the "reason or reasons for" the suspension. Regulation Blackout Trading Restriction Rule 104, 17 C.F.R. 245.104. Furthermore, any disclosure made in a report on Form 8-K must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading. *See* Exchange Act Rule 12b-20, 17 C.F.R. 240.12b-20. ESOP purchases and sales could resume after the fraud is fully and publicly disclosed. Accordingly, instituting an ESOP trading suspension is another step a plan manager could take in response to a fraud at the employer that is not inconsistent with the securities laws.

C. DoL's other measures are not inconsistent with the securities laws.

DoL's amicus brief identifies other actions that an ESOP manager in these circumstances could take, including urging those responsible for the fraud to disclose the fraud, or reporting possible violations to DoL and/or the SEC. While these actions may not be required by or independently sufficient to meet the

obligations of the securities laws, they would not be inconsistent with the securities laws.

DoL's amicus brief explains that, to satisfy ERISA, ESOP managers who are not responsible for the employer's fraud, or who are unable to make a fraud-revealing disclosure that is public, could urge the issuer and other executives who are responsible for the fraud and are capable of making a corrective public disclosure to do so. Although such actions may not prove successful, and are not necessarily sufficient to satisfy a manager's obligations under the securities laws, it would not be inconsistent with the securities laws' objective of promoting full disclosure of fraud.

Another alternative action DoL's brief identifies is for an ESOP manager in these circumstances to report the fraud to DoL and/or the SEC. This is not inconsistent with the securities laws, as Congress in Exchange Act Section 21F provides incentives and protections, including anti-retaliation provisions, for individuals who report violations of the securities laws to the SEC. *See* 15 U.S.C. 78u-6.[16] And whistleblowing to the SEC under Section 21F is not inconsistent with whistleblowing under 18 U.S.C. 1514A, a statute administered by DoL. *See*

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[16] The SEC has issued regulations regarding these whistleblower provisions. *See* 17 C.F.R. 240.21F-1, *et seq*. Tips regarding possible securities law violations can be electronically submitted to the SEC Office of the Whistleblower. *See* https://www.sec.gov/whistleblower.

Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015). But such reporting to federal agencies, by itself, would not constitute corrective public disclosure.

CONCLUSION

In answering the question of law the district court certified for interlocutory appeal, this Court should apply the legal interpretations set forth in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on March 11, 2016, I electronically filed the SEC's amicus curiae brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit using the CM/ECF system. I also certify that, on the same day, I caused the SEC's amicus curiae brief to be served on counsel for the participants in the case through the CM/ECF system.

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