[ORAL ARGUMENT NOT YET SCHEDULED]

No. 24-7025

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT D. GOODRICH, INDIVIDUALLY AND IN HIS CAPACITY AS TRUSTEE OF THE ROBERT D. GOODRICH REVOCABLE TRUST,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A. *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant.

Amicus Public Investors Advocate Bar Association ("PIABA") has no parent company, and no publicly held company has a 10% or greater ownership interest in the entity. PIABA is a trade or professional organization whose members represent public investors in disputes with financial industry members and whose mission includes advocating for the protection of public investors.

References to the rulings at issue appear in the Brief for Appellant.

PIABA understands that this case has not previously been before this Court or any other court.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Public Investors Advocate Bar Association ("PIABA") is a bar association comprised primarily of attorneys who represent members of the investing public. The mission of PIABA is to promote the interests of, and to help protect the investing public. PIABA also advocates for public education regarding investment fraud and industry misconduct. PIABA often issues comment letters regarding FINRA rule changes, provides testimony to government agencies and Congress, and files *amicus* briefs on a variety of issues pertaining to the protection of the investing public—the very people and businesses who provide corporations with the capital needed to drive economic activity in the United States. Particularly relevant to this case, PIABA members often represent persons harmed by low-quality financial advice.

No party's counsel has authored this brief in whole or in part, or contributed money which was intended to fund preparing or submitting this brief. This brief was funded solely by PIABA.

SUMMARY OF THE ARGUMENT

Investment advisers, and others who manage assets and provide investment and financial advice, are prototypical fiduciaries. Clients pay regular, significant fees for access to professional expertise and advice. This means that financial advisers holding themselves out as having substantial expertise must apply that expertise on behalf of their clients and act in their clients' best interests at all times. At a minimum, an adviser's fiduciary duty includes an obligation to *advise* a client—hence the name—about the principal risks and merits of any proposed transaction.

An adviser's obligation to give advice continues even when a client proposes a transaction. Allowing advisers to abdicate their duties whenever a client proposes a course of action would deprive clients of the benefits of the relationship while the advisers keep their substantial fees. And this is particularly problematic when clients may face unique risks because of their specific financial circumstances. There, advisers must provide tailored advice about the primary risks that apply to their clients' particular needs. An adviser does not fulfil this duty by giving generic, standard advice that only covers certain risks. Worse, advisers giving standardized advice in these situations may mislead clients to believe that the principal risks they face are only those which have been discussed, thereby shielding the true risks and placing their clients' hard-earned assets in jeopardy.

This duty springs from a variety of common law and statutory sources, and it cannot be waived. When the primary objective of a fiduciary relationship is advice and discretion, the fiduciary cannot contractually avoid liability for failing to hold up his end of the bargain. Contractual provisions attempting to do so upend the fiduciary relationship, violate public policy, and should be unenforceable. PIABA therefore urges this Court to reverse the judgment of the district court finding that Bank of America and Lettinga could waive their duties, and remand for further proceedings.

ARGUMENT

I. Those Managing Client Investments Owe Meaningful Fiduciary Duties.

Like many other banks managing client assets, Bank of America touts its fiduciary status on its website. It tells clients and prospective clients that its "trust and investment management relationship with you is *supported by the strongest standard of integrity, trust and accountability— the fiduciary standard —which requires us to act solely in your best interests.*"[1] Indeed, federal regulations confirm that Bank of America acted in a "fiduciary capacity" because it received fees and acted as an "investment adviser" and with "investment discretion." 12 C.F.R. § 9.2(e). Cases have long recognized that a "trustee is held to something stricter than

[1] Bank of America, The fiduciary standard, https://www.privatebank.bankofamerica.com/articles/fiduciary-standard.html (last visited July 18, 2024) (emphasis added).

the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464–465 (1928).

A. Financial Advisers Owe Their Clients Fiduciary Duties.

The Supreme Court has found that the "services of an investment adviser are not significantly different from the traditional fiduciary functions of banks." *Bd. of Governors of Fed. Rsrv. Sys. v. Inv. Co. Inst.*, 450 U.S. 46, 55 (1981). Thus, the principles governing an investment adviser's fiduciary duty also apply to banks acting in "fiduciary capacity."

The SEC has explained that investment advisers owe meaningful fiduciary duties. *See* SEC, Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248; File No. S7-07-18 (June 5, 2019). The duty here includes "a duty of care and a duty of loyalty." *Id.* at 7. This creates an affirmative obligation to "provide investment advice in the best interest of its client." *Id.* at 12. Where, as here, the adviser "is compensated with a periodic asset-based fee, the adviser's duty to provide advice and monitoring will be relatively extensive as is consistent with the nature of the relationship." *Id.* at 20.

A fiduciary must understand the client's situation and provide advice informed by that knowledge. The SEC interpretation explains that advisers must strive to develop a "reasonable understanding of a retail client's objectives" and "should, at a minimum, make a reasonable inquiry into the client's financial situation." *Id.* at 13. At minimum, the client's situation includes the terms of any loans or other contracts a bank has with its client.

B. Chartered Financial Analysts Provide Heightened Expertise in Financial and Investment Management.

Although the norms of a profession ordinarily provide the relevant standard of care, courts hold persons claiming greater competence or specialized knowledge to the higher standard. *See* Restatement (Third) of the Law Governing Lawyers § 52, cmt. d (2000) ("[A] lawyer who represents to a client that the lawyer has greater competence or will exercise greater diligence than that normally demonstrated by lawyers in good standing undertaking similar matters is held to that higher standard, on which such a client is entitled to rely."). Thus, persons who represent that they have "greater" skill or "knowledge" in a trade or profession must live up to their promises. Restatement (Second) of Torts § 299A (1965). Indeed, this Court has recognized this principle in the medical malpractice context. *Robbins v. Footer*, 553 F.2d 123, 129 (D.C. Cir. 1977) (finding that when a "physician holds himself out as a specialist, . . . he is held to the general standard of care required of all physicians in the same specialty").

Here, Matthew Lettinga held himself out as offering superior expertise and diligence as a Chartered Financial Analyst ("CFA"). The CFA Institute's Code of Ethics and Standards of Professional Conduct provides guidance about the scope of

Lettinga's duty.[2] It requires him to "[e]xcercise diligence, independence, and thoroughness in analyzing investments, making investment recommendations, and taking investment actions."[3] It also requires clear communication about any "significant limitations and risks associated with the investment process."[4] A CFA must use "reasonable judgment in identifying which factors are important to their investment analyses, recommendations, or actions and include those factors in communications with clients."[5]

C. Bank of America and Lettinga Owed Goodrich a Common Law Fiduciary Duty to Evaluate Transactions and Disclose Risks.

"A fiduciary duty is founded upon trust or confidence reposed by one person in the integrity and fidelity of another." *Rwanda v. Rwanda Working Grp.*, 227 F. Supp. 2d 45, 64 (D.D.C. 2002) (internal quotation marks and citation omitted). Fiduciaries who invest the funds of another have a duty to exercise the same care, skill, and caution as a prudent person in the management of his own funds. *W. Shoshone Identifiable Grp. by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 608 (2019). "A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard." *Fink v. Nat. Sav.*

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[2] CFA Institute, Code of Ethics and Standards of Professional Conduct, https://www.cfainstitute.org/-/media/documents/ethics-in-practice/code_of_ethics_and_standards_of_professional_conduct_2024.pdf (last visited July 25, 2024).

[3] *Id.* at V.A.1.

[4] *Id.* at V.B.3.

[5] *Id.* at V.B.4.

& Tr. Co., 772 F.2d 951, 957 (D.C. Cir. 1985). This Court therefore has recognized that conducting an *independent* evaluation of a transaction is "the most basic of fiduciary duties." *Id.*

Fiduciaries also have a corollary duty to disclose facts to their clients. *See Sununu v. Philippine Airlines, Inc.*, 792 F. Supp. 2d 39, 51 (D.D.C. 2011) ("A duty to speak can stem from a fiduciary relationship."). "[A]ny distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients." *SEC v. Zandford*, 535 U.S. 813, 823 (2002). Highlighting the importance of disclosure when investing client assets, even brokers managing non-discretionary accounts must act in their client's best interest and disclose relevant information in the brokers' possession regardless of whether the broker is a fiduciary. *Merrill Lynch Pierce Fenner & Smith, Inc. v. Cheng*, 901 F.2d 1124, 1128 (D.C. Cir. 1990).

D. Bank of America and Lettinga Failed to Disclose the Relevant Risks and Limitations of Liquidating Goodrich's Holdings.

Bank of America encourages clients to work with its financial advisers because they provide "informed guidance" during market volatility.[6] Indeed, the record reflects that Bank of America provided some standard, generalized advice

[6] Bank of America, The value of financial advice during volatile markets, https://www.ml.com/articles/financial-advisor-advice-volatile-markets.html (last visited July 25, 2024).

about the difficulty of timing market swings—but not the sort of informed guidance a diligent fiduciary would provide. This advice falls short of the fiduciary standard because Bank of America and Lettinga failed to disclose and advise Robert Goodrich of the patent risks of liquidating his holdings. JA 159–160.

For Goodrich, any attempt at "market timing" was impossible. Bank of America and Lettinga knew that Goodrich's desire to exit and re-enter the markets was impossible because they allowed Goodrich to use his securities account as collateral for loans. JA 378 ¶ 12, 379 ¶ 15, 397–398, 401–402. Generalized communications about the dangers of in-and-out trading during volatile equity markets do not suffice when a client would not be able to re-enter the equities markets—the back side of an "in" and an "out." Indeed, these sorts of communications might lead an investor to affirmatively believe that they *could* re-enter the market. By telling Goodrich that the risk he faced simply was that he would likely not be able to properly time the bottom of the market, JA 379–380 ¶ 15, 400, the bank falsely implied that Goodrich could continue to trade in and out after liquidating his position.

Consider the same dynamic in a slightly different context. A ship's owner might call the ship's captain to propose pulling into a harbor to wait out a storm because he worried about some wind and the rain. If the captain knew that the ship would be impounded and seized should it enter the harbor, staying silent about the danger would be plainly inadequate. A captain that simply warned that storms were difficult to predict and noted that a good catch could often be had right after a storm would obscure the real risk. Staying silent about the ship's inability to set sail again should it enter the harbor would leave the owner with the misimpression that he might only miss out on some upside should he seek safety in the harbor.

II. Fiduciaries Cannot Disclaim Their Obligation to Disclose Risks and Other Known Material Facts.

As explained below, fiduciaries who manage another's investments cannot blindly follow a client's instructions. Instead, they must at all times fulfill their duty to, at a minimum, fully disclose the risks of the requested transaction. That obligation does not evaporate simply because a client proposes a transaction. Allowing brokers to disclaim this obligation converts the fiduciary advisory relationship to one of being a mere order-taker, even though the client has paid for and expects the higher duty and service which the law requires.

PIABA agrees with Goodrich's explanation of why Bank of America and Lettinga could not waive their fiduciary duty to Goodrich. *See* Br. at 25–35. Even if Goodrich does not have a pending claim under a statute which prohibits so-called "hedge clauses," it is well-established that statutes which provide "specific guidelines to govern behavior" can provide the standard for a common law duty. *Carleton v. Winter*, 901 A.2d 174, 180 (D.C. 2006). And the Fourth Circuit's discussion in *Trumball Investments, Ltd. v. Wachovia Bank, N.A.*, 436 F.3d 443 (4th

Cir. 2006), is particularly apt. There, the court considered the obverse of this case—the client sued a broker for *not* following its instruction in a discretionary account. In finding that the broker was not beholden to the client's instruction, the court explained:

> These are, after all, discretionary accounts—in which the operating presumption in the parties' relationship is that an expert broker will make appropriate investments on behalf of and without prior authorization from its client. The accounts by definition give the broker substantial discretion to use its best judgment.

Id. at 448.[7] "A broker operating a discretionary account typically owes greater duties to his client than a broker who must receive authorization for each transaction. Most notably, the broker managing a discretionary account has to make investment decisions that are faithful to the needs and objections of his client." *Id.* at 445–46; *see also id.* at 446 ("[D]iscretionary accounts can be of greater utility because any decision will be made solely on the broker's first-hand knowledge and expertise."). So too here, where Bank of America and Lettinga had a legal duty to exercise discretion in Goodrich's account and render advice rather simply be an order-taker with no advisory role.

[7] Although much of *Trumball* concerned the language of the parties' agreement, the court also noted that its conclusion is bolstered by "the undisputed nature of the agreement," specifically that it was for a discretionary account. *Trumball*, 436 F.3d at 448.

The importance of a fiduciary duty where there is an advisory relationship cannot be overstated. An advisor cannot retain the benefits of an advisory and discretionary relationship—such as reduced administrative costs and increased efficiency, *id.* at 446, and the greater fees clients pay for it—and then disclaim his obligations when it suits the broker. In other words, brokers cannot get paid for advice and discretion and then refuse to give it. Sanctioning that result undermines the foundations of the fiduciary relationship and the legal protections which exist for investors. The only ones who come out ahead are the brokers, who can stay silent and allow transactions they know to be harmful to proceed, while investor rights are eroded and the investing public shoulder the losses. And because many individual investor cases are decided by arbitration without published opinions and not in the court system, judicial guidance is paramount. A decision from this Court which explains that brokers, investment advisors, and others who manage client assets cannot avoid their responsibilities will provide crucial direction.

Comparing this situation to lawyers, who are traditional fiduciaries, reinforces the point. For example, attorneys cannot avoid warning a client of risks of a legal strategy simply because the client requests the attorney to act. *Newland v. Hall*, 527 F.3d 1162, 1208 (11th Cir. 2008) ("We have cautioned that an attorney may not 'blindly follow' a client's instructions not to investigate or use mitigating evidence, but must instead first advise his client which strategies offer the best chance of success."); *Peterson v. Katten Muchin Rosenman LLP*, 792 F.3d 789, 791 (7th Cir. 2015) ("[O]ne function of a transactions lawyer is to counsel the client how different legal structures carry different levels of risk, and then to draft and negotiate contracts that protect the client's interests. A client can make a business decision about how much risk to take; the lawyer must accept and implement that decision."); *cf. Padilla v. Kentucky*, 559 U.S. 356, 387 (2010) (Alito, J., concurring) ("When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject.").

This is because, as fiduciaries, "[i]t is the duty of every attorney to inform a client of the available options for alternative legal solutions, as well as to explain the foreseeable risks and benefits of each." *Metrick v. Chatz*, 639 N.E.2d 198, 201 (Ill. 1994); *see also id.* ("The purpose of such a rule is to enable the client to make an informed decision as to whether the foreseeable risks of a proposed legal course of action are justified by its potential benefits when compared to other alternative courses of action."); *cf. Jones v. Lattimer*, 29 F. Supp. 3d 5 (D.D.C. 2014) (finding that claims that an attorney never advised client of the risks associated with turning down settlement offers could support a legal malpractice claim). Even though "the decision whether to use such evidence in court is for the client, the lawyer must first evaluate potential avenues and advise the client of those offering possible merit." *Newland v. Hall*, 527 F.3d 1162, 1209 (11th Cir. 2008)

Holding that Bank of America and Lettinga can ignore their fiduciary duties simply because Goodrich requested the transaction would frustrate the very purpose of an advisory relationship and require clients to "perform the very acts for which they employed the [fiduciary]." *Conklin v. Hannoch Weisman*, 678 A.2d 1060, 1069 (N.J. 1996) (quoting *Theobald v. Byers*, 193 Cal. App. 2d 147, 151 (Ct. App. 1961)). Because it is the very knowledge and expertise of the fiduciary which makes his advice indispensable and is the reason for which she is being compensated, "[s]uch a result cannot be upheld." *Id.*; *Peterson,* 792 F.3d at 793 ("A lawyer is not a business consultant. But within the scope of the engagement a lawyer must tell the client which different legal forms are available to carry out the client's business, and how (if at all) the risks of that business differ with the different legal forms.").

Fiduciaries, whether lawyers or financial advisors, should not be allowed to silently expose their clients to real dangers simply because the clients unknowingly request them. Similarly, there are no policy considerations that would erode Bank of America's and Lettinga's duty to disclose risks created by the requested transactions. For example, "[d]efense attorneys in criminal cases retain 'wide latitude to control strategy and tactics' and need not pursue any and all arguments the defendant wishes to pursue." *State v. Schloredt*, 177 Wash. App. 1001 (Wash. Ct. App. 2013) (quoting

In re Pers. Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (Wash. 2001)); *see also id.* ("I don't know that a lawyer, even if they represent somebody, has the obligation to bring an argument that they don't believe has merit."). But outside the fast-paced nature of trial, attorneys must disclose to a client the risks of a requested action. *See*, *e.g.*, *Conklin*, 678 A.2d at 1069 ("An attorney in a counselling situation must advise a client of the risks of the transaction in terms sufficiently clear to enable the client to assess the client's risks.").

Here, Lettinga could easily have explained the downstream consequences of Goodrich's sell-off request. Such information would have allowed Goodrich to make a truly informed decision, likely different than his original ill-informed impulse. Public policy forbids Bank of America and Lettinga from contracting away this statutory, common law, and common-sense duty. *See Tatneft v. Ukraine*, 21 F.4th 829, 838 (D.C. Cir. 2021) (holding that contracts which violate public policy are unenforceable).

CONCLUSION

PIABA supports Goodrich in urging this Court to reverse the district court's order granting summary judgment for Bank of America and Lettinga.

[Signature page follows]

Dated: August 12, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1):

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Dated: August 12, 2024

/s/ *Alan L. Rosca*
Alan L. Rosca

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August 2024, a copy of the foregoing was electronically filed and served via the Court's CM/ECF system upon all counsel of record.

/s/ *Alan L. Rosca*
Alan L. Rosca