No. 24-1281

In the United States Court of Appeals
for the Second Circuit

JOSHUA KNIGHT, *et al.*,
Plaintiffs-Appellants,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of New York
Case No. 7:22-cv-04592
The Honorable Judge Nelson S. Román

Brief for the U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of Labor ("Secretary") has the primary authority to interpret and enforce Title I of ERISA and is responsible for "assur[ing] the . . . uniformity of enforcement of the law under the ERISA statutes." *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 693 (7th Cir. 1986). To that end, the Secretary has an interest in effectuating ERISA's express purpose of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and "providing for appropriate remedies . . . and ready access to the Federal courts." 29 U.S.C. § 1001(b).

ERISA requires that claims alleging violations of the statute's fiduciary standards be brought within three years from the date a plaintiff obtains "actual knowledge" of the violation. 29 U.S.C. § 1113(2). The Supreme Court has explained that "to have 'actual knowledge' of a piece of information, one must in fact be aware of it," which "requires more than evidence of disclosure alone." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*. 140 S. Ct. 768, 776–77 (2020) (quoting 29 U.S.C. § 1113(2)). Yet the district court here found that Plaintiffs had "actual knowledge" of Defendants' breach—namely, Defendants' use of

an outdated mortality table to calculate Plaintiffs' pension benefits—simply because Plaintiffs received lengthy Pension Projection Statements disclosing that mortality table. On that basis alone, the district court dismissed Plaintiffs' claim for breach of fiduciary duty as time-barred under 29 U.S.C. § 1113(2). The Secretary has a substantial interest in ensuring that the "actual knowledge" requirement in ERISA's statute of limitations is properly applied.

The Secretary files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. Factual Background

1. The IBM Plan

The IBM Personal Pension Plan ("IBM Plan" or "Plan") is a defined-benefit pension plan governed by ERISA that provides retirement benefits to substantially all U.S. employees of IBM. A51 (¶ 31), A56 (¶ 58). The Plan is administered by IBM's Plan Administrator Committee, which is a named fiduciary of the Plan. A52 (¶¶ 35, 37).

Under the Plan, the default benefit payment for unmarried participants "is expressed as a single life annuity, meaning a series of

monthly benefit payments beginning at retirement and continuing until a participant's death." A56 (¶ 59). The default benefit payment for married participants "is a 50% joint and survivor annuity" that pays "the participant's surviving spouse . . . 50% of whatever amount the participant received during his lifetime." *Id.* (¶ 60). Married participants also may select other joint and survivor annuity options that pay "anywhere from 1% to 100% of the monthly benefit paid to the retiree." *Id.* (¶ 62).

To calculate a married participant's joint and survivor annuity, IBM takes the participant's single-life annuity and converts it to a joint and survivor annuity by using a variety of actuarial assumptions. A46 (¶ 6). The actuarial assumptions differ depending on whether the participant joined the plan before or after July 1, 1999, when the Plan was restructured. A48 (¶ 15). This suit concerns participants who joined the plan before July 1, 1999. A47–A48 (¶ 13).

For participants who joined the Plan before July 1, 1999, the Plan uses "the UP-1984 [Unisex Pension (UP) – 1984] Mortality Table." A57 (¶ 65). The UP-1984 Mortality Table was "developed by the Committee on Self-Administered Retirement Plans from the Society of Actuaries in

1976" and was based on mortality experience data among non-insured private pensioners observed over the years 1965-1970." *Id.* Because the UP-1984 Mortality Table was developed in 1976 when the American workforce was "predominantly male, only 20% of the mortality reflected in the UP-1984 Mortality Table is based on female employee experience." *Id.* Further, it is "based on a cross-section of 'bluecollar' workers" who "generally have decreased longevity compared to 'white-collar workers.'" *Id.* (¶ 66).

2. Plaintiffs' Retirement Benefits and Pension Projection Statements

Plaintiffs are three long-time IBM employees who joined the Plan prior to July 1, 1999, and who selected various forms of joint and survivor annuities upon retirement. A50–A51 (¶¶ 25–27). Plaintiffs' benefits were calculated using the UP-1984 Mortality Table. *See id.*

Prior to Plaintiffs' retirements (and more than three years before filing suit), IBM supposedly sent each Plaintiff a Pension Projection Statement showing their projected pension payments under various election options. S*ee, e.g.,* A651–A681 (Knight Pension Projection Statement); A687–A718 (Fabrizo Pension Projection Statement); A733–A764 (Campbell Pension Projection Statement). The Statements make

clear that they are "only an estimate of what you *could* receive," and that the "actual benefit will be determined at the time you elect to commence benefits under the Plan." A655 (Knight); A691 (Fabrizio); A736 (Campbell) (emphasis in originals). After listing Plaintiffs' benefit estimates, the Statements each include a section labeled "Calculation Notes." Among other details, the Calculation Notes describe how a concept referred to as "Relative Value" is estimated. *See* A658; A696; A742. For example, the 36 single-spaced lines of Calculation Notes in Plaintiff Campbell's Pension Projection Statement include the following sentence: the relative value of "[a]ny protected Prior Plan based qualified pension benefit payable in an annuity form is determined using an interest of 8% and average life expectancies based on the UP-1984 Mortality Table . . . ." A742.

B. Proceedings Below

Plaintiffs filed a putative class action Complaint in 2022 alleging that IBM and IBM's Plan Administrator Committee violated ERISA's actuarial equivalence and non-forfeitability rules by calculating their benefits using the outdated UP-1984 Mortality Table. *See* A67–A72 (¶¶ 118–145) (citing 29 U.S.C. §§ 1053–1055). Plaintiffs also allege that

the Plan Administrator Committee violated ERISA's fiduciary standards by using the outdated mortality table. *See* A72–A75 (¶¶ 146–157) (citing 29 U.S.C. § 1104). Plaintiffs allege that the UP-1984 Mortality Table "is more than 40 years out of date, despite dramatic increases in longevity of the American public." A58 (¶ 72). Plaintiffs claim that if Defendants had used more current actuarial assumptions—such as those referenced in regulations promulgated by the United States Department of Treasury—their benefits would have been larger. A50–A51 (¶¶ 25–27); A54 (¶ 47) (citing 26 U.S.C. § 417(e)(3)).

Defendants moved to dismiss Plaintiffs' claims as time barred. Defendants claimed that Plaintiffs' non-fiduciary claims—for which ERISA does not prescribe a statute of limitations—were barred by the Plan's two-year limitations period tied to when a participant "knew or should have known" of the relevant facts. *See* Dkt. 47-1 at 7–11. Defendants further argued that Plaintiffs' fiduciary-breach claim was untimely under ERISA's statute of limitations for such claims, 29 U.S.C. § 1113(2), because Plaintiffs supposedly had "actual knowledge" of the alleged fiduciary breach more than three years before filing suit

upon receiving their Pension Projection Statements, which disclosed the UP-1984 Mortality Table. *See id.* at 11–12. Defendants relied on a recent decision from the Southern District of New York, *Masten v. Metropolitan Life Insurance Company*, to argue that "[t]he court 'can . . . reasonably infer that [a participant] had knowledge of the alleged fiduciary breach' involving use of unreasonable actuarial assumptions once the participant receives the first pension payment." Dkt. 47-1 at 12 (quoting 543 F. Supp. 3d 25, 38 (2021)) (alterations in Dkt. 47-1).

The district court dismissed all of Plaintiffs' claims as time barred. *See generally*, A774–A783. As to the fiduciary breach claim, the court found that the Pension Projection Statements supposedly sent to Plaintiffs more than three years before filing suit identified the UP-1984 Mortality Table and therefore "disclosed all the facts relevant to their claim of fiduciary breach." A782. The court found that Plaintiffs had "even more" information than the benefit payments that were deemed sufficient to impart actual knowledge in *Masten*. *Id.* The court did not make any factual findings as to whether Plaintiffs were in fact aware of Defendants' use of the UP-1984 Mortality Table when they received their Pension Projection Statements.

SUMMARY OF THE ARGUMENT

The district court's dismissal of Plaintiff's fiduciary breach claim as time barred contravenes ERISA's statute of limitations and Supreme Court precedent interpreting it. As relevant here, ERISA requires plaintiffs to bring suit for fiduciary violations within three years of obtaining "actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). The Supreme Court recently explained that "[t]o meet § 1113(2)'s 'actual knowledge' requirement, . . . the plaintiff must in fact have become aware of that information." *Sulyma.* 140 S. Ct. at 777. And proving that awareness, the Court emphasized, "requires more than evidence of disclosure alone." *Id.*

The district court's decision flies in the face of *Sulyma.* Contrary to *Sulyma*'s instruction, the district court never evaluated when Plaintiffs "in fact" became aware of Defendants' use of the UP-1984 Mortality Table to calculate their pension benefits. *See Sulyma,* 140 S. Ct. at 777. Instead, the court held that Plaintiffs had actual knowledge of Defendants' breach merely upon receiving their Pension Projection Statements, for the sole reason that those Statements "disclosed all the facts relevant to their claim of fiduciary breach" (i.e., the UP-1984

Mortality Table). In other words, though the Supreme Court in *Sulyma* admonished that "disclosure alone" does not suffice to impart actual knowledge, the district court here held exactly the opposite. This Court should reverse.[1]

ARGUMENT

I. ERISA's Three-Year Statute of Limitations for "Actual Knowledge" Requires More Than Evidence of Disclosure Alone

ERISA requires that claims for violations of the statute's fiduciary standards be brought within the earlier of (1) six years of the breach or violation, or "(2) [t]hree years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113. The district court dismissed Plaintiffs' fiduciary-breach claims only under the second of these provisions, 29 U.S.C. § 1113(2)—the three-year statute of limitations tied to when a plaintiff obtains "actual knowledge" of the breach or violation.

[1] The Secretary takes no position on whether the district court properly dismissed Plaintiffs' non-fiduciary breach claims as time barred under the Plan's two-year statute of limitations provision. The limitations period set out in 29 U.S.C. § 1113 applies only to claims asserting violations of ERISA's fiduciary provisions.

The Supreme Court recently addressed the meaning of ERISA's "actual knowledge" standard. *See Sulyma*, 140 S. Ct. at 768. The plaintiff in *Sulyma*, a participant in IBM's defined-contribution retirement plan, sued defendants for breaching ERISA's fiduciary duties by investing plan contributions in funds that contained alternative asset classes (like hedge funds and private equity funds) that carried high fees and underperformed other available funds, like index funds *See id.* at 774. Plaintiff received "numerous disclosures" during the course of his employment, "some explaining the extent to which his retirement plans were invested in alternative assets." *Id*. One of those disclosures appeared on a website to which plan participants were referred, and which plaintiff himself repeatedly visited. *Id.* at 774–75. But plaintiff testified at his deposition that when he visited that website "he did not 'remember viewing'" any disclosures related to the plan's investments. *Id.* at 775. He also submitted a declaration stating that "he was 'unaware . . . the monies that [he] had invested through the Intel retirement plans had been invested in hedge funds or private equity.'" *Id.* Nevertheless, the defendants argued that "[o]nce a plaintiff

receives a disclosure . . . he 'ha[s]' the knowledge that § 1113(2) requires because he effectively holds it in his hand." *Id.* at 777.

The Supreme Court disagreed. The Court explained that "to have 'actual knowledge' of a piece of information, one must in fact be aware of it." *Id.* at 776. The Court reasoned that "if a plaintiff is not aware of a fact, he does not have 'actual knowledge' of that fact however close at hand the fact might be." *Id.* at 777. The Court thus concluded that "[a]s presently written, . . . § 1113(2) requires more than evidence of disclosure alone," as a contrary rule would "turn[] § 1113(2) into what it is plainly not: a constructive-knowledge requirement." *Id.* Rather, "[t]o meet § 1113(2)'s 'actual knowledge' requirement, . . . the plaintiff must in fact have become aware of that information." *Id.*

The Court clarified, however, that its decision did not "foreclose[] any of the usual ways to prove actual knowledge at any stage in the litigation," including deposition testimony in which plaintiffs admit to reading particular disclosures, "inference[s] from circumstantial evidence," and "evidence suggesting that plaintiff took action in response to . . . information." *Id.* at 779 (internal citations and quotations omitted). Nor would defendants be precluded "from

contending that evidence of 'willful blindness' supports a finding of 'actual knowledge.'" *Id.* But the defendants in *Sulyma* did "not argue that 'actual knowledge' is established in any of these ways, only that they need not offer any such proof." *Id.* And that, the Court reiterated, was "incorrect." *Id.*[2]

II. The District Court Improperly Dismissed the Complaint as Time Barred Based on Evidence of Disclosure Alone

The district court's dismissal of Plaintiffs' fiduciary breach claim is directly contrary to *Sulyma*. The court explained that the Pension Projection Statements that IBM supposedly sent Plaintiffs "disclosed all the facts relevant to [Plaintiffs'] claim of fiduciary breach." A782. For that reason alone, the court concluded that "Plaintiffs had actual knowledge of the facts underlying their claims more than three years

[2] The Supreme Court's decision in *Sulyma* is consistent with longstanding Second Circuit precedent interpreting ERISA's "actual knowledge" standard. *See, e.g., Caputo v. Pfizer, Inc.*, 267 F.3d 181, 193–94 (2d Cir. 2001) (characterizing the district court's interpretation of § 1113(2) "as being triggered upon plaintiffs' 'constructive knowledge' of a breach" as "repugnant to the plain language of the statute as well as its legislative history," and finding that "a plaintiff has 'actual knowledge of the breach or violation' within the meaning of ERISA § 413(2) [§ 1113(2)] . . . when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty"); *Janese v. Fay*, 692 F.3d 221, 227–28 (2d Cir. 2012) (similar).

prior to the filing of the June 2, 2022 complaint." A782–A783. That rationale is irreconcilable with *Sulyma*, where the Supreme Court made clear that § 1113(2) requires "more than evidence of disclosure alone." *Sulyma*, 140 S. Ct. at 777. The district court did not even cite *Sulyma*, let alone attempt to reconcile its decision with it.

Further, the district court did not find that Plaintiffs had actual knowledge based on any of the "usual" methods *Sulyma* identified. *See id.* at 779. Because this case was dismissed on the pleadings, there is certainly no deposition testimony from any of the Plaintiffs attesting that they even received their Pension Projection Statements, let alone read them (including the Calculation Notes in which the UP-1984 Mortality Table was mentioned). For the same reason, there is no "evidence suggesting that plaintiff[s] took action in response to" the outdated mortality table before filing this lawsuit, or other "circumstantial evidence" manifesting their awareness of the mortality table. *Id.* Plaintiffs also cannot reasonably be deemed "willfully blind" to the outdated mortality table, *see id.* at 779, as there is no evidence that they "subjectively believe[d] . . . there was a high probability that a fact exists"—here, Defendants' use of an outdated mortality table to

calculate their benefits—yet took "deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

Aside from being directly contrary to *Sulyma*, the notion that Plaintiffs obtained "actual knowledge" of the UP-1984 Mortality Table from its appearance in their Pension Projection Statements is simply not credible. As explained, the UP-1984 Mortality Table appears in the Statements once, *after* the pages detailing Plaintiffs' projected benefits—the key part of the Statements—and in a section labeled "Calculation Notes" comprising single-spaced, often technical text. *See* A658; A696; A742. Moreover, the Calculation Notes do not state explicitly that the mortality table was used to calculate any particular annuity estimate, but rather that it was used to determine the "*relative value* of any protected Prior Plan based qualified pension benefit payable in an annuity form." A658 (Knight) (emphasis added); *see also* A696 (Fabrizio) & A742 (Campbell). To deduce the practical import of the mortality-table disclosure, therefore, a participant would need to cross reference it with the Statements' earlier explanation of "relative value." It is the height of speculation that any Plaintiff, after receiving

their Statement, continued reading past the key information to find the technical notes, and understood their practical implications by referencing an earlier definition.[3]

To support its contrary conclusion, the district court—while entirely ignoring *Sulyma*—relied heavily on *Masten*. The district court characterized *Masten* as holding that knowledge of unreasonable actuarial assumptions may be inferred "once the participant receives the first pension payment." *See* Dkt. 54 at 9–10.

For starters, it is not clear *Masten* even stands for that proposition. The plaintiffs in *Masten*, like plaintiffs here, alleged that certain joint and qualified annuities offered by their plan were calculated using outdated actuarial tables, and asserted a fiduciary breach claim on that basis. 543 F. Supp. 3d at 30–31. The district court dismissed the fiduciary breach claim under the *six-year* statute of

[3] Even if it were reasonable to assume that Plaintiffs read the Calculation Notes in their Pension Projection Statements and made the required inferential leaps, the Statements are merely pre-retirement *estimates* of what Plaintiffs' pensions were likely to be, not statements of how Defendants in fact determined Plaintiffs' actual benefits. *See, e.g.,* A655 (clarifying that the Pension Projection Statement is "only an estimate of what you *could* receive," and that the "actual benefit will be determined at the time you elect to commence benefits under the Plan.").

limitations provision tied to when the breach occurred, 29 U.S.C. § 1113(1), explaining that the "breach occurred with the selection of the outdated mortality tables as conversion factors," an action that took place more than six years before the complaint was "filed on December 3, 2018." *Id.* at 37–38. The court then went on to say—in what is arguably dicta—that based on when plaintiff "received his first payment on December 1, 2012" the court can "also reasonably infer that he had knowledge of the alleged fiduciary breach as of, or soon after that date, *i.e.*, more than three years before filing his complaint." *Id.* at 38; *see Cotto v. Herbert*, 331 F.3d 217, 250 n.20 (2d Cir. 2003) (describing dicta as statements that are "not necessary to the holdings of the decisions in which they were made").

But even if it was not dicta, the idea that a pension payment calculated using outdated actuarial assumptions imparts actual knowledge of those assumptions on the payee contravenes not only *Sulyma*, but also Second Circuit precedent. In *Novella v. Westchester County*, the Second Circuit explained that a claim challenging a benefit calculation does not accrue for ERISA statute of limitations purposes upon mere receipt of payment because "simply receiving a lower

pension payment is not enough to put a pensioner on notice of a miscalculation." 661 F.3d 128, 148 (2d Cir. 2011). And it certainly is not enough under *Sulyma*, which held that even disclosing the relevant facts themselves (here, the outdated assumptions) does not itself satisfy the "actual knowledge" standard. If disclosing the relevant facts is not enough by itself to prove actual knowledge, a payment that *does not* disclose the challenged assumptions does not come close to passing muster.

At this stage of litigation, and on the record before the Court, it is impossible to ascertain whether any Plaintiff had actual knowledge of the actuarial assumptions Defendants used to calculate their benefits at the time Plaintiffs received their Pension Projection Statements. *See, e.g., Sulyma*, 140 S. Ct. at 777 (to have "actual knowledge," a plaintiff "must in fact have become aware of that information."). At minimum, limited discovery regarding Plaintiffs' knowledge is necessary to properly determine the point at which each Plaintiff had actual knowledge of the alleged fiduciary breach for statute of limitations purposes.

CONCLUSION

The Secretary respectfully requests that this Court reverse the district court's dismissal of Plaintiffs' fiduciary breach claim.

Respectfully submitted,

Date: August 23, 2024

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Local Rules 29.1(c) and 32.1(a)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,367 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

Date: August 23, 2024

/s/ *Sarah D. Holz*
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CERTIFICATE OF SERVICE

I hereby certify that on this day, August 23, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: August 23, 2024

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