Scaling Chinese Walls: Insights From Aftra v. JPMorgan Chase

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SCALING CHINESE WALLS: INSIGHTS FROM AFTRA V. JPMORGAN CHASE

ABSTRACT

The material non-public information financial services firms receive from clients utilizing commercial banking services may often prove beneficial to the firm’s trust account clients if the information is used in making investment decisions for these trust accounts. Consequently, financial services firms confront two equally dubious options: to utilize the information to benefit the trust account client and break insider trading laws, or to disregard the information and seemingly violate the firm’s fiduciary duty to the trust account client. To successfully defend against either of the above claims, firms should establish and maintain effective Chinese Walls between private and public side departments and demonstrate that decisions made with respect to private and public side clients are not tainted by conflicting interests. A recent case tried in the Southern District of New York, Aftra v. JPMorgan, provides an opportunity to inspect these problems in light of the 2008 financial crisis.
TABLE OF CONTENTS

INTRODUCTION ........................................................................................................ 769

I. BACKGROUND .................................................................................................. 772
   A. Repurchase Agreements ................................................................. 772
   B. Securities Lending/Asset Management ........................................ 774
   C. Chinese Walls ................................................................................. 775
   D. Fiduciary Duty ................................................................................ 779
      1. Duty of Loyalty ......................................................................... 779

II. AFTRA RETIREMENT FUND v. JP MORGAN ............................................ 780
   A. JPMC Repurchase Agreement with Sigma .................................. 780
   B. JPMC Securities Lending Agreement with Aftra ....................... 781
   C. Court’s Ruling ............................................................................. 782
      1. Duty of Loyalty ......................................................................... 782
   D. Related Litigation ......................................................................... 782
      1. BP Savings Plan v. Northern Trust .......................................... 783

III. ANALYSIS ................................................................................................... 784
   A. Are Chinese Walls a Defense to Breach of Fiduciary Duty of
      Loyalty Claims? ............................................................................ 784
      1. Hypothetical .............................................................................. 785
      2. Additional Scenario Where the Hats and Chinese Wall Defenses
         May Be Proper .......................................................................... 786
   B. An Alternative Theory of Aftra’s Breach Claim ......................... 788
   C. Solutions to the Chinese Walls and Duty of Loyalty Debate ...... 789
      1. Breakup of Multiservice Financial Institutions ....................... 790
      2. Restricted and Watch Lists ....................................................... 790

CONCLUSION .................................................................................................... 791
Enactment of the Gramm-Leach-Bliley Act (GLBA),¹ which repealed important portions of the Glass-Steagall Act (GSA),² broadened the activities that depository banks may engage in by establishing the label of financial holding companies.³ The expected consequence of the GLBA was the consolidation of financial services into a few large, and often international, banking corporations.⁴

As purveyors of a variety of financial products, these companies are privy to material nonpublic information (MNPI) relating to their clients’ business operations and future economic outlook, such as when a corporate borrower provides the lending institution with financial statements and future expected cash flows.⁵ Occasionally, information gained by one division in administering its duty to clients may prove useful to another division in making business decisions that would impact the banking corporation, a separate client, or both.⁶ The advantageous transfer of MNPI between departments⁷ was prohibited by an early case⁸ brought under the Securities and Exchange Commission’s (SEC) Rule 10b-5⁹ of the Securities Exchange Act of 1934.¹⁰

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³ 12 U.S.C. §§ 1841(p), 1843(l)(1) (2006). Financial holding companies are permitted to engage in activities financial in nature or incidental thereto, as well as complementary financial activities that do not pose a substantial risk to the safety and soundness of the institution. See 12 U.S.C. § 1843(k)(1). After 1999, financial holding companies were allowed to underwrite securities, offer all types of insurance policies, participate in market securities transactions as a broker-dealer, provide advisory services, act as trustee, and manage trust fund investments and other financial services. 12 U.S.C. § 1843(k)(4).
⁵ Id. at 16, 238.
⁶ Id. at 27.
⁷ Division and department are used synonymously. Any common points of distinction are disregarded for the purposes of this Note. Here, departments are characterized and distinguished by the activities in which financial holding companies are permitted to engage. See 12 U.S.C. § 1843(k)(4).
⁸ Cady, Roberts & Co., Exchange Act Release No. 6668, 40 SEC 907 (Nov. 8, 1961) (dealing with the use of inside information acquired by a trustee in making investment decisions for the trust). Although the inside information came to the trustee from an outside source, not an internal department, the ruling effectively prohibited a trustee from using MNPI acquired from any source. See id. at 907–12.
Conflicts of interest in large financial holding companies are endemic to the industry, and may take on two forms: a conflict between the firm’s own economic interests and those of its clients, or a conflict between the interests of different types of clients of the financial institution. In either form it is the use, not possession, of MNPI in making investment and business decisions that is illegal. In an attempt to preempt and combat the transfer of MNPI between divisions, financial services companies establish and monitor compliance procedures.

One technique firms can use to avoid the transfer of MNPI is to construct Chinese Walls between the public and private sides of the firm. The effectiveness of Chinese Walls in permitting the exchange of MNPI has been a debated topic since insider trading was recognized in Cady.
The number of potential conflicts of interest increase as a firm broadens the variety of financial services it offers, especially when sales, advisory, and underwriting functions are combined. Conflicts of interest have been cited as a contributing factor to the economic meltdown of 2008. The economic meltdown of 2008 spurred a large amount of litigation against firms in the financial services industry. This Note inspects one such claim—Board of Trustees of Aftra Retirement Fund v. JPMorgan Chase Bank, N.A.—where Judge Scheindlin found that JPMorgan (JPMC) did not violate its duties of loyalty or disclosure when it collected a substantial premium on repurchase agreements made between Sigma Finance (Sigma) and JPMC’s commercial lending division while Aftra Retirement Fund...
(Aftra), under the direction and advisement of JPMC’s securities lending division, lost nearly all of its investment in Sigma when it went bankrupt.\(^{26}\) Integral to this inspection is the apparent conflict of interest between JPMC’s commercial lending and securities lending\(^{27}\) departments and the use of Chinese Walls to prohibit the transfer of MNPI.

This Note will: (1) offer background and historical information on commercial repurchase agreements, securities lending/asset management services, Chinese Walls, and the fiduciary duty of loyalty; (2) provide context to legal arguments by highlighting the elements of the Aftra v. JPMorgan claim; (3) analyze the Aftra v. JPMorgan court’s discussion of the use of Chinese Walls as a defense to claims for breach of the fiduciary duty of loyalty; (4) inspect an alternative line of argumentation that may have proven successful for Aftra; and (5) discuss two possible solutions to the Chinese Walls debate enlightened by the Aftra v. JPMorgan ruling. The implications of Aftra v. JPMorgan will impact many subsequent cases that deal with conflicts of interest within large financial services firms.

This Note’s analysis highlights the importance of Chinese Walls in defending against duty of loyalty claims. A financial services firm’s use of Chinese Walls, if functioning properly, permits it to reject a plaintiff’s claim that (1) the firm was acting in a dual and conflicted role when dealing with fiduciary assets and (2) MNPI was used in making public side investment decisions.\(^{28}\) Ironically, Aftra’s claim seeks to impose upon JPMC the requirement to disregard, or scale, a Chinese Wall within its organization in order to benefit the fiduciary client’s assets.\(^{29}\) Two alternatives are available to eliminate or minimize the importance of Chinese Walls: (1) require the break-up and separation of large financial services firms such that there is no possibility for conflicts of interest between private and public side departments, and (2) establish restricted and watch lists that serve to make both public and private side managers aware of a potential conflict of interest between fiduciary and non-fiduciary clients.\(^{30}\)

I. BACKGROUND

A. Repurchase Agreements

Repurchase (repo) agreements provide for the simultaneous sale of securities with a contractual obligation to repurchase them in the future at a

\(^{26}\) *Id.* at 677.

\(^{27}\) JPMC’s securities lending division performs trustee services by investing cash collateral for clients. *See infra* notes 49–50 and accompanying text.

\(^{28}\) *Aftra*, 806 F. Supp. 2d at 688.

\(^{29}\) *Id.* at 693.

\(^{30}\) *See Gorman*, *supra* note 18, at 494–97.
higher price.\textsuperscript{31} This transaction is best viewed as a loan in which Corporation A lends the sale price of the securities\textsuperscript{32} to Corporation B in exchange for an agreement that at a later date Corporation B will repay the sale price, with accumulated interest, to Corporation A, and Corporation A will return the securities to Corporation B.\textsuperscript{33} Eligible collateral includes Treasury securities and other readily marketable securities.\textsuperscript{34} One night is the most common duration for a repo agreement.\textsuperscript{35}

Repo agreements “are subject to haircuts that are based on the nature and value of the underlying securities, [and] the amount of such agreements in relation to ... marks-to-market.”\textsuperscript{36} These “haircuts” require the value of the securities sold to be 102\%–103\%\textsuperscript{37} of the sale price in order to protect the lender from a decrease in the asset’s value over the duration of the agreement.\textsuperscript{38} The Bankruptcy Code affords derivative contracts (including repo agreements) special treatment that purportedly reduces systemic risk by facilitating settlement and clearing.\textsuperscript{39}

The United States repurchase market in mid-2008 exceeded $10 trillion, or about 70\% of U.S. Gross Domestic Product (GDP), while the European market was 65\% of Euro area GDP at €6 trillion.\textsuperscript{40} Repo market


\textsuperscript{32} The securities serve as the collateral for the loan. \textit{See id.} at 1–2.

\textsuperscript{33} \textit{See id.} The difference between the repurchase price and the original sales price is the interest earned by the lending institution. \textit{See United States v. Manko}, 979 F.2d 900, 902 (2d Cir. 1992).


\textsuperscript{37} Matt Phillips et al., \textit{Heading for a ‘Haircut’}, \textit{Wall St. J.}, July 28, 2011, at C1. Lenders typically require borrowers to give $102 in assets or U.S. Treasuries for $100 cash. \textit{Id.}

\textsuperscript{38} \textit{See} MOORAD CHOIDHURY, \textit{The Repo Handbook} 128, 149 (2d ed. 2010).

\textsuperscript{39} \textit{See} Franklin R. Edwards & Edward R. Morrison, \textit{Derivatives and the Bankruptcy Code: Why the Special Treatment?}, 22 YALE J. ON REG. 91, 93–94 (2005) (arguing that special treatment of derivative contracts through an automatic stay in bankruptcy proceedings may increase, not decrease, systemic risk).

\textsuperscript{40} Peter Hördahl & Michael R. King, \textit{Developments in Repo Markets During the Financial Turmoil}, BIS Q. REV., Dec. 2008, at 37, 39.
growth nearly doubled from 2000 to 2007, mostly due to increases in overnight repo transactions. The 2008 subprime mortgage crisis tightened repo lending because lenders began to worry about the health of their own balance sheets. Companies who relied on the overnight repo market, often investment banks, suffered at the “mercy of lender sentiment.” The overnight repo market hit a breaking point in early 2008 when lending all but dried up and only the highest quality collateral was accepted.

B. Securities Lending/Asset Management

Securities lending is a contractual agreement between two parties where the lender transfers securities to the borrower with the agreement that the borrower will return them on a later date. The borrower provides the lender with collateral against the value of the securities. Borrowers often engage in securities lending for the purpose of short selling, but other purposes exist.

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43 Id.
44 See Brunnemeier, supra note 41, at 88. In March 2008, Bear Stearns “was suddenly unable to secure funding on the repo market,” which led to the eventual purchase of Bear Stearns by JPMorgan with assistance from the New York Federal Reserve. Id.; see also José Gabilondo, Leveraged Liquidity: Bear Raids and Junk Loans in the New Credit Market, 34 J. CORP. L. 447, 465 (2009) (stating it was the “refusal of Bear’s repo lenders to extend overnight loans that confirmed that Bear had a liquidity crisis”).
45 See Hördahl & King, supra note 40, at 42–43.
46 André Ruchin, Can Securities Lending Transactions Substitute for Repurchase Agreement Transactions?, 128 BANKING L.J. 450, 451 (2011). Lending agreements, at the discretion of the lender, may specify a fixed date for borrowers to return the securities or allow lenders to request them on demand. Id.
47 See Susan F. Pollack & Craig H. Weaver, Legal Issues Impacting Securities Lending Activities of Banks, in EXCHANGE ACTIVITIES, at 217, 223 (PLI Commercial Law & Practice, Course Handbook Ser. No. 600, 1992). The most common form of collateral is cash, but U.S. Treasuries and other readily marketable assets are also accepted. Id. Fluctuations in the value of the securities impact the collateral required of the borrower, which is increased or decreased according to daily adjustments by marking to market. Id.
48 Kevin A. Zambrowicz, The AM. LAW INST., SP054 BROKER-DEALER REGULATION 37, 39 (2009) (“Borrowers may engage in securities lending ... to cover short sales or failed trades, or to execute hedging or arbitrage strategies.”). Ironically, although the parties have conflicting positions—the lender is long on the stock and the borrower is short—the lender allows its securities to be used in a bet by the borrower against the lender’s expectation that the securities will rise in value.
Securities lending agents are normally appointed by the securities lender to invest the cash collateral according to predetermined guidelines set by the lender. The level of discretionary investment authority the asset manager is allowed by the security lender has liability implications, and it is an important issue to be resolved in the contractual documents of the lending and management agreements.

Asset managers are compensated by receiving a percentage of the gain in the invested collateral’s value, typically thirty to forty percent, but do not share in any losses experienced by the securities lender. Because the security lender bears the risk of loss, the asset manager is required to invest “collateral funds conservatively and prudently to safeguard principal and to maintain adequate liquidity.... [M]ost collateral pools are restricted to short-term investments because [they] usually have less volatility.”

C. Chinese Walls

Prior to developments in the interpretation of section 78j(b) of the Securities Exchange Act of 1934, the standard process for investment decisions by a trustee was to “seek[] out and evaluate[] information” from all files and personnel across departments within the financial institution. It was expected that any special skills or knowledge should be “put to use for the benefit of ... trust beneficiaries.” However, as previously noted, the Cady, Roberts decision limited the sources of information that managers were permitted to use when investing fund assets.

49 Many large custodians, the banking entities that hold the lenders’ securities, have a securities lending division within their corporate structure. See id. at 40; see also Stephen Bier et al., Overview of Fund Securities Lending Programs, 124 BANKING L.J. 654, 656 (2007) (discussing the care required in selecting a securities lending agent).
40 See Pollack & Weaver, supra note 47, at 223.
42 See Pollack & Weaver, supra note 47, at 223.
43 Timothy DeLange & Ian Berg, Other People’s Money: The Unrealized Conflicts of Securities Lending, H held by law.harvard.edu/corpgov/2010/06/17/other-peoples-money-the-unrealized-conflicts-of-securities-lending/.
44 Id.
46 Herzel & Colling, supra note 18, at 76–77.
Less than a decade after Cady, Roberts, the SEC urged financial services institutions to adopt and adhere to internal policies to guard against disclosure of confidential information. These internal policies sought to prohibit communications between commercial lending or underwriting activities (private side) and trust department activities (public side). More recently, the Office of the Comptroller of the Currency (OCC) has required that national banks that exercise fiduciary authority must follow written policies and procedures to “ensure[] that fiduciary officers and employees do not use material inside information in connection with any decision ... to purchase or sell any security ... and prevent[] self-dealing and conflicts of interest.”

Before identifying the components of Chinese Walls, it is important to pinpoint what type of information they attempt to block. Although there is no clear definition of MNPI, some categories of sensitive information may be considered material. Examples include nonpublic information about financial results, future earnings projections, impending bankruptcy or financial liquidity problems, or changes in senior management. “In short, material nonpublic information is any information which, if publicly disclosed, could reasonably affect the price of the stock,” or be a significant factor in altering an investment decision. However, advantages gained by a securities investor through its own efforts “derived from publicly available


60 Herzel & Colling, supra note 18, at 79–80.

61 Fiduciary Activities of National Banks, 12 C.F.R. § 9.5 (b)–(c) (2012). Investment managers, who also function in a fiduciary capacity, are required to maintain and enforce policies and procedures to prevent the misuse of nonpublic information; however, latitude is given to advisers to take into consideration the nature of its business in deciding on specific measures. 15 U.S.C. § 80b-4a (2006).


64 Id.

65 3 ROBERT B. HUGHES, LEGAL COMPLIANCE CHECKUPS: BUSINESS CLIENTS app. 23-3 (2009).

66 See Snow et al., supra note 63, at 146.
information” are not prohibited, even if the conclusions drawn from such information are nonpublic.\footnote{67 Thomas Lee Hazen, Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information, 61 HASTINGS L.J. 881, 883 (2010). All traders are not required to have equal information before trading. See Dirks v. SEC, 463 U.S. 646, 657 (1983).}

The characteristics of a Chinese Wall depend on the size and structure of the bank or financial holding company.\footnote{68 See Herzl & Colling, supra note 18, at 88. A common method is the physical\footnote{69 Mèndez-Peñate, supra note 18, at 686.} and/or functional\footnote{70 See Sheldon I. Goldfarb, Chinese Wall Policies and Procedures, at 809, 813 (PLI Corporate Law & Practice, Course Handbook Ser. No. 692, 1990). Functional separations attempt to avoid the intermingling of bank departments that possess private information by separating tasks and activities in which staff from each department engage. Id.} separation of the lending and trust departments.\footnote{71 See id.} At a minimum, Chinese Walls may be erected by internally distributing a policy statement outlining the purpose and basic provisions of the information barrier.\footnote{72 See Mèndez-Peñate, supra note 18, at 685. The statement may include procedures that should be followed by persons responsible for private information. Herzl & Colling, supra note 18, at 88.} An independent compliance department may review trades and activities to ensure adherence to the policy statement.\footnote{73 See 3 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD § 6:274 (2d ed. 2011) (discussing Chinese Walls procedures ordered by a recent bankruptcy court decision). Personnel responsible for private information may be required to sign a letter acknowledging they are aware of the restrictions. Id.} Restricting access to computer databases containing sensitive documents is another technique aimed at prohibiting misuse of confidential information.\footnote{74 See Harry J. Weiss, Outline for Enforcement Session: SEC and SRO Enforcement Developments, in COPING WITH BROKER/DEALER REGULATION AND ENFORCEMENT 2008, at 49, 135 (PLI Corporate Law & Practice, Course Handbook Ser. No. 1701, 2008).} Other characteristics include implementing educational programs for employees, eliminating shared committee membership between the departments, and establishing protocols to deal with accidental communications.\footnote{75 See Charlotte M. Fischman, Client Conflicts: The Large Law Firm Experience and the Use of the Chinese Wall, at 69, 98–100 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 365, 1988).} Large law firms have put into place similar policies and procedures to avoid conflict of interest problems between different clients and the lawyers who assist those clients.\footnote{76 See Mèndez-Peñate, supra note 18, at 699–700.}

It is necessary that some individuals be allowed to cross the Chinese Walls to perform their responsibilities within the corporation,\footnote{77 See Mèndez-Peñate, supra note 18, at 699–700.} most notably
senior executives. Directors and senior officers “stand[] astride the wall [and are] faced with a seemingly impossible task of maintaining a dichotomy of mind between information gained” from various departments. Directors and officers are often not involved in the individual trades performed by trust department managers, however, some specific instances have been reported where senior management had specific knowledge of and involvement in trust department activities. Trust department employees, and the senior executives who supervise them, are under no fiduciary duty to seek out inside information for the benefit of the managed trusts, but maximizing profits through increased brokerage and performance fees provides a strong incentive to exploit such information.

Restricted and watch lists have been suggested as a method to supplement Chinese Walls. When the commercial lending department enters into a relationship with a client, and therefore gains access to nonpublic information, the client’s name is added to a firm-wide list that prohibits the trust department from recommending that client’s securities. Therefore, no conflict of interest exists that may lead to disclosure of nonpublic information. There are two main problems that restricted lists present. First, the mere fact that a client is on the restricted list suggests something that has the potential

78 See Theodore A. Levine et al., An Overview of Compliance Policies and Procedures for Multiservice Financial Institutions, at 731, 762–63 (PLI Corporate Law & Practice, Course Handbook Ser. No. 692, 1990). Others allowed to cross the barrier include lawyers, accountants, and appropriate research personnel. Id.

79 Steven R. Hunsicker, Conflicts of Interest, Economic Distortions, and the Separation of Trust and Commercial Banking Functions, 50 S. Cal. L. Rev. 611, 645 (1977) (arguing that it is economically feasible to completely separate trust and commercial departments to avoid conflicts of interest).

80 See Herzel & Colling, supra note 18, at 92 n.54.


82 See Herzel & Colling, supra note 18, at 86–87.

83 See Hunsicker, supra note 79, at 643–44.

84 Slade v. Shearson, Hammill, & Co., 517 F.2d 398, 403 (2d Cir. 1974) (finding that constructing Chinese Walls alone is not a sufficient bar to liability in the case that a trust department solicits customers for a corporation’s securities when the investment banking department knows of inside information pertaining to the corporation that is contrary to the assertions of the trust department).

85 See id. The list can prescribe that certain actions may or may not be taken with regards to a corporation’s securities—exceptions relating to whose account is permitted to trade in the security (proprietary, client, or employee), time limits on the restriction, and how to alter a previous recommendation of the security (buy, sell, or hold). See Levine et al., supra note 78, at 781–84.

86 See Levine et al., supra note 78, at 785.
to affect the securities’ value. Second, large financial institutions deal with a vast number of corporations through various departments, and the range of securities that may be recommended would be greatly circumscribed.

D. Fiduciary Duty

1. Duty of Loyalty

Asset managers who exercise discretionary control in the management of an employee retirement plan are subject to provisions of the Employee Retirement Income Security Act (ERISA) and have a fiduciary duty to the managed fund in that capacity. In order to state a claim under ERISA for breach of fiduciary duty, the pleading “must allege 1) that defendant was a fiduciary who, 2) was acting within his capacity as a fiduciary, and 3) breached his fiduciary duty.”

Element 2 implies there are instances where a fiduciary may act against the interests of the plan if done outside of its capacity as fiduciary. Pegram

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87 Gorman, supra note 18, at 494–95. Depending on the way the restricted list is structured (what department placed the corporation on the list, what action is prescribed, and how long the client will be on the list), an analyst may be able to glean information from and hypothesize about the corporation merely because of its presence on the list. This is most pronounced when the corporation’s securities had previously been recommended by the analyst, providing grounds for even greater conjecture on the corporation’s future outlook. Id.

88 The same client may also be using different departments simultaneously, such as a corporation issuing new securities through the underwriting division and receiving financing through the commercial lending division.

89 See Levine et al., supra note 78, at 786. The effect on large banks would be extremely onerous, imposing a drastic solution that is not proportional to the problem it purports to solve. See Herzel & Colling, supra note 18, at 82–83.


91 In re Morgan Stanley ERISA Litigation, 696 F. Supp. 2d 345, 353 (S.D.N.Y. 2009) (denying defendant’s motion to dismiss because allegations were sufficient to state a claim for breach of fiduciary duty to avoid conflicts of interest, to prudently manage plan assets, and to disclose material information to the plan).

92 See Pegram v. Herdrich, 530 U.S. 211, 225–26 (2000) (allowing fiduciary plan managers to act against the interests of the plan when the manager does so outside of its responsibility as fiduciary to the plan).
v. Herdrich specifically permits ERISA fiduciaries to wear multiple hats, or represent multiple interests, as long as they “wear the fiduciary hat when making fiduciary decisions.”93 This rationale has been extended to large financial services firms where fiduciary and non-fiduciary activities are carried out in various departments.94 Consequently, the plaintiff in a breach of fiduciary duty of loyalty claim must assert that the activity complained of occurred while the defendant was administering to the plan in its fiduciary capacity.95

Element 3 pertains to the nature of the transaction or activity that the plaintiff, the fiduciary plan trustee, complains of, not the capacity within which the fiduciary is acting as in Element 2.96 Fiduciaries must discharge their duties solely in the interest of participants, “for the exclusive purpose of[] providing benefits to participants and ... defraying reasonable expenses.”97 Implicit in this statute is the requirement that trustee fiduciaries act completely independent of conflicting personal interests.98 Prohibited transactions due to conflicts of interest include (1) dealing with plan assets for the benefit of the fiduciary’s own account, (2) transactions involving the plan where the interests of the plan are adversely affected, and (3) receiving kickbacks from transactions involving the plan assets.99

II. AFTRA RETIREMENT FUND V. JPMORGAN

A. JPMC Repurchase Agreement with Sigma

Sigma Finance was a special investment vehicle (SIV) that utilized short-term funding to invest in asset-backed securities and other long-term

\begin{itemize}
  \item \textit{Id.}
  \item \textit{See EBC I, Inc. v. Goldman, Sachs & Co., 832 N.E.2d 26, 33 (N.Y. 2005) (stating that although Goldman Sachs was acting in a fiduciary role as underwriting advisor to a client, other underwriting activities on behalf of that client do not bring with them fiduciary duties).}
  \item \textit{Id. at 758.}
  \item \textit{29 U.S.C. § 1104(a)(1)(A) (2006).}
  \item \textit{See Dabney v. Chase Nat. Bank of New York, 196 F.2d 668, 670 (2d Cir. 1952).}
  \item \textit{See 29 U.S.C. § 1106(b)(1)–(3) (2006). It is argued that Congress deemed that some transactions by fiduciaries must be summarily avoided, and that the aims of the fiduciary and the plan are irreconcilable. Consequently, in such instances fiduciaries are completely barred from acting. See Laurence B. Wohl, \textit{Fiduciary Duties Under ERISA: A Tale of Multiple Loyalties}, 20 U. DAYTON L. REV. 43, 59 (1994). The second prohibited transaction that is listed in the text above notes that certain transactions involving the plan are disallowed, which the court in \textit{Aftra v. JPMorgan} emphasized in its opinion. See Bd. of Trs. of Aftra Ret. Fund v. JPMorgan Chase Bank, N.A., 806 F. Supp. 2d 662, 681 (S.D.N.Y. 2011).}
\end{itemize}
financial instruments. On September 30, 2008, the Sigma board of directors determined Sigma could no longer meet its obligations and should be placed in receivership. During the liquidity crunch, Sigma looked to JPMC for financing through repo agreements in place of traditional commercial paper and term notes. Recognizing Sigma’s impending collapse, internal correspondence within JPMC’s investment banking division highlighted potential gains from the unwinding of Sigma and other similar shadow banking entities. Through various repo agreement plans totaling nearly $13.5 billion, from February to August of 2008, JPMC’s investment banking division hand-selected collateral that gave it the best prospect of profit in the event of a Sigma default.

B. JPMC Securities Lending Agreement with Aftra

In June 2007, Aftra used JPMC’s securities lending services to gain access to $500 million in collateral from borrowers of its securities; Aftra then authorized JPMC’s asset management division to invest the collateral in Sigma’s secured medium term notes (MTN). These MTNs allowed Sigma to retain the right to transfer specific assets to repo lenders, rendering those

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103 See Aftra, 806 F. Supp. 2d at 671–72. Specifically, JPMC executives outlined services that could be provided to Sigma and others involved in Sigma’s financing, such as advising Sigma noteholders on unwinding its portfolios, identifying Sigma assets that would be attractive purchases for JPMC, and protecting JPMC’s own monetary interests. Id.

104 Id. at 675–76. These repo agreements were executed after JPMC executives recognized Sigma was near bankruptcy. Id.

105 Id. at 675. Aftra claims JPMC gained a profit of $1.9 billion from the cherry-picked collateral after Sigma’s collapse. Id. at 678. However, at the time of Sigma’s default, JPMC faced a nearly $383 million loss on the collateral; JPMC argues that its business decision to maintain possession of the collateral over a period of years (resulting in substantial asset appreciation) has no bearing on Aftra’s claim. Id.

106 Id. at 670. The notes, which matured in June 2009, were AAA-rated and secured by Sigma assets. Id.
assets unavailable to MTN holders if Sigma defaulted. After Sigma entered receivership, Aftra recovered about six cents on the dollar for its MTNs.

C. Court’s Ruling

1. Duty of Loyalty

The court did not rule on Aftra’s claim that JPMC breached its fiduciary duty to prudently manage plan assets because it was not at issue in the parties’ motions. JPMC’s motion for summary judgment was granted on Aftra’s claims for breach of duty of loyalty and duty to disclose. Judge Scheindlin determined, as a matter of law, “JPMC was not acting in a fiduciary capacity when it extended repo financing to Sigma,” or when JPMC issued a default notice to Sigma, thereby seizing Sigma’s collateral. The duty of loyalty claim was of particular importance to the court’s analysis, and it failed because JPMC was acting in its capacity as creditor of Sigma, not fiduciary of Aftra, when the repo agreements were made and the default order issued. Congressional intent justified the holding, citing a calculated tradeoff between increasing capital formation and aligning financial services firms’ bottom lines with the success of their clients’ investments.

D. Related Litigation

As previously noted, the 2008 financial crisis caused many lawsuits against the financial services industry. Much of the litigation stemmed from negligence and breach of contract claims brought by class action plaintiffs whose investments had lost substantial value due to the wide-reaching impact of the subprime loan market and the resulting credit crunch. This

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107 Id. at 670–71. JPMC’s Asset Management division was aware of the repo lender’s superior claim to Sigma’s assets vis-à-vis noteholders at least six weeks prior to Sigma’s collapse. Id. at 677.
108 Id. at 677.
109 See Aftra, 806 F. Supp. 2d at 666.
110 Id.
111 Id. at 691.
112 Id.
113 Id. at 691–92.
114 See Meyerowitz, supra note 22, at 97.
115 See Kevin J. Smith & Nicole M. Hudak, Financial Services Companies Fighting Negligence Claims, 128 BANKING L.J. 123, 123 (2011) (discussing how defendants may utilize a New York law that permits the dismissal of negligence claims where the defendant did not undertake duties outside those specifically enumerated in the contract).
Section considers litigation related\(^{117}\) to the *Aftra Retirement Fund v. JPMorgan* (*Aftra v. JPMorgan*) case.

1. **BP Savings Plan v. Northern Trust\(^{118}\)**

The BP Savings Committee (BP Committee) entered into investment manager agreements (IMA) with Northern Trust to invest BP Committee assets (securities) in lending index funds.\(^{119}\) Northern Trust, through its securities lending division, found borrowers for these assets and secured collateral to invest for the benefit of the BP Committee’s plan beneficiaries.\(^{120}\) When the fund containing the invested collateral lost substantial value in 2008, the BP Committee was not allowed to withdraw the remaining collateral according to the investment guidelines set forth in the IMA.\(^{121}\)

The BP Committee claimed that Northern Trust breached its fiduciary duties to prudently manage plan assets and disclose conflicts of interest created by the collateral investment program.\(^{122}\) The BP Committee was successful in its motion to dismiss Northern Trust’s claim seeking contribution and indemnification under ERISA,\(^{123}\) but the fiduciary duty claims have yet to be decided.\(^{124}\)

There are key distinctions that may place *BP Savings Plan v. Northern Trust* outside the scope of *Aftra v. JPMorgan*. First, the conflict of interest claim relates to Northern Trust’s activities within its fiduciary capacity as a securities lending agent,\(^{125}\) whereas *Aftra*’s claim involves JPMC’s activities as a non-fiduciary commercial repo lender to Sigma.\(^{126}\) Second, at this stage in the pleadings, it has not been mentioned whether Northern Trust misrepresented the risk profile of the collateral pools. In *Aftra v. JPMorgan*, Sigma’s demise, according to JPMC executives, was extremely likely and the most advantageous approach for the JPMC commercial

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\(^{117}\) Similarities are based on the factual circumstances surrounding the lawsuit and the claims asserted by the plaintiff.


\(^{119}\) *Id.* at 981.

\(^{120}\) *Id.* The collateral was invested in commingled pools, and the BP Committee had rights under the investment guidelines to portions of the pool’s assets. *Id.*

\(^{121}\) *Id.*

\(^{122}\) *Id.* at 981–82.

\(^{123}\) *Id.* at 986.

\(^{124}\) *BP Savings Plan*, 692 F. Supp. 2d at 986.


lending division was to profit from the bankruptcy while leaving the securities lending and asset management divisions to determine their own courses of action. However, since the *Aftra v. JPMorgan* and *BP Savings Plan v. Northern Trust* claims for breach of fiduciary duty to prudently manage plan assets have not been ruled on, the respective courts may determine that these differences are moot.

III. Analysis

A. Are Chinese Walls a Defense to Breach of Fiduciary Duty of Loyalty Claims?

Aftra’s theory of breach can be summarized in the following way: JPMC breached its fiduciary duty of loyalty to Aftra when it secured Sigma collateral through repo agreements, such that JPMC had a higher priority to Sigma assets than the Sigma notes in which Aftra had invested. According to Aftra, this was done by JPMC to capitalize on the potential profit from the more lucrative collateral at the expense of Aftra. The court dismissed this theory on the grounds that even though JPMC was acting as a fiduciary in its capacity as asset manager for Aftra, it was not a fiduciary to Sigma as a repo lender.

Closely mirroring the aforementioned argument is the *Pegram v. Herdrich* court’s discussion of a fiduciary’s right to wear multiple hats as long as the fiduciary duty hat is worn when dealing with fiduciary plan assets. Although this declaration fits nicely into academic discussions, it proves more difficult when applied to real-life situations. “Decisions [are not] made in a vacuum.” Decisions can rarely be isolated to represent the interests of a single client. Therefore, information barriers play an essential part in curtailing conflicts of interest between different roles, or “hats.”

JPMC confronted Aftra’s claim on the grounds that its information barrier between the securities lending and commercial lending departments prevented a conflict of interest that would violate the duty of loyalty. Proper information barriers appear to be a necessary link in the causal chain of Judge Scheindlin’s holding—if a fiduciary acts outside its capacity as

127 See id. at 674–76.
128 Id. at 666; *BP Savings Plan*, 692 F. Supp. 2d at 986.
129 *Aftra*, 806 F. Supp. 2d at 682.
130 See id.
131 Id. at 666.
132 See supra notes 92–94 and accompanying text.
133 STEPHEN P. ROBBINS ET AL., ORGANISATIONAL BEHAVIOUR: GLOBAL AND SOUTHERN AFRICAN PERSPECTIVES 129 (2d ed. 2009).
134 *Aftra*, 806 F. Supp. 2d at 682, 688.
fiduciary to plan assets, or in other words the fiduciary takes off the fiduciary hat and puts another on in its place, there needs to be some tactic to inhibit the use of knowledge gained while wearing the fiduciary hat in making decisions outside of that capacity. Judge Scheindlin mentioned the effectiveness of JPMC’s Chinese Wall policies but did not cite their use as a reason for rejecting Aftra’s claim.

This Section inspects the interaction between information barriers and a fiduciary’s ability to act outside of its fiduciary capacity to the detriment of the fiduciary’s client. It finds that when a plaintiff claims the defendant breached its fiduciary duty of loyalty due to a conflict of interest, the defendant would be wise to raise two defenses. First, the defendant should assert that it was not acting within its fiduciary capacity when the breaching event occurred. Second, the defendant should illustrate the effective information barriers in place between fiduciary and non-fiduciary departments.

1. Hypothetical

Martha gives Invest For You, Inc. (IFY) discretion to invest her retirement assets, anticipating a reasonable return. IFY also lends money to local businesses. In Y-1, IFY decides to loan XYZ Corporation (XYZ) funds from its proprietary account, the loan being secured by XYZ property. In Y-2, IFY invests in XYZ debt on Martha’s behalf, as an unsecured creditor. At bankruptcy in Y-3, IFY has a higher priority than Martha in collecting XYZ assets.

What would be IFY’s best defense to a breach of duty of loyalty claim brought by Martha? If IFY offers the Hats defense, it must prove it was (1) acting outside of its role as fiduciary to Martha when it loaned funds to XYZ in Y-1, and (2) making decisions exclusively for the benefit of Martha in Y-2. Logically, Martha will claim IFY’s investment decisions pertaining to her retirement assets were impaired or jaded by the commercial loan to XYZ of proprietary funds. How would the Chinese Wall defense

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135 See generally id. at 685–86 (discussing fiduciary duties and information barriers).
136 See id. at 688–90.
137 Id. at 666.
138 In the interest of brevity, this defense will be called the Hats defense.
139 This defense is called the Chinese Wall defense.
140 This Hypothetical is different from the Aftra v. JP Morgan case. Aftra asserted that JPMC breached its duty solely by creating a higher priority to Sigma assets compared to Aftra’s position. Aftra, 806 F. Supp. 2d at 682. The Hypothetical is used primarily to demonstrate the interaction between the Hats and Chinese Wall defenses.
142 See Mèndez-Peñate, supra note 18, at 688–89. IFY may invest Martha’s retirement assets in XYZ in order to improve the likelihood that they collect on the commercial loans in the event of default; there are other reasons why an asset manager may invest
assist IFY in this situation? It would eliminate Martha’s aforementioned rebuttal to the Hats defense. Successfully raising the Chinese Wall defense will mean, theoretically, that IFY’s public and private side departments in charge of each of the respective transactions with XYZ were unaware of the other’s position.143 The defense allows an inference that IFY blocked the transfer of information about the commercial loan terms between the asset management and commercial lending departments. The nature and type of information allowed to pass between departments is a debated topic, and even the very mention of a client’s name between departments could bring liability.145 As long as the court finds IFY’s information barrier to be sufficient, IFY can avoid liability under a plaintiff’s conflict of interest theory stemming from the fiduciary duty of loyalty.146

In the Hypothetical, as in Aftra v. JPMorgan, Martha may claim there is a duty to pass over, or scale, the Chinese Wall in order to protect the fiduciary client’s assets.147 The plaintiff’s theory would go something like this: Once IFY became privy to MNPI in its role as commercial lender to XYZ in Y-1, IFY should be required to disclose that information to the asset management department if the use of the MNPI could enlighten the investment decisions made on behalf of Martha’s assets.148 Wholly separate from the above analysis is a claim of breach of the duty to prudently manage Martha’s assets, which may have some bearing on what information IFY is allowed to pass between departments.149

2. Additional Scenario Where the Hats and Chinese Wall Defenses May Be Proper

In addition to the Hypothetical, other situations exist where the Hats or Chinese Wall defenses may help a defendant avoid liability on a conflict

Martha’s assets in XYZ, such as accumulating a corporation’s stock in the discretionary accounts of its clients in order to vote proxies in a way that benefits the asset manager but not the fiduciary clients. Id. at 690–91.

143 In the event that IFY is comprised of a single individual, the Chinese Wall defense is purely artificial—the same person would be in charge of both investment decisions.


145 See Friend v. Sanwa Bank Cal., 35 F.3d 466, 468 (9th Cir. 1994) (citing 29 U.S.C. § 1104(a)(1)) (plaintiff claiming it is a per se violation of ERISA to have dual and conflicting fiduciary duties of loyalty).

146 See Aftra, 806 F. Supp. 2d at 668–69.

147 See id. at 689–90.

148 See id. at 665–66.

149 See Gorman, supra note 18, at 491–92 (identifying “catch-22” scenarios where compliance with Chinese Walls produces subpar results for fiduciary clients and potential breach issues for the fiduciary).
of interest claim under the fiduciary duty of loyalty. In an often-evolving industry, new and novel episodes of conflicting interests are ever-present, and there are assuredly many more scenarios that may arise in the fiduciary duty context than are shown here.

A plaintiff may allege that it is a per se violation for a defendant to represent two fiduciary clients whose interests conflict. Often, this claim arises in the context of corporate executives who act in two roles: corporate officer and pension plan fiduciary for employee assets. In this type of scenario, a pension plan’s claim against the officer would invoke an argument similar to that of Aftra—officers should utilize MNPI gained in their role as corporate officers (a fiduciary role to shareholders) when disposing of pension plan assets. Corporate executive defendants can assert a Hats defense to show that when making decisions in a fiduciary capacity to pension plan beneficiaries, they did so independent of any other competing interests, and vice versa for actions in its fiduciary capacity to shareholders. In reaction to the same claim, a Chinese Wall defense may be called upon to protect the executive from the illegal act of transferring MNPI in violation of insider trading laws. Support for this argument comes from the rejection of the previously permissible activity of trustees seeking information from any source that would assist in making decisions beneficial to the trust assets.

A claim for breach of fiduciary duty of loyalty due to a conflict of interest should investigate two questions. First, is the fiduciary trustee acting within its capacity as fiduciary to the plan when a decision is made, or is a non-fiduciary hat on at the time of the decision? Second, was an effective

151 See Friend v. Sanwa Bank Cal., 35 F.3d 466, 468 (9th Cir. 1994).
153 See Aftra, 806 F. Supp. 2d at 690.
154 See Shelby D. Green, To Disclose or Not to Disclose? That Is the Question for the Corporate Fiduciary Who Is Also a Pension Plan Fiduciary Under ERISA: Resolving the Conflict of Duty, 9 U. PA. J. LAB. & EMP. L. 831, 852 & nn.118–19 (2007). Courts are split on when the Hats defense is appropriate; the determining factor appears to be when the decision regarding the pension plan is a business decision (amending a plan) or a fiduciary decision (offering new investment options to employees as part of their pension plan). Id.
156 Herzel & Colling, supra note 18, at 76–77.
157 Under the broad functional definition of fiduciary in 29 U.S.C. § 1002(21)(A), the question of whether the entity was acting in its fiduciary capacity will be a fact-intensive inquiry. See Thomas Gies, Current Issues in ERISA Fiduciary Breach and Benefit Claims Litigation, in PRACTISING LAW INST., ERISA LITIGATION 10 (2008).
information barrier in place to prohibit the transfer of MNPI between public side (fiduciary) and private side (commercial lending or underwriting) activities? Depending on the plaintiff’s theory of breach, the first question may end the inquiry. However, in most instances, as in the Hypothetical above, the second question must also be addressed.

B. An Alternative Theory of Aftra’s Breach Claim

Judge Scheindlin noted on three occasions that Aftra’s theory of breach was not based on the belief that JPMC’s position as repo dealer influenced its decisions as fiduciary of Aftra funds. If Aftra had pled this theory, they would have been required to show JPMC engaged in a prohibited transaction where a conflict of interest existed. The factual evidence to assert this theory of breach would likely have come from internal JPMC correspondence between public and private side departments outlining their respective investments in a third party and how JPMC could benefit at the expense of Aftra. However, it is unlikely JPMC executives would have been naive enough to put such a plan in writing. Therefore, an inference would have been required by taking into account communications between the departments where the assets of JPMC, Aftra, and Sigma are managed. The record indicates three exchanges, discussed below, where either 29 U.S.C. § 1004(a)(1)(A) or 29 U.S.C. § 1106(b)(2) could be implicated.

In the first communication (Email #1), a private side executive mentioned discussions he had with SIV market investors, including the JPMC securities lending division, about the likely upheaval of the SIV market. After distribution of Email #1 to various public and private side executives, another communication (Email #2), sent on behalf of JPMC CEO Jamie Dimon, directed that a study be carried out by the asset management division of the JPMC clients who had the most exposure to the SIV market, with a particular emphasis on Sigma. The third communication (Email

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160 See supra notes 97–99 and accompanying text.


162 See Aftra, 806 F. Supp. 2d at 671–72. The email contained evidence of the SIV market panic and outlined possible profit opportunities due to the poor financial shape of the market. Id.

163 Id.
2013] SCALING CHINESE WALLS 789

#3), an email within the private side between executives, stated that the JPMC asset management division was a large purchaser of SIV and Sigma assets, and it questioned if a firm-wide position would need to be taken into consideration before entering repo agreements with Sigma.164

The content of Emails #1 and #3 was permissible because the private side did not divulge any MNPI about Sigma; in fact, it was doing market research to decide if JPMC should lend to Sigma on a repo basis.165 However, Email #2 provides telling insight into the knowledge of wall-straddlers.166 Because Dimon was privy to information on both sides of the Chinese Wall, his decisions are inherently suspect for a conflict of interest.167 Dimon’s request for a study of exposures may indicate to the asset management department that something needs to be done regarding Aftra’s investment in Sigma,168 but it does not call into question its loyalty to Aftra. Both 29 U.S.C. § 1004(a)(1)(A)(i) and 29 U.S.C. § 1006(b)(2) are written as obligations on the fiduciary actor, not the non-fiduciary commercial lender.169 In order to find a violation of these statutes, we must find evidence of the fiduciary acting within that capacity to the detriment of the fiduciary client.170 No indication is given in Email #2 that Dimon directed the asset management department to maintain its position in Sigma’s MTNs (on behalf of Aftra) to help JPMC’s firm-wide position. Although courts are content to allow circumstantial evidence and reasonable inferences to prove intent in these types of cases,171 no such evidence appears in the record. Therefore, if Aftra would have pled a separate theory of JPMC’s breach of fiduciary duty of loyalty, it would probably not have prevailed on the facts provided.

C. Solutions to the Chinese Walls and Duty of Loyalty Debate

Debate against the consolidation of the financial services industry has only increased since the financial crisis of 2008.172 The number of conflicts

164 Id. at 673.
165 Id. at 672–73.
166 See supra notes 77–79 and accompanying text.
167 See Aftra, 806 F. Supp. 2d at 669, 689.
168 Aftra’s duty to prudently manage plan assets was not decided on by the court. Id. at 666.
169 Although they both may be part of the same commercial entity.
of interest increase with the size of the financial institution and the types of activities in which it engages. Many solutions are proffered to deal with these conflicts, and two are inspected here.

1. Breakup of Multiservice Financial Institutions

One suggestion is to break up, or separate, the functions of multiservice institutions. This proposal attempts to segregate investment and commercial banking activities, much like the GSA did in 1933. Under this proposal, JPMC would be required to break up and disaffiliate public and private side departments. Such a shift in the financial services landscape would have tremendous effects—impacting the securities market’s ability to raise capital and corporate profit margins, to name just one.

Separation of public and private side businesses would have avoided the plaintiff’s perceived conflict of interest claim in Aftra v. JPMorgan. The JPMC asset management department would have been its own separate entity and not subject to the influence of wall-straddlers, firmwide positions, or the like. Judge Scheindlin dismissed the disaggregation of financial services because it would “negat[e] the legislative will and public policy expressed in decades of legislation and regulation.” The monetary costs of divesting and disaggregating the financial services industry would likely far exceed any benefit gained by omitting losses to investors due to perceived (or actual) conflicts of interest.

2. Restricted and Watch Lists

Restricted and watch lists function to make both public and private side employees aware of clients who may present a conflict of interest to the

services institutions’ monopoly power and suggesting the Dodd-Frank Act gives insufficient authority to breakup these institutions on antitrust grounds).

173 See supra notes 3–4, 11–13 and accompanying text.
174 Poser, supra note 18, at 120.
176 Poser, supra note 18, at 120–21.
177 Id.
180 Id. at 690 (citation omitted).
181 See Herzel & Colling, supra note 18, at 74.
The components of these lists vary greatly, from complete prohibitions on trading (restricted list) to supervision of trading by compliance personnel (watch list) to ferret out conflicts of interest.

The record does not reflect if JPMC had either type of list in place at the time of the Aftra ruling. However, there are drawbacks to both approaches. If JPMC imposed restricted list requirements, either the public side or the private side would lose business, because if the private side is associated with a client or company, the other is restricted from dealing with that client, and vice versa. Watch lists require the involvement of the compliance department in both public and private side activities, greatly increasing compliance costs. Also, when more employees are permitted to stand astride the information barrier, the potential for insider trading violations increases. Restricted and watch lists have been proven ineffective at improving Chinese Walls, and while the lists might have altered the decisions of JPMC executives in the Aftra case, they would pose a substantial cost if implemented as a mandatory fixture in the financial services industry.

CONCLUSION

Conflicts of interest have long been an issue in the financial services industry because of the “complex and opaque web of relationships” and products offered by multi-service institutions. In an attempt to combat these

183 See Poser, supra note 18, at 118. When a client or security is on a restricted list, the client or security cannot be the subject of recommendations or be traded. Id.
184 Id.
185 Involvement would include, but is not limited to, being an underwriter for a company’s securities, commercial lender to a company, or asset manager to a company or entity.
186 See supra notes 88–89 and accompanying text.
187 See Poser, supra note 18, at 118.
188 See id. (suggesting increased internal costs due to the extra workload placed on the compliance department).
189 See Hunsicker, supra note 79, at 645.
190 See Poser, supra note 18, at 118.
191 Gorman, supra note 18, at 494–95.
conflicts, firms establish walls between departments where those interests may conflict. Characteristics of these barriers, or Chinese Walls, range from disseminating a written policy that outlines prohibited communications between departments and employees to more expensive actions like physical separation of departments or sophisticated computer firewall protections. If MNPI passes over or is allowed to scale the Chinese Wall, then in a subsequent lawsuit for breach of fiduciary duty, the defendant has the burden to prove the information was not used illegally.

When a claim is not likely to prevail on Rule 10b-5 grounds because a functioning Chinese Wall was in place at the defendant’s institution, a plaintiff may claim the defendant breached its fiduciary duty of loyalty because of conflicting interests. Defendants have, among others, two possible defenses to this claim—the Hats and Chinese Wall defenses. When and in what circumstance these defenses may be used depends on the plaintiff’s theory of breach.

The court in Aftra v. JPMorgan deemed the defendant’s Hats defense sufficient to rule in its favor on a motion for summary judgment on the plaintiff’s fiduciary duty of loyalty claim. Interestingly, the court appears to utilize the Chinese Wall defense as a partial justification for its ruling. The Hypothetical offers an examination of the relationship between these defenses.

In the Hypothetical, the defendant fiduciary profited from a commercial loan at the expense of its fiduciary client. The fiduciary may defeat the client’s duty of loyalty claim by showing it did not act in its capacity as fiduciary when collecting on the commercial loan. Because of the difficulty in determining which hat a defendant is wearing at a particular moment in

194 See Herman & Safanda, supra note 57, at 21.
195 See supra notes 68–75 and accompanying text.
196 See SEC v. Adler, 137 F.3d 1325, 1336–38 (11th Cir. 1998).
197 See BROMBERG & LOWENFELS, supra note 73, § 6:274.
200 Id.
201 Id. at 666.
202 See supra notes 134–37 and accompanying text.
203 See supra notes 140–47 and accompanying text.
204 See supra notes 140–47 and accompanying text.
time, the Chinese Wall defense complements the Hats defense by assuring
the court that no MNPI was acquired by the fiduciary when it transacted in
its fiduciary role. Although illegal, a client may argue for the fiduciary
to pass MNPI over or through the information barrier. Wise financial insti-
tutions will construct Chinese Walls and document the effectiveness of these
measures in order to rebut a plaintiff’s duty of loyalty claim.

Aftra could have brought its breach of duty of loyalty claim on an alter-
native theory, asserting that JPMC’s management of Aftra assets was influ-
enced by its repo positions with Sigma. Under this claim, a court must
analyze internal JPMC correspondence in search of proof, by inference or
circumstantial evidence, that executives forced or coerced JPMC asset
managers into decisions relating to Aftra assets, which were not in the
plan’s best interests. The inquiry is fact-specific and susceptible to failure
because executives are unlikely to put such directives in writing that can
later be divulged in discovery. However, this approach permits the plain-
tiff to put forth a theory that is not necessarily rebuffed by a defendant’s
Hats defense.

In response to the conflicts of interest in the financial services indus-
try, two proposals have been advanced to limit or eliminate fiduciary duty
of loyalty claims. Complete divestment by a financial holding company of
its public or private side operations would harm the financial services indus-
try beyond any gain acquired by fiduciary clients from avoiding the
issue of conflicting interests. Additionally, and perhaps more important-
ly, such an action would be incongruent with Congress’s intent in enacting
the Gramm-Leach-Bliley Act. Restricted and watch lists are offered as
alternatives to conventional Chinese Walls policies. Imposing broad re-
stricted lists on large multi-service financial firms eliminates many potential

206 See supra notes 91–94 and accompanying text.
207 See Cady, Roberts & Co., Exchange Act Release No. 6668, 40 SEC 907 (Nov. 8,
1961). But see Slade v. Shearson, Hammill & Co., Inc., 517 F.2d 398 (2d Cir. 1974) (find-
ing the defendant liable for breach of fiduciary duty of loyalty in spite of the defense that
the information barrier functioned correctly on the grounds that defendant voluntarily
entered into two conflicting fiduciary relationships). The case was ultimately settled after
the appeals court remanded without answering the trial court’s certified question involving a
controlling question of law. See Bromberg & Lowenfelds, supra note 73, § 6:274.
208 See supra notes 161–62 and accompanying text.
209 See Eccles et al., supra note 171, at 591.
210 See supra notes 182–83 and accompanying text.
212 See Jeffrey M. Kaplan & Joseph E. Murphy, Compliance Programs and the
clients and securities from both public and private side functions,\textsuperscript{213} whereas watch lists provide more opportunities for insider trading\textsuperscript{214} and increase costs by requiring additional compliance personnel to monitor trading. Although Chinese Walls may be inept at protecting investors from large losses,\textsuperscript{215} as in the case of \emph{Aftra v. JPMorgan},\textsuperscript{216} they will continue to occupy an important locus in the panorama of financial services regulation.

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\textsuperscript{213} See \textit{supra} notes 88, 89, 185, 187 and accompanying text.
\textsuperscript{214} See \textit{supra} notes 189–90 and accompanying text.
\textsuperscript{215} See Gorman, \textit{supra} note 18, at 491–92.

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