CASE NO. 04-1082

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. TATUM, Individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

v.

R. J. REYNOLDS TOBACCO CO. et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE AMERICAN BENEFITS COUNCIL SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, the Chamber of Commerce of the United States and the American Benefits Council provide the following corporate disclosure:

-- The Chamber of Commerce of the United States and the American Benefits Council have no parent corporations.

-- No publicly held company owns 10% or more of the stock of the Chamber of Commerce of the United States or the American Benefits Council.

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Ellen Dunham Bryant

Dated: ___________________

TABLE OF CONTENTS

Table of Authorities iii

Interest of Amicus Curiae and Motion for Leave to File 1

Argument 3

A. The Proposition that Fiduciaries Have a Duty to "Veto" Plan Amendments that Fail to Meet Fiduciary Standards Would Nullify the Right of the Sponsor to Amend its Employee Benefit Plans free from Fiduciary Responsibility. 4

B. The Text of ERISA Refutes the Notion That Fiduciaries Have a Duty to "Veto" Plan Amendments that Do Not Measure Up to Fiduciary Standards. 7

C. The Proposition that Fiduciaries Have a Duty to "Veto" Plan Amendments that Fail to Meet Fiduciary Standards Is Unworkable Because It Would Prevent Plan Amendments Disadvantageous to Participants. 13

Conclusion 20

TABLE OF AUTHORITIES

FEDERAL CASES

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 15

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) . . . . *passim*

Hughes Aircraft Co. v. Jacobsen, 525 U.S. 432 (1999) . . . . *passim*

In Re Enron Corp. Securities Derivative and ERISA Litigation, 284 F.Supp.2d 511 (S.D. Tex. 2003) 17

In Re Sears, Roebuck & Co. ERISA Litigation, No. 02 C8324, 2004 WL 407007 (N. D. Ill. March 3, 2004) 16

Laborer's National Pension Fund v. Northern Trust Quantitative Advisors, Inc., 173 F.3d 313 (5th Cir. 1999) 16

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

Nelson v. IPALCO Enterprises, Inc., 2003 WL 402253 (S.D. Ind. 2003) 17

Wright v. Oregon Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004) 17

FEDERAL STATUTES

29 U.S.C. § 1104(a)(1) . . . . *passim*

29 U.S.C. § 1002(21)(A) 8

FEDERAL RULES

Fed. R. App. P. 29 2

INTEREST OF *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents more than three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interest of its members by filing *amicus* briefs in cases involving issued of vital concern to the nation's business community. The Chamber has participated as *amicus curiae* in hundreds of cases in the federals courts of appeals and the Supreme Court.

The American Benefits Council is a broad-based, nonprofit trade association founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. The Council's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Its members also include employee benefit plan support organizations, such as actuarial and consulting firms, insurers, banks, investment firms, and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries.

The membership of both the Chamber and the American Benefits Council has a vital interest in this case because the ability of its members to establish and maintain employee benefit plans depends on the proposition that the sponsor of a plan acts free from fiduciary responsibility in designing, amending or deciding to terminate a plan. The view proposed by the Secretary of Labor as amicus curiae -- that every fiduciary who implements a plan amendment has an independent duty to test the amendment against fiduciary standards -- would effectively deprive employers of the vital right to act in their own best interests in designing, amending and deciding to terminate employee benefit plans.

We have been unable to obtain appellant's consent to consent the filing of this brief. Therefore, pursuant to Fed. R. App. P. 29, the Chamber and the American Benefits Council respectfully move for leave to file this brief *amicus curiae* in support of appellee urging affirmance.

ARGUMENT

We agree with appellee Reynolds Tobacco Co. and *amicus curiae* Secretary of the United States Department of Labor (the "DOL") that the sponsor of an employee benefit plan acts free from fiduciary responsibility in creating, amending and terminating an employee benefit plan, as the United States Supreme Court has now held three times. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), *Hughes Aircraft Co. v. Jacobsen*, 525 U.S. 432 (1999). While admitting that proposition, however, the brief of the DOL seeks to undercut it by arguing that any fiduciary that implements a plan amendment has an independent fiduciary duty to test the amendment against fiduciary standards and, if it concludes that the amendment is not in the best interest of the participants, to ignore it. Brief of the Secretary of Labor as *Amicus Curiae* in Support of Appellant and Requesting Reversal of the District Court Decision (the "DOL Brief") at 12-18.

The proposition advanced by the DOL would effectively subject all plan amendments to fiduciary standards and nullify the right of the sponsor to make amendments free from fiduciary responsibility. We write separately to make clear that the proposition advanced by the DOL (a) would eviscerate the Supreme Court's decisions in *Curtiss-Wright v. Schoonejongen*, *Lockheed v. Spink* and

Hughes Aircraft v. Jacobsen, (b) is directly contradicted by the statute, and (c) is completely unworkable.

A. The Proposition that Fiduciaries Have a Duty to "Veto" Plan Amendments that Fail to Meet Fiduciary Standards Would Nullify the Right of the Sponsor to Amend its Employee Benefit Plans free from Fiduciary Responsibility.

It is fair to say that virtually every decision made by the sponsor in the design of an employee benefit plan ultimately requires someone (often a fiduciary) to implement it.[1] For example, if the sponsor writes the plan to provide one level of benefit to employees at one plant and another level of benefit to employees at another plant, some fiduciary must judge at which plant a particular claimant is employed. If the sponsor writes the plan to provide a benefit of 60% of base pay, but not commissions, some fiduciary must determine the employee's base pay and calculate 60% of it. If the sponsor writes the plan to provide a benefit in the event of disability, some fiduciary must determine whether the claimant is disabled. In other words, employee benefit plans are not self-executing.

[1] Plan sponsors voluntarily maintain health and retirement benefit plans. The voluntary system recognizes that plan sponsors have varying pressures and needs that affect how they design their benefit plans. These pressures also affect their ability and willingness to maintain benefit programs. Without the inherent ability to design and make changes to the design of employee benefit plans sponsored by them, and without the concern that the fiduciary could override the decision, employers are far less likely to provide the benefit plans for their employees. Obviously, this would be to the significant detriment of the employees and their families.

The DOL Brief acknowledges, as it must after *Curtiss-Wright v. Schoonejongen*, *Lockheed v. Spink* and *Hughes Aircraft v. Jacobsen*, that the sponsor acts free from fiduciary responsibility in designing the plan. That is to say, the sponsor is unencumbered by any fiduciary responsibility in deciding that the benefit shall be higher at one plant than at another, that it shall provide a benefit of 60% of base pay (not total compensation), or that it shall provide a benefit to those who satisfy its definition of disability (not to just anyone who is sick or injured). It could not be otherwise, for in setting the terms of the plan the sponsor must be free to act in its own self-interest, a freedom denied to a fiduciary.[2] DOL Brief at 7-12.

What it gives with one hand, however, the DOL Brief attempts to take away with the other, arguing that, although the sponsor acts free from fiduciary responsibility in making the amendment, any fiduciary who implements the amendment must independently test it against fiduciary standards and, if it fails the fiduciary test, must ignore it. DOL Brief at 12-18. Such a holding would make the right of the sponsor to act free from fiduciary responsibility entirely illusory.

[2] As the Supreme Court has repeatedly stated, this principle stems from the voluntary nature of employee benefit plans. Since employers are not required to have plans at all, they enjoy the freedom to structure them as they see fit (within the boundaries of ERISA, of course). By contrast, a fiduciary of an ERISA-covered plan is bound by ERISA to act solely in the interest of the participants and beneficiaries of the plan, eschewing the interests of any other interested party including the sponsor. ERISA sec. 404(a)(1), 29 U.S.C. § 1104(a)(1).

What if the fiduciary who implements the plan had a fiduciary duty to ignore plan provisions that it considered not in the interest of the participants of the plan? Would the fiduciary have a duty to decide whether higher benefits for employees at one plant really are justified and, if it concluded that they were not, to ignore the terms of the plan? Would the fiduciary have a duty to decide whether it was best for the participants to have their benefits calculated without regard to commissions and, if not, to include commissions nonetheless? (Commissioned salespeople would no doubt make a passionate plea.) Would the fiduciary have a duty to decide whether the particular definition of disability really serves the interests of the participants or whether a different one should be applied instead?

Any reasonable person would recognize those questions as rhetorical. If each decision of the sponsor in setting up the plan became subject to fiduciary duty later when a fiduciary implemented it, then the decisions would not really be free from fiduciary responsibility at all, and the principle that the sponsor acts free from fiduciary responsibility -- so forcefully established by the Supreme Court -- would evaporate into thin air. In fact, the opposite is true and is the only basis on which employee benefit plans can operate: the sponsor acts free from fiduciary responsibility in setting up the plan, and the fiduciary has no discretion -- hence, no fiduciary duty -- to depart from the terms of the plan. To hold otherwise would be

to render *Curtiss-Wright v. Schoonejongen*, *Lockheed v. Spink* and *Hughes Aircraft v. Jacobsen* dead letter.

B. The Text of ERISA Refutes the Notion That Fiduciaries Have a Duty to "Veto" Plan Amendments that Do Not Measure Up to Fiduciary Standards.

Those who carry out the terms of employee benefit plans have such functions as the plan document grants them. ERISA may or may not apply fiduciary responsibility to one or more of those functions, but the duty to perform the function arises, in the first instance, from the plan document. Before the question of fiduciary responsibility can be answered, therefore, it is necessary to ask whether the plan document grants the actor any discretionary authority with regard to the matter. If the plan document does not afford the actor discretion in the matter, there is no discretionary authority to which the fiduciary duty may attach.

Besides being compelled by common sense, that proposition is embedded in the statute. It is found in two places: first in the definition of "fiduciary" but then again in the recitation of fiduciary responsibility.

In the definition of "fiduciary," the statute provides that an actor becomes a fiduciary only to the extent that he performs a function defined as giving rise to fiduciary responsibility -- the so-called functional definition of fiduciary. Thus, fiduciary responsibility attaches to the function -- by whomever performed -- rather

than to the actor. And it becomes a category mistake to declare in blanket fashion that a person "is" a fiduciary, because some functions performed by that person may carry fiduciary responsibility while other functions do not. The appropriate inquiry is not whether the person "is" a fiduciary but whether, in performing the task in question, the person performed one of the functions to which fiduciary responsibility attaches.

The functions to which fiduciary responsibility attaches are enumerated in the statute:

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

ERISA sec. 3(21)(A), 29 U.S.C. § 1002(21)(A). The key observation is that all of those functions involve carrying out the terms of the plan; none involve determining what the terms of the plan shall be, which is the province of the sponsor and not subject to fiduciary responsibility.

For example, if the sponsor writes the plan to provide one level of benefits to employees at one plant but a different level of benefits to employees at a different plant, the determination that there shall be different benefit levels has been made

by the sponsor, free from fiduciary responsibility. The administrator who executes the terms of the plan does not exercise any authority or control over whether there will be two different benefit levels; that decision was made by the sponsor, written into the plan document, and thereby placed beyond the authority or control of the administrator. Thus, the administrator does not perform a fiduciary function by accepting and carrying out the differential in benefits. The same would apply to carrying out the terms of the plan regarding base pay (rather than total compensation) or the definition of disability. The plan gives the actor no leeway -- no room to exercise independent authority or control -- regarding those decisions and thus does not impose fiduciary responsibility.

A typical plan administrator does indeed perform some fiduciary functions, because he exercises authority or control over innumerable details of implementation of the plan, but only because the plan document leaves that discretion to the plan administrator. For example, a plan administrator typically uses his own discretion in prescribing forms for claiming benefits, in determining what substantiation is sufficient to establish entitlement to benefits, in notifying participants of their rights and options, and in determining exactly how and when to make payment. Those functions satisfy the definition of “fiduciary” and therefore carry fiduciary responsibility because *the plan commits those functions to the discretion of the administrator*.

But where the plan does not leave a matter to the discretion of a fiduciary -- where the sponsor has made the decision and expressed it as a term of the plan -- the matter has been decided. Because the matter has already been decided, no discretion is left to any person to reconsider that matter. To make the subsidiary decisions relating to implementation, yes. But not to reconsider the decision itself, whose outcome is stated as a term of the plan in the plan document. Since the plan does not grant to any person authority to reconsider the decision, there is no authority or control to which fiduciary responsibility can attach under the statute.

This brings us to the second important statutory provision, section 404(a)(1)(D) of ERISA, which sets out the standards by which a fiduciary must discharge his duties. The important point here is that there must first be a duty, imposed by the plan or by the statute, before fiduciary responsibility can attach to it. Introducing the list of fiduciary standards, the statute makes this perfectly clear:

> [A] fiduciary shall discharge his *duties with respect to a plan* --
>
> [in accordance with the listed standards].

ERISA sec. 404(a)(1) (emphasis added). Thus, while section 404 is sometimes casually referred to as creating fiduciary duties, it does not actually create the duties of the fiduciary; it sets out the standards by which those duties must be performed.

The italicized language from the statute, often overlooked, is the key to understanding the role of the fiduciary. Some conceive of the fiduciary as a free-ranging ombudsman, charged with righting all wrongs. That concept underlies the position of the DOL in this case. But the command of Congress was much narrower -- that a fiduciary follow the dictates of fiduciary responsibility in discharging his *duties with respect to the plan*. Simply put, if there is no duty under the plan (or the statute), there is nothing to which fiduciary responsibility can attach.

To leave no doubt about that result, Congress underlined the responsibility of the fiduciary to act in accordance with the terms of the plan. Even where the fiduciary is afforded discretion:

> [A] fiduciary shall discharge his duties with respect to a plan --
>
> in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and Title IV.

ERISA sec. 404(a)(1)(D). How could Congress have said any more clearly that a fiduciary is bound by the terms of the plan?

Ironically, the DOL Brief uses that very language as the basis for its argument that fiduciaries are *not* bound to observe the terms of the plan but, instead, are duty bound to re-test all of the sponsor's decisions by fiduciary standards. The DOL Brief performs this illusion by twisting the language of the

statute like a Möbius strip until it circles back on itself and actually reverses meaning. Here is how they do it:

-- They say that the phrase "insofar as such documents and instruments are consistent with the provisions of this title" means that any terms of the plan inconsistent with ERISA need not be followed. DOL Brief at 12. So far so good.

-- Then they say that any terms of the plan that would operate against the interests of the participants are inconsistent with ERISA, because it would be a breach of fiduciary duty to observe them. DOL Brief at 13.

-- Therefore, the DOL concludes, fiduciaries need not follow any terms of the plan that would operate against the interests of the participants. *Ibid.*

The circularity is apparent: the minor premise assumes the conclusion. The minor premise is that any terms of the plan that would operate against the interests of the participants are inconsistent with ERISA. We know this, according to the DOL, because a fiduciary would be forbidden to carry them out, because carrying them out would be contrary to the interests of the participants and thus produce a breach of fiduciary duty. But the purpose of the syllogism is to examine whether it would be breach of fiduciary duty to carry out the terms of the plan; one cannot *conclude* that it would be a breach by *assuming* that it would be a breach.

In actuality, the minor premise is false. In any employee benefit plan there will be many terms that operate against the interests of the participants. Virtually

all limitations and restrictions on benefits could be said to operate against the interests of the participants. Yet limitations and restrictions are not only permissible but necessary in order to define the promise. If the sponsor is free to act in its own best interests in designing the plan, as it unquestionably is, then the limitations and restrictions imposed by the sponsor in the design of the plan must be allowed to stand, subject only to the overriding requirements of Congress expressed in the statute.[3]

C. The Proposition that Fiduciaries Have a Duty to "Veto" Plan Amendments that Fail to Meet Fiduciary Standards Is Unworkable Because It Would Prevent Plan Amendments Disadvantageous to Participants.

Not all limitations and restrictions will be original features of a plan; the sponsor must be free to introduce limitations and restrictions by amendment. Almost by definition, however, an amendment introducing a limitation or restriction will be adverse to the interests of the participants. If the plan administrator had a fiduciary duty to review every plan amendment and test it against fiduciary standards, which require that actions be taken solely in the interest of the participants of the plan, then no amendment imposing a limitation or

[3] The duty to follow the terms of the plan must, of course, yield where the terms of the plan violate the substantive requirements of ERISA, which is what ERISA says in enjoining the fiduciary to discharge his duties with respect to the plan in accordance with the plan document but only where the terms of the plan are consistent with ERISA. ERISA sec. 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

restriction would ever pass muster. And so the sponsor would effectively be unable to amend a plan to impose a limitation or restriction.

The plan amendment at issue in this case is good example. The sponsor amended the plan to eliminate an investment option. Needless to say, such amendments are regular occurrences -- and entirely necessary and proper -- as sponsors seek to optimize the investment opportunities in 401(k) plans. Yet the position of the DOL would require the administrator or trustee of the plan, acting as fiduciary, to make an independent decision about whether the amendment was in the interest of the participants and, if it was not, to refuse to implement it. But if every plan amendment must be vetted against fiduciary standards, then the right of the sponsor to amend the plan free from fiduciary responsibility becomes a nullity.

Looking beyond this case, the range of plan amendments that might be affected by the principle proposed by the DOL Brief is astounding. Suppose a sponsor wished to amend a 401(k) plan to eliminate loans. If the plan administrator had a duty to review that decision against fiduciary standards, how could the amendment stand? Suppose a sponsor wished to amend a health plan to promote managed care by providing that treatment sought at out-of-network providers would be reimbursed at a lower level. If the administrator had a duty to review that amendment against fiduciary standards, how could the amendment stand? Or consider plan termination. After all, termination of a plan is just an

extreme form of plan amendment. If the sponsor decided to terminate a plan and amended it to so provide, would the plan administrator have a duty to review that decision against a fiduciary standard and, concluding that termination was not in the best interest of the participants, to keep the plan alive?[4]

So how could four other courts have held that a fiduciary has a duty to review -- and if necessary reject -- plan amendments lawfully made by the sponsor? DOL Brief at 13. The answer is, they didn't. Here are the four cases cited for that proposition in the DOL Brief:

1. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) -- Here the trustees of a multiemployer plan sought to enforce a plan provision authorizing them to audit participating employers. The employer resisted, arguing that the plan provision was inconsistent with ERISA and therefore should be not enforced. The Supreme Court held that the plan provision was not inconsistent with ERISA and therefore would be enforced. Since the fiduciary was seeking to *enforce* a term of plan, the Supreme

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[4] Consistent with the Supreme Court's subsequent decisions in *Curtiss-Wright v. Schoonejongen*, *Lockheed v. Spink*, and *Hughes Aircraft v. Jacobsen*, the DOL has opined that a sponsor's decision to terminate a plan is not subject to fiduciary responsibility. DOL Information Letter to John Erlenborn, March 13, 1986. It would be somewhat disingenuous now for the DOL to take the position that, while the sponsor acts free from fiduciary responsibility in deciding to terminate a plan, the decision must still be reviewed against fiduciary standards because the plan administrator has a duty to second-guess the decision and, if adverse to the interest of the participants, to refuse to carry it out.

Court was not called upon to decide (and did not decide) whether there is a fiduciary duty to disregard the terms of the plan.

2. *Laborer's National Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313 (5th Cir. 1999) -- This case presented the question whether a particular investment was prudent under the investment guidelines in the plan. The Fifth Circuit held that it was prudent under those guidelines and went on to say that it would be prudent under the statute and regulations as well. Since the investment was prudent under both the plan and the law, the Fifth Circuit was not called upon to decide (and did not decide) whether there is a fiduciary duty to disregard the terms of the plan.

3. *In Re Sears, Roebuck & Co. ERISA Litigation*, No. 02 C8324, 2004 WL 407007 (N. D. Ill. March 3, 2004) -- In this case, ruling only on a motion to dismiss, the Northern District of Illinois held that, while the plan was designed to invest primarily in employer stock, the fiduciary still had discretion not to invest in employer stock. Noting that "[s]ome amount of discretion by the entity controlling the plan is required to invoke a fiduciary duty" (at *4), the court held that there was enough discretion to support a claim of breach of fiduciary duty. Since the plan document left the matter to the discretion of the fiduciary, the court was not called upon to decide (and did not decide) whether there is a fiduciary duty to disregard the terms of the plan.

4. *In Re Enron Corp. Securities Derivative and ERISA Litigation*, 284 F.Supp.2d 511 (S.D. Tex. 2003) -- Here the Southern District of Texas held that the complaint stated a claim of breach of fiduciary duty for investing in employer stock. The plan called for investment "primarily" in employer stock, with the result that "the leeway provides the plan fiduciaries with considerable discretion, which they allegedly did not exercise prudently or loyally." 284 F.Supp.2d at 670. While the court stated that "an investment fiduciary must disregard plan documents if following their terms would be imprudent," the remark was casual *dictum* introduced by the signal "Moreover" and buried on page 159 of the opinion. Since the plan in fact afforded the fiduciary discretion with regard to investment, the court was not called upon to decide (and did not decide) whether there is a fiduciary duty to disregard the terms of the plan.[5]

By contrast, there are two cases where the proposition advanced in the DOL Brief was actually litigated and decided, and in both cases the proposition was rejected. *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004), and *Nelson v. IPALCO Enterprises, Inc.*, 2003 WL 402253 (S.D. Ind. 2003).

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[5] The DOL brief cites eight more cases, not for the proposition advanced, but as "consistent with" the proposition. DOL Brief at 14-15. In every case, however, the court carefully recites that the plan document left the fiduciary with discretion over the matter at issue. In none of the cases did the terms of the plan settle the matter, so in none of the cases was the court called upon to decide whether there is a fiduciary duty to disregard the terms of the plan.

In *Oregon Metallurgical*, an employee stock ownership plan provided for the investment of plan assets primarily in employer stock. Responding to a clamor for diversification from the participants, the sponsor amended the plan to permit up to 85 percent of a participant's account to be removed from employer stock and invested in other securities. But under the terms of the plan amendment, a minimum of 15% of each account was required to remain invested in employer stock. Participants sued the plan administrator and trustee alleging a breach of fiduciary duty for complying with the plan's requirement that at least 15% of each account remain invested in employer stock.

The Ninth Circuit affirmed the dismissal of the complaint, holding that the fiduciaries were obligated to observe the terms of the plan, which were not unlawful, and had no duty to deviate from it:

> ERISA requires fiduciaries to comply with a plan as written unless it is inconsistent with ERISA. . . . Because Defendants complied with the Plan's lawful terms and were under no legal obligation to deviate from those terms, they provided Plaintiffs with their benefits due.

360 F.3d at 1100.

In *IPALCO*, the plan document required matching contributions to be invested in employer stock and did not afford any fiduciary any leeway to invest them otherwise. The court held that there could be no breach of fiduciary duty in so investing matching contributions, pursuant to the mandate of the plan, distinguishing many of the same cases that the DOL Brief cites, on the ground that

the plan documents in those cases all permitted at least some discretion to the fiduciary. 2003 WL 402253 at *5-*8.

The Court should be under no illusion that other courts have adopted the view proposed by the DOL Brief. If this Court wants to walk that plank, it will be the first to do so.

CONCLUSION

The proposition advanced by the DOL -- that plan amendments made by the sponsor free from fiduciary responsibility must nevertheless be subjected to fiduciary scrutiny by the fiduciary who implements them -- would nullify the freedom of the sponsor to make amendments that are disadvantageous to participants (established by the Supreme Court), draws no support from the statute (which is plainly to the contrary), and is utterly unworkable (sponsors *mus*t be able to amend plans in ways disadvantageous to participants). The Chamber and the American Benefits Council respectfully suggest that the decision of the district court is correct and should be affirmed.

Respectfully submitted,

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Dated: __________________ _______________________________

Ellen Dunham Bryant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing:

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATE AND THE AMERICAN BENEFITS COUNCIL SUPPORTING APPELLEES AND AFFIRMANCE

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