10-1303-cv

In the

United States Court of Appeals

for the

Second Circuit

ISADORE FISHER, on behalf of himself and a class of persons similarly situated and on behalf of the JPMorgan Chase 401(k) Savings Plan and the Deferred Profit Sharing Plan of Morgan Guaranty Trust Company of New York and Affiliated Companies for the United States Employees, JANNA M. WOOTEN, KELLI M. BUNN, TAMMY T. SOILEAU and AMY K. HARVEY,

Plaintiffs - Appellants

v.

JPMORGAN CHASE & CO., WILLIAM B. HARRISON, MARC J. SHAPIRO, RICHARD DONALDSON, JR., JOHN DOES 1-30, J.P. MORGAN INVESTMENT SERVICES, THE PLAN INVESTMENT MANAGEMENT COMMITTEE, THE BENEFITS FIDUCIARY COMMITTEE, INA R. DREW, DINA DUBLON, PATRICK L. EDSPARR, JOHN J. FARRELL, PETER H. KOPP, MARIA ELENA LAGOMASINO, BLYTHE S. MASTER, EDWARD L. MCGANN, JOHN C. WILMOT, HANS W. BECHERER, RILEY P. BECHTEL, FRANK A. BENNACK, JR., LAWRENCE A. BOSSIDY, M. ANTHONY BURNS, H. LAURANCE FULLER, ELLEN V. FUTTER, WILLIAM H. GRAY, III, HELENE L. KAPLAN, LEE R. RAYMOND, JOHN R. STAFFORD AND LLOYD D. WARD,

Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK AT FOLEY SQUARE

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE AMICUS[1]

This case is of a type that has become ubiquitous over the past several years – a "stock drop" case, in which plaintiffs claim fiduciary breaches in connection with a decline in value of employer stock held in an ERISA plan. What is special about this case, however, are the very fundamental questions that the Court is being asked to address, and that will dictate both the outer bounds of the obligations imposed on the fiduciaries of plans holding employer stock and the procedural framework for pleading these types of fiduciary breach claims. As a result, this case is likely to have far-reaching consequences for fiduciaries of ERISA plans within the jurisdiction of the Second Circuit, including the fiduciaries of many plans sponsored by members of this *amicus*, the Chamber of Commerce of the United States of America (the "Chamber").

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members sponsor Employee Stock Ownership Plans ("ESOPs") or other individual account plans

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[1] All parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. Pro. 29(a). This brief was not authored in whole or in part by any party's counsel, and money was contributed to fund its preparation solely by the *amicus* and its members. *See* Loc. R. 29.1(b).

that contain employer stock funds as an investment vehicle, and all of these members may potentially be affected by the Court's decision.

The reasons why the District Court's decision is correct are explained in detail in the Brief for Appellees. For the sake of efficiency and convenience, the relevant facts as laid out in that brief are incorporated here by reference. All defined terms used by Appellees also are used in this brief with the same meanings. The Chamber files this brief *amicus curiae* to aid the Court in its understanding of the nature of the fiduciary duties at issue, the importance of the questions to be decided by the Court, and the deleterious impact that a reversal could have on all plans containing employer stock.

ARGUMENT

I. THE DISTRICT COURT'S DECISION APPLYING THE *MOENCH* PRESUMPTION OF PRUDENCE SHOULD BE AFFIRMED.

The District Court concluded that the Plan afforded the JPMorgan Chase fiduciaries discretion to offer an employer stock fund as an investment option in the Plan and that, consistent with the standard articulated by the Third Circuit in *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995), the fiduciaries were entitled to a presumption that maintaining the employer stock fund was prudent. SPA-10, 12. This so-called "*Moench* presumption" affords the minimum amount of deference appropriate with respect to plans holding employer stock, and it is necessary to effectuate Congressional intent that employer stock funds be

preserved and treated differently where necessary to protect their unique function. Accordingly, the decision of the court below should be affirmed.

For decades, Congress has recognized, blessed, and encouraged ESOPs and employer stock investment options in individual account plans. *See Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003); *Grindstaff v. Green*, 133 F.3d 416, 422 (6th Cir. 1998); *Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). And Congress has specifically exempted them from fundamental requirements under ERISA such as the duty to diversify and the prohibited transaction rules. 29 U.S.C. §§ 1104(a)(2), 1108(e) (2010). This is because, to put it simply, ESOPs and employer stock funds are special. Unlike traditional retirement plans, they are not designed with the primary purpose of guaranteeing retirement benefits, but rather are designed primarily to invest in the employer's securities. *See Moench,* 62 F.3d at 568; *Donovan*, 716 F.2d at 1458. Congress deemed encouraging employer stock ownership to have value apart from augmenting a retirement portfolio, such as providing employees with voting rights and increased motivation that may improve productivity, and providing the employer with another tool of corporate financing. *See Steinman*, 352 F.3d at 1103; *Moench*, 62 F.3d at 569; *Largest Study Yet Shows ESOPs Improve Performance and Employee Benefits*, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/main/article.php/id/25/ (last visited July 22, 2010).

In order to preserve the ability to offer employer stock investment without frustrating its purpose, Congress has made clear that it views and treats such funds differently:

> The Congress is deeply concerned that the objectives sought by [the series of laws encouraging ESOPs] will be made unattainable by the regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590 (1976), *quoted in Moench*, 62 F.3d at 569. "Congress, believing employees' ownership of their employer's stock a worthy goal, has encouraged the creation of ESOPs both by giving tax breaks and by waiving the duty ordinarily imposed on trustees by modern trust law." *Steinman*, 352 F.3d at 1103.

Affording fiduciaries deference when they maintain employer stock funds not only furthers Congressional intent, it also comports with traditional standards of trust law in which ERISA is rooted: "ERISA abounds with the terminology and language of trust law," and "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (citing Restatement (Second) of Trusts § 187 (1959)). Here, the settlor drafted this Plan to give the fiduciaries discretionary powers over investment options, but with the unambiguous

expectation that an employer stock fund would be offered. *See Appellees' Br.* at 9-10, 33-34. The Plan includes definitions for both "Common Stock" and the "JPMorgan Chase Common Stock Fund" in the very first section (A-150, 155), and it refers to the stock fund at least a dozen more times throughout its provisions (A-172, 173-76, 189, 193, 195-97, 200). Indeed, the Plan provides that as much as 100% of its assets may be invested in employer stock. (A-172.) Applying the presumption of prudence in this situation is thus consistent with, and akin to, using an "abuse of discretion" standard to review decisions of the plan's fiduciaries concerning plan interpretation. *See Conkright v. Frommert*, __ U.S. __, 130 S. Ct. 1640, 1651 (2010). There is no rational reason to show less deference to fiduciaries who are acting consistently with the plan sponsor's clear intentions, than to fiduciaries who are exercising discretion regarding the interpretation of ambiguous plan terms.

Appellants argue, however, that even if the presumption of prudence is appropriate in some cases, it should not apply in this case because, they assert, the Plan's fiduciaries were not *required* by the Plan documents to offer employer stock. This argument reflects a fundamental misconception regarding the doctrinal foundation for the presumption. The presumption is not grounded solely on the settlor's intent, but rather also on Congressional intent – Congress's explicit desire to encourage stock ownership through these kinds of plans – in addition to respect

for the settlor's desire. Thus, the presumption of prudence is the minimum standard of deference that should apply "to any allegations of fiduciary duty breach for failure to divest an [eligible individual account plan] or ESOP of company stock." SPA-12 (quoting *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008)).[2]

Equally important to the application of the presumption of prudence is the constraint that the presumption not be easily rebutted – especially in a case where the plan document clearly indicates that the sponsor anticipated that the employer stock fund would be available. The threshold for overcoming the presumption must be sufficiently high to encompass only extraordinary circumstances that would not have been foreseen by the sponsor in designing the plan to permit investment in an employer stock fund, *i.e.*, facts and circumstances so extreme as

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[2] Indeed, if the plan were deemed to mandate unequivocally that an employer stock investment option be maintained, the fiduciaries would lack discretion to eliminate the employer stock fund and, therefore, could *never* be held liable for breach of fiduciary duty for failing to do so. *See*, *e.g.*, *In re Citigroup ERISA Litig.*, No. 07 Civ. 9790, 2009 WL 2762708, *7-8 (S.D.N.Y. Aug. 31, 2009) (where plain language of plan required that the employer stock fund "shall be permanently maintained as an Investment Fund under the Plan," there was "no discretion whatsoever to eliminate [employer] stock as an investment option, and defendants were not acting as fiduciaries") (emphasis omitted); *In re ING Groep, N.V. ERISA Litig.*, 48 Emp. Ben. Cas. 2594, 2600 (N.D. Ga. 2010) (because employer stock investment option was mandated by the plan, "defendants did not act as fiduciaries with regard to the decision to offer [employer] stock as an investment option"); *Urban v. Comcast Corp.*, No. 08-773, 2008 WL 4739519, *12 (E.D. Pa. Oct. 28, 2008) ("where a plan's settlor mandates investment in employer securities, the plan fiduciaries are 'immune from judicial inquiry' related to such investments") (citation omitted).

to justify requiring the fiduciary to disregard and act in direct contravention of the sponsor's expectations. To hold otherwise would eviscerate the sponsor's ability to design its plan as it wishes, a bedrock principle in ERISA. *See*, *e.g.*, *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1498 (3d Cir. 1994) ("an employer is free to develop an employee benefit plan as it wishes" because "ERISA's concern is with the *administration* of benefit plans and not with the precise design of the plan." (citations omitted) (emphasis in original)). Thus, a mere showing that the stock price declined – even substantially – cannot be enough, because any equity investor expects to see prices rise and fall periodically over time, and consequently, a drop in stock price is hardly an unforeseen circumstance. Instead, the presumption should be rebuttable only by a showing of extreme circumstances; for example, that the fiduciary knew or should have known that the circumstances of the company were so "dire" that the stock was in severe and imminent danger of being rendered "entirely worthless." *See Edgar v. Avaya, Inc.*, 503 F.3d 340, 348-49 (3d Cir. 2007); *Kirschbaum*, 526 F.3d at 255.[3]

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[3] The Department of Labor advocates a much lower threshold, arguing that it should be sufficient to overcome the presumption – or that the presumption should not apply at all – where it is alleged that the fiduciaries knew that the stock price was "artificially inflated." *Brief of Amicus Curiae Hilda L. Solis, Sec'y of the United States Dep't of Labor in Support of Appellants Requesting Reversal,* filed in *Gearren v. The McGraw-Hill Companies, Inc.*, at 18. The premise of the Department's argument is that the fiduciary has knowledge of non-public information indicating that the market has overpriced the stock – and thus, it argues, offering the stock as an investment option in the plan is imprudent because

Finally, the *Moench* presumption makes sense only if it is applied at the initial pleading stage. As noted above, the presumption embodies a deferential *standard of review*; it is not just a question of "who bears the burden of proof." Fiduciaries who act consistently with Congressional and the plan sponsor's intent should not be hauled into federal court and subjected to the rigors of discovery, motions practice, and trial before they are shown any deference. Accordingly, Plaintiffs must be required to plead sufficient facts at the outset to rebut the presumption that the fiduciary acted prudently in maintaining the stock fund.

Indeed, pleading facts adequate to rebut the presumption is required by the pleading standard articulated by the Supreme Court in *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). In *Iqbal* and *Twombly*, the Supreme Court made clear that a plaintiff must allege in his complaint sufficient facts supporting the elements of the asserted claim such that a "plausible" claim has been stated. *Iqbal*, 129 S. Ct. at 1949. In the context presented here, the elements of the claim necessarily include the extreme factual

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it is imprudent to overpay for plan assets. *See id.* The Department's perspective, however, wholly disregards the securities laws that prohibit insider trading. Even if the fiduciaries could be demonstrated to have non-public, materially adverse knowledge, they could not act on that knowledge to divest the stock without violating the securities laws. Moreover, given the ease with which a plaintiff could allege that a plan's fiduciaries "knew" the stock was overvalued, sometimes based on nothing more than hindsight and the fact that its price subsequently declined, the Department's advocated standard would amount to no standard at all.

circumstances necessary to rebut the presumption of prudence, *i.e.*, facts that would not have been anticipated by the settlor, such as facts supporting a plausible claim that the employer stock was in severe and imminent danger of being rendered "entirely worthless." *Edgar*, 503 F.3d at 348-49; *Kirschbaum*, 526 F.3d at 255. If these critical facts and circumstances do not exist, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (internal quotation marks and citations omitted).

Applying any lower standard than that afforded by the *Moench* presumption would not merely fail to advance Congress's policies with respect to employer stock funds, but it would surely dampen employers' willingness to offer such funds. The most current statistics from the National Center for Employee Ownership reveal that there are well over 11,000 plans whose assets are primarily invested in employer stock (through both ESOPs and employer stock funds contained in other types of defined contribution plans) – plans that cover nearly 18 million employee participants and have total assets of more than $1 trillion. *See A Statistical Profile of Employee Ownership*, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/ main/article.php/id/2/ (last visited July 22, 2010). Employer stock funds are also popular among employees, who appreciate being able to have more of a participatory role in their employer, such as through stock voting rights,

than they would otherwise have. A rule that inappropriately subjects the continued maintenance of employer stock funds to fiduciary review without appropriate deference will threaten the popularity – if not the very existence – of these plans.

II. AN ERISA FIDUCIARY'S DISCLOSURE OBLIGATIONS SHOULD NOT BE BROADENED SO AS TO OVERLAP THE DISCLOSURE OBLIGATIONS IMPOSED BY THE SECURITIES LAWS.

The District Court appropriately rejected the Plaintiffs' claims for breach of ERISA fiduciary duties based on the Defendants' alleged misrepresentations in securities filings and failure to make affirmative disclosures about employer financial performance that may have an impact on stock prices. These claims demonstrate the need for this Court to strike a clear dividing line between ERISA and the securities laws. The positions advanced by the Plaintiffs and the Department of Labor would render the securities laws that already govern disclosure obligations to the investing public meaningless and redundant – in favor of an all-encompassing ERISA umbrella triggered only by the fact that some ERISA plan participants (a subset of all investors) have invested in employer stock. Congress has not prescribed this result and this Court should not broaden ERISA's role so significantly.

The Plaintiffs' misrepresentation claim is based solely on alleged misstatements contained in securities filings, which, they allege generally, were incorporated into one or more summary plan descriptions ("SPDs"). As a

preliminary matter, no court has found liability on an ERISA misrepresentation claim based solely on statements made in SEC filings incorporated by reference into a plan's summary plan description. To the contrary, courts faced with such claims have routinely dismissed them. *See, e.g.*, *Edgar*, 503 F.3d at 349-50; *Kirschbaum*, 526 F.3d at 257; *In re Lehman Bros. Sec. and ERISA Litig.*, No. 09-MD-2017, 2010 WL 354937, at *4 (S.D.N.Y. Feb. 2, 2010); *In re Citigroup*, 2009 WL 2762708, at *22-24. Representations made in corporate securities filings are by definition made in the company's corporate capacity, *i.e.*, as a settlor, and not in its capacity as an ERISA fiduciary. *See Kirschbaum*, 526 F.3d at 257; *see also Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) (an employer is not deemed to be acting in a fiduciary capacity merely "because it ma[kes] statements about its expected financial condition or because 'an ordinary business decision turn[s] out to have an adverse impact on the plan'" (citation omitted)). Incorporation of these securities filings by reference into plan documents simply ensures that plan participants have similar access to information as other types of investors; it does not suddenly transform the disclosures from corporate acts to fiduciary acts. *Kirschbaum*, 526 F.3d at 257.

The Plaintiffs' claim for breach of an alleged duty to make an affirmative disclosure of corporate financial information is even more troubling. In pursuing such a claim, the Plaintiffs are asking the Court to layer additional duties (and a

remedy) pursuant to ERISA on top of the already extensive statutory scheme created by the securities laws. This is simply wrong. First, an affirmative duty to disclose corporate information is not found anywhere in the text of ERISA. ERISA provides extensive reporting and disclosure requirements with respect to plan benefits, benefit distributions, and other issues, but none with respect to corporate financials. Well-accepted principles of statutory interpretation dictate that Congress's failure to include in the statute an obligation to disclose company financial information must be construed as an intent to foreclose increasing the fiduciary's role in that manner under ERISA. *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (a "familiar principle" of statutory interpretation is that "the mention of one thing implies the exclusion of the other"). Consistent with this principle of statutory interpretation, this Court has held it "inappropriate to infer an unlimited disclosure obligation on the basis of [ERISA's] general provisions that say nothing about disclosure." *Board of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997).

Second, broadening disclosure obligations of ERISA fiduciaries to include a duty to disclose company financial information when employer stock is held in the plan would impinge upon the securities laws that already occupy the field. ERISA itself prohibits this: "nothing in this subchapter 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." 29 U.S.C. § 1144(d) (2010). Where a matter is governed by another body of federal law, such as the securities laws here, that other body of federal law cannot be displaced by additional or different liabilities imposed by ERISA. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831-32 (2003) ("the scope of permissible judicial innovation [under ERISA] is narrower in areas where other federal actors are engaged"); *Baker v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004) (rejecting the notion of a fiduciary duty of disclosure because to hold otherwise would risk "disturbing the carefully delineated corporate disclosure laws").

Securities laws governing corporate disclosure obligations are well-developed and well-equipped to provide appropriate remedies for any disclosure failures relating to employer stock. The Securities Exchange Act of 1934 expressly prohibits false and misleading statements in SEC filings, 15 U.S.C. § 78a-7811 (2010), and Rule 10b-5 makes it unlawful for anyone "to make any untrue statement of a material fact or to omit to state a material fact necessary" with respect to the offering of securities, 17 C.F.R. § 240.10b-5 (2010). Further, the Securities Exchange Act provides that investors harmed by violations of these and other securities laws may recover monetary damages to compensate them for their losses. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972). A second remedy to be provided by ERISA is simply unnecessary.

Indeed, ERISA "stock drop" class actions are more often than not paralleled by securities class actions, and the plan participants who make up the ERISA class are also plaintiffs in the securities action, making it especially superfluous to layer on additional disclosure obligations in this context.[4]

Broadening ERISA's scope to provide duplicate remedies already provided in the securities field is not only irrational, it could also have potentially serious practical consequences for ERISA plans. If there are to be double avenues of recovery available to all participant investors, along with the associated costs of double litigations and exposure for multiple class action attorneys' fees, ERISA sponsors might well conclude that the cost of offering employer stock is simply too high. Similarly, company representatives who might otherwise serve as ERISA fiduciaries, faced with a bombardment of multiple liabilities for the same action, may conclude their risks are simply too high. The result of these increased risks

[4] Requiring special disclosures to plan participants under ERISA that may not align with securities disclosure obligations would have the irrational result of treating plan participants differently than other classes of the investing public. The Department of Labor argues that the way to address this disparity is for ERISA fiduciaries simply to make the disclosures to the entire general public. *Brief of Amicus Curiae Hilda L. Solis, Sec'y of the United States Dep't of Labor in Support of Appellants Requesting Reversal,* filed in *Gearren v. The McGraw-Hill Companies, Inc*, at 26. But this truly begs the question regarding ERISA's role, where another body of federal law already has the field covered. It would make no sense whatsoever to hold that ERISA imposes broader duties of disclosure to the investing public with respect to employer stock than the securities laws require, such that ERISA would, in effect, trump the securities laws in an area so uniquely within the latter's sphere of influence.

and costs may very well be the curtailing of employer stock as an investment option in ERISA plans, which would be directly contrary to Congress's explicit and expressed intent to encourage employees' investment in their employers through these vehicles.

Here, in fact, a purported class of JPMorgan Chase stockholders *did* file a securities action – a case that was dismissed for failure to state a claim. *ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase & Co.*, 553 F.3d 187, 207 (2d Cir. 2009). Accordingly, what the Plaintiffs seek here is worse than a "double recovery" – under the guise of ERISA, they are seeking to recover on a securities claim that has already been held to be fatally deficient. It would make absolutely no sense for ERISA to provide a remedy for a supposed misrepresentation contained in a securities filing, when the securities laws themselves did not. This would bring ERISA into *conflict* with the securities laws, a result that plainly cannot be countenanced.

For all of the foregoing reasons, the Court should decline the invitation to expand and increase the disclosure obligations under the securities laws, solely on behalf of a single group of investors – employee plan participants – through the redundant, or even conflicting, application of ERISA. The District Court correctly rejected the Plaintiffs' invitation to do so, and this Court should do so as well.

CONCLUSION

For the reasons stated herein, the Chamber respectfully requests that this Court affirm the judgment of the District Court.

Dated: August 4, 2010

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this Brief of Amicus Curiae Chamber of Commerce of the United States of complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 3,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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August 4, 2010

ANTI-VIRUS CERTIFICATION

In accordance with Local Rule 32, I certify that I have scanned for viruses the PDF version of this brief *amicus curiae* which was submitted in this case as an email attachment to briefs@ca2.uscourts.gov, using Microsoft Forefront Client Security, and no viruses were detected.

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CERTIFICATE OF SERVICE

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