RECORD NO. 18-2497

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JUSTIN FESSLER,

Plaintiff – Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Amici Curiae Brief of The Metropolitan Washington Employment Lawyers Association and The North Carolina Advocates for Justice in Support of Appellant

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-2497 Caption: Justin Fessler v. International Business Machines Corporation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Metropolitan Washington Employment Lawyers Association ("MWELA")
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ James Edward Rubin ("MWELA") Date: April 1, 2019

Counsel for: MWELA

CERTIFICATE OF SERVICE

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I certify that on April 1, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ James Edward Rubin
(signature)

April 1, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 18-2497 Caption: Justin Fessler v. International Business Machines Corporation

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Advocates for Justice ("NCAJ")
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Cheyenne N. Chambers Date: April 1, 2019

Counsel for: NCAJ

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

The Metropolitan Washington Employment Lawyers Association ("MWELA"), a professional association of over 300 attorneys, is the local affiliate of the National Employment Lawyers Association ("NELA"), the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes. MWELA has previously submitted *amicus* briefs to this Court, as well as to the appellate courts in Maryland, Virginia, and Washington, D.C.

The North Carolina Advocates for Justice ("NCAJ") is a professional association of more than 2,500 North Carolina attorneys. A primary purpose of NCAJ is the advancement and protection of the rights of those injured or damaged by the wrongful acts of others. NCAJ regularly participates in the legislative process, prepares resource materials, conducts continuing legal education seminars, and appears as *amicus curiae* before state and federal courts. The Employment Law Section of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), MWELA and NCAJ certify that no counsel for a party authored this *amici curiae* brief in whole or in part, and that no party, no party's counsel, and no person or entity other than *amici*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

the NCAJ includes lawyers who represent individuals in employment litigation involving state and federal law.

MWELA and NCAJ seek to assist this Court with addressing a significant employment law issue: whether employers, who mislead their employees about incentive compensation, can insulate themselves from fraud claims by a boilerplate disclaimer. The disposition of this issue strikes at the core of the employer-employee relationship and could have a critical effect on employees' ability to recover wages that were expressly and repeatedly promised by dishonest employers.

ARGUMENT[2]

I. THE ISSUE OF WHETHER IBM'S DISCLAIMERS INSULATE ITS SUBSEQUENT FRAUDULENT PROMISES TO PAY COMMISSIONS SHOULD NOT BE RESOLVED AT THE PLEADING STAGE.

It is well-settled that "[a] Rule 12(b)(6) motion tests the sufficiency of a complaint; it *does not, however, resolve contests surrounding the facts*, the merits of a claim, or the applicability of defenses." *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) and *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)) (emphasis added). A 12(b)(6) motion should only be granted if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, __ F.3d ___ , 2019 WL 1105179, at *3 (4th Cir. 2019) (quoting *Edwards*, 178 F.3d at 244).

[2] *Amici* adopt the statement of facts set forth in the Appellant's brief.

To the extent a plaintiff's "claims do not fall within the four corners of [the U.S. Supreme Court or the Fourth Circuit's] prior case law, this does not justify dismissal under Rule 12(b)(6)." *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015). "On the contrary, Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Id.* (*quoting McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) and *Baker v. Cuomo*, 58 F.3d 814, 818–19 (2d Cir. 1995), *vacated on other grounds*, 85 F.3d 919 (2d Cir. 1996) (*en banc*)).

The issue of whether disclaimers should insulate an employer from liability for fraud when the employer later makes knowingly false compensation promises should not be resolved at the pleading stage. The district court held that the Incentive Plan Letters ("IPLs") "warned" Fessler that the company "might well, modify or eliminate his commission payments." (JA 809). But the issue in a fraud claim is reasonable reliance. It is not possible to know at the pleading stage whether it was reasonable for Fessler to rely on the disclaimers found in the IPLs, or to rely instead on an employer's later repeated promises of uncapped incentive earnings. The district court's holding that the IPLs

determined the issue not only constitutes an improper factual finding that is not supported by the record; it is also an inappropriate factual determination under 12(b)(6) review. *See Bank of Montreal v. Signet Bank*, 193 F.3d 818, 834 (4th Cir. 1999) (noting that the reasonableness of a party's reliance is a "question[] to be decided by the jury in light of, inter alia, the nature of the parties and the transaction, the representations, omissions, and distractions presented by the defendant, and the duties of investigation assumed by the plaintiff"); *Miller v. Premier Corp.*, 608 F.2d 973, 982 (4th Cir. 1979) (emphasizing that the "issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of fact").

Here, what Fessler should reasonably have relied upon is a disputed factual question. IBM's "warnings" are in documents that state they are not be taken as "an express or implied contract." (JA 809). The IPLs claim that IBM may eventually decide to pay no commissions. (JA 740). But the IPLs also state that IBM can amend compensation plans at any time, which is what IBM did. *Id.* During the Plan periods, IBM stated on several occasions, as an incentive for Fessler to sell IBM's

products, that it would *never* cap his commissions or earnings. So, the question at issue here—one that is improper to resolve at the 12(b)(6) stage—is whether Fessler was to rely on the boilerplate in the IPLs or on IBM's repeated statements in the course of the plan period that commissions would not be capped.

No doubt IBM will argue that other factors support a claim that employees such as Fessler should rely on documents like the IPLs. Resolving whether an employee's reliance was reasonable, however, requires an examination of complex facts occurring over the course of an evolving employer-employee relationship. Inferences will need to be drawn from the evidence, including from the documents and testimony. Reliance is best determined through detailed witness examinations and critical reviews of documents. The issue may ultimately be resolved by weighing the employee's credibility against the credibility of the employers' managers. As this Court has consistently held, this sort of examination is inappropriate for determination based on the skeletal record that was before the district court. *Bank of Montreal*, 193 F.3d at 834; *Miller*, 608 F.2d at 982.

II. AN EMPLOYER'S DISCLAIMERS SHOULD NOT INSULATE IT FROM LIABILITY WHEN IT LATER MAKES FRAUDULENT PROMISES TO PAY COMMISSIONS.

When employers promise to pay employees a given rate for their work, employees should be able to believe them. Employees work in exchange for promised wages. The promise to pay compensation underpins the entire employee-employer relationship. This is so even when an employer has earlier issued boilerplate disclaimers like those found in the IPL.

Employer promises of uncapped commissions make logical and compelling sense to employees who are paid on commission. An employer that makes such a promise does so with the intention to incentivize employees to perform the time-intensive work necessary to complete complicated million-dollar sales. The employee who hears that promise understands and is motivated by the promised reward. These high-dollar sales can involve extraordinary efforts, requiring the employee to sacrifice time for family and other commitments, to reach a mutual goal. Without that promise, there would be no incentive for a commissioned employee to seek out high-revenue deals, or indeed work at all on major

deals. If the promise is illusory, if the commission could be cut or zeroed-out arbitrarily, only the employer benefits from the employee's effort.

The timing of a compensation promise is often critical in an employee-employer relationship. The power balance in that relationship can change from day to day. For commissioned sales, the closer a salesperson comes to completing a multi-million-dollar sale, the more important he or she becomes to the employer. At that moment, an employer's temptation to make promises about uncapped earnings is at its highest because it wants to spur the employee to close the deal. The employer should not be permitted to disclaim its promise after the deal is closed.

If this Court holds that employers can rely on boilerplate disclaimers to avoid the factual issues that surround the reasonableness of an employee's reliance on explicit, repeated promises about commission rates, employers will copy IBM's lead. They will bury disclaimer statements, like those found in the IPLs, in lengthy boilerplate-filled documents and use the disclaimer to avoid liability for subsequent false promises of compensation, no matter how explicitly or repeatedly made.

CONCLUSION

Amici curiae respectfully submit that this Court should affirm its precedent that the reasonableness of an employee's reliance on an employer's representations and promises is a fact-intensive inquiry that should not be resolved at the pleading stage under Rule 12(b)(6). Such an inquiry cannot be short-circuited by non-contractual disclaimers communicated *before* an employer knowingly makes false promises designed to induce an employee to perform labor, and then withdrawn *after* the employee completes that work to the benefit of the employer.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) because this brief contains 9 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 this brief has been prepared in a proportionally spaced typeface using *Microsoft Word 2016* in *14pt Century Schoolbook.*

Dated: April 1, 2019

/s/ Cheyenne N. Chambers
Counsel for Amici Curiae

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I hereby certify that on this 1st day of April 2019, I caused the foregoing brief to be served by this Court's electronic case filing system on the following:

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I further certify that I caused the required bound copies of the foregoing brief to be filed with the Clerk of the Court by placing them in a postage pre-paid envelope addressed to the Clerk and sending it by overnight mail.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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