No. 10-13002-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAYMOND A. LANFEAR, RANDALL W. CLARK,
ANTONIO FIERROS,
Plaintiffs-Appellants,

TERRY CLARK et al.,
Plaintiffs,
v.

HOME DEPOT, INC., ROBERT L. NARDELLI, JOHN I. CLENDENIN,
MILLEDGE A. HART, III, KENNETH G. LANGONE,
Defendants-Appellees,

LARRY M. MERCER, et al.,
Defendant.

On Appeal from the United States District Court
for the Northern District of Georgia

Brief of the Secretary of Labor as amicus curiae in support of the Plaintiff-Appellant

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THE SECRETARY'S INTEREST

As the head of the federal agency with primary responsibility for enforcing ERISA, the Secretary of Labor has a strong interest in ensuring ERISA's correct interpretation. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc). The district court's decision, Lanfear v. Home Depot Inc., --- F.Supp.2d ----, 2010 WL 2427413 (N.D. Ga. June 7, 2010), misinterprets ERISA in three respects. First, it immunizes plan fiduciaries from liability for imprudent investments in employer stock by mischaracterizing prudence claims related to such investments as claims about diversification. Second, the decision alternatively relies on a presumption of prudence, established in Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), which has no basis in ERISA's language or purposes and which presents a novel question in this Court. Third, the decision permits fiduciaries to evade the trust-law duty, recognized in Varity Corp. v. Howe, 516 U.S. 489 (1996), to communicate truthful material information to plan participants and beneficiaries. The Secretary has a compelling interest to see these substantial errors corrected.

STATEMENT OF ISSUES

1. Whether the district court erred in treating as a statutorily barred diversification claim the plaintiffs' prudence claim that defendant plan fiduciaries should have overridden plan terms mandating investment in stock issued by the

employer, Home Depot, where it would be imprudent to continue to permit investment in the employer stock at allegedly inflated prices.

2. Whether the court erred in alternatively holding that the defendants were entitled to a presumption of prudence in continuing to allow the plan to purchase employer stock at inflated prices, and that the plaintiffs failed to plausibly plead facts overcoming the presumption.

3. Whether the court erred in holding that the plaintiffs did not plausibly allege that the defendants breached their fiduciary duty to speak truthfully to plan participants by providing misleading information about the company's financial condition.

STATEMENT OF THE CASE

Plaintiffs are participants in the Home Depot FutureBuilder Plan. Lanfear, 2010 WL 2427413, at *1. The Plan is an eligible individual account plan ("EIAP"), a form of defined contribution plan that allows participants to manage investments in their own accounts. It includes an employer stock option. Id. at *7 ("the Trustee shall establish and maintain . . . Investment Funds for the investment of Contributions and Accounts [and] shall include a Company Stock Fund. . . .").

The defendants are various individuals and entities associated with the Plan, including the individuals charged with administering the Plan and selecting the investment options offered through the Plan. Id. at *2. The plaintiffs allege that

the defendants failed to disclose two practices that artificially inflated Home Depot's stock price: Home Depot's back-dating of stock options and its "return-to-vendor" ("RTV") chargeback practices. 2010 WL 2427413, at *3. The basis for the first allegation is that, on June 16, 2006, Home Depot issued a press release summarizing the results of an internal investigation, "which found that the company had been routinely backdating stock options between 1981 and 2000" and had underestimated "Home Depot's compensation expenses" resulting in "a $227 million charge in the company's 2006 consolidated financial statements." Id. The basis for the second allegation is that, while retailers are normally able to recoup the full costs of defective products from vendors using a "RTV" chargeback procedure, here the plaintiffs allege that Home Depot used RTV improperly to profit from vendors by charging them for products "that were never defective, damaged, or returned to the store." Id. at *4. The failure to speak truthfully about these practices allegedly inflated the stock price. Id. Plaintiffs allege that the disclosures of these improper practices detrimentally impacted the company's finances and caused a fall in the stock price (from $42.02 to $35.09). Id. at *4.

Plaintiffs' prudence claim states that ERISA required defendants to take steps to withdraw Home Depot stock as an investment option for participants during this period or disclose the true extent of Home Depot's risk exposure and financial health. 2010 WL 2427413, at *9. Plaintiffs' misrepresentation claim

states that defendants should have, at least, accurately informed participants of Home Depot's risks related to these practices. Id. at *13.

In an earlier opinion, the district court dismissed the plaintiffs' claims on statutory standing grounds. Lanfear v. Home Depot, Inc., 536 F.3d 1217, 1221, 1223 (11th Cir. 2008). On appeal, this Court reversed the dismissal but remanded for a determination as to whether the plaintiffs had exhausted their administrative remedies. Id. at 1225. This Court recognized the plaintiffs' claims as "plausible" claims of fiduciary breach and "governed by ERISA" for subject-matter jurisdiction and exhaustion purposes. Id. at 1221-1224.

After exhausting their administrative remedies, the plaintiffs' claims were, again, before the district court, which then dismissed all claims pursuant to Fed. R. Civ. P. 12(b)(6). First, the court dismissed all claims against the Administrative Committee because the Plan specifically assigned to the Investment Committee authority to manage the Plan's investment funds. Id. at *9 & n.16. Although plan documents did not explicitly exclude such authority from the Administrative Committee's broad duties, the court relied on the fact that the Plan did not specifically grant such authority to the Administrative Committee and therefore "the Plan preclude[d] the Administrative Committee and its members from being held liable as fiduciaries with respect to investment decisions." Id. at n.16.

The court then acknowledged that the plaintiffs "do not directly allege that Defendants failed to diversify the Plan." Id. at *10. Nevertheless, the court concluded that "[t]he basis of these allegations is that Defendants should have invested and made matching contributions in stock other than Home Depot stock and/or should have eliminated the Home Depot Stock Fund as an investment option; in other words that Defendants should have diversified the Plan's investments." Id. Accordingly, the court treated the plaintiffs' prudence claims as claims for diversification, and noted that the Plan, as an EIAP with employer stock holdings, was exempted from such claims per ERISA Section 404(a)(2). 29 U.S.C. 1104(a)(2). Id.

The court declined to adopt the Moench presumption because the presumption applies to only prudence claims; the court, however, had decided that the plaintiffs' claims should be treated as disguised diversification claims barred under section 404(a)(2). 2010 WL 2427413, at *11. But the court alternatively concluded that dismissal is also justified under Moench on two grounds. Id. at *12-*13. First, the court interpreted Moench as stating that "where the Plan document requires investment in a company stock fund, a fiduciary's retention of that fund is 'immune from judicial inquiry.'" Id. Accordingly, the court found that because the Plan documents required investment in a company stock fund, the fiduciary was "immune." Id. Second, the court concluded that "even if Moench

did apply, the presumption of prudence can only be rebutted in the case of a company on the brink of financial collapse." Id. at *13 (quotation marks and citations omitted). The court found that the alleged 16% decline did not satisfy this standard. Id.

The court also rejected the plaintiffs' misrepresentation claim. 2010 WL 2427413, at *14. First, the court concluded that "representations made in SEC filings are not actionable under ERISA" even if those filings are incorporated by reference into "the prospectus for stock issued through an EIAP plan." Id. Second, the court noted that "'ERISA does not impose an obligation to disclose broad categories of non public financial information regarding publicly traded securities.'" Id. The court relied significantly on In re ING Groep, N.V. ERISA Litig., No. 09-cv-00400 (N.D. Ga. Mar. 31, 2010), which is currently on appeal before this Court, Case No. 10-11498-DD. The Secretary filed an amicus brief supporting the appellants in that case. Brief of the Secretary of Labor as Amicus Curiae, Case No. 10-11498-DD (filed Nov. 12, 2010).

SUMMARY OF THE ARGUMENT

The district court erred in treating the plaintiffs' prudence claims as diversification claims. To the contrary, ERISA and the trust law clearly delineate between diversification and prudence obligations, 29 U.S.C. 1104(a)(2). While EIAPs are exempt from the duty to diversify, they must still invest plan assets

prudently. Id. The plaintiffs allege that the defendant-fiduciaries acted imprudently by permitting the purchase of company stock at an artificially inflated price; this prudence claim is obviously distinct from claims alleging a violation of the duty to diversify plan assets.

The court also erred in holding that the fiduciaries are immune from liability for purchasing imprudent investments in company stock because the plan terms mandate continued investment. To the contrary, ERISA and controlling precedent expressly provide that fiduciaries must override plan terms if they conflict with ERISA, id. § 1104(a)(1)(D); Herman v. NationsBank Trust Co., 126 F.3d 1354 (11th Cir. 1997). Accordingly, fiduciaries must make prudent investment decisions regarding employer stock even if plan documents require such investment.

The court further erred in alternatively holding that ERISA supports the Third Circuit's Moench presumption of prudence with respect to the Plan's purchase of employer stock. A presumption of prudence finds no basis in ERISA's text and contravenes ERISA's purposes. Certainly, no presumption should apply to the purchase of stock that the fiduciaries allegedly knew or should have known was inflated. Known overpayments are categorically imprudent under ERISA and trust law, and violate fiduciary duties that apply to all plans and investment options. In

any event, the application of a presumption at the pleadings stage, foreclosing development of rebuttal evidence, was improper.

Finally, the court erred in dismissing the misrepresentation claim. The obligation to truthfully communicate to participants material information for the protection of their plan investments does not permit fiduciaries to hide behind their corporate roles to evade this duty and mislead participants. This obligation includes a duty to correct misrepresentations made in SEC filings subsequently incorporated into disseminated plan documents.

ARGUMENT

I. THE DEFENDANTS MUST OVERRIDE PLAN TERMS REQUIRING THEM TO IMPRUDENTLY INVEST IN EMPLOYER STOCK

A. ERISA's Fiduciary Standards Do not Permit Fiduciaries to Knowingly Overpay for Employer Stock

Section 404(a)(2) exempts EIAPs from "the diversification requirement of [section 404(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification)." 29 U.S.C. 1104(a)(2) (emphasis added). This provision clearly states that the prudence requirement otherwise applies to the fiduciaries' actions with regard to employer stock. See, e.g., DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 432-3 (4th Cir. 2007); Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 955-56 (D.C. Cir. 1985). The district court therefore erred in construing this expressly limited exception as generally exempting EIAPs that hold employer

stock from ERISA's fiduciary obligations of prudence and loyalty, not just the duty to diversify. Cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 97 (1993) (courts '"usually read [statutory] exception[s] narrowly in order to preserve the primary operation'" of the general rule) (citation omitted).

The district court improperly conflated the plaintiffs' claim that the defendant-fiduciaries had violated their duty of prudence by permitting plan investment in imprudent company stock with the distinct and unrelated statutory claim that fiduciaries had violated a specific duty to diversify plan assets, which the plaintiffs do not allege. Compare 2010 WL 2427413, at * 10 ("Plaintiffs do not directly allege that Defendants failed to diversify the Plan ... [h]owever ... [the Plaintiffs' prudence claim] at its core a diversification claim") with, e.g., DiFelice, 497 F.3d at 423-24 ("a fiduciary must initially determine, and continue to monitor, the prudence of each investment option available to plan participants") (distinguishing prudence and diversification obligations for EIAP plans with employer stock, the type of plan at issue in this case).

When fiduciaries fail to diversify, they generally expose plans to the undue risk commonly posed by fluctuations in a single asset's market value as a result of investment concentration. See 29 U.S.C. 1104(a)(1)(C); Steinman v. Hicks, 352 F.3d 1101, 1104-1105 (7th Cir. 2003). Consistent with cases like DiFelice, 497 F.3d at 423-24, the trust law differentiates between general prudence obligations

and the more specific diversification obligation, which only protects against risks associated with investment concentration. Matter of Estate of Janes, 90 N.Y.2d 41, 50-52 (N.Y. 1997) (differentiating between the "hazard" of concentration that diversification protects and other risks of loss that prudence safeguards); First Alabama Bank v Spragins, 475 So.2d 512, 515-16 (Ala. 1985) (recognizing the continued obligation to prudently manage investments when trust documents exempt fiduciaries from a duty to diversify); see generally Harris Trust & Sav. Bank v. Salomon Smith Barney, 530 U.S. 238, 250 (2000) ("common law of trusts . . . offers a 'starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes'") (citation omitted). Plaintiffs allege that buying or holding any Home Depot stock was imprudent.

Moreover, a fiduciary who knowingly overpays for an asset for the plan is personally liable for breaching his duties of prudence and loyalty. Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992); Restatement (Third) of Trusts § 205 cmt. e. (if a "trustee is authorized to purchase property for the trust, but in breach of trust he pays more than he should pay, he is chargeable with the amount he paid in excess of its value") and illus. 9; see also In re Syncor ERISA Litig., 516 F.3d 1095, 1102 (9th Cir. 2008); In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 233, 237-38 (3d Cir. 2005). Such overpayment is a breach wholly apart from the concentration risk mitigated by diversification. In Feilen, 965 F.2d at 671, the

Eighth Circuit correctly held that ERISA fiduciaries violated ERISA both when they caused the plan to overpay for employer stock and when they allowed the plan to pay another corporation's obligations without consideration. Moreover, fiduciaries' continued purchase of employer stock at an inflated price disserves plan interests and, instead, serves the company's interest by propping up the stock price through purchases for more than the stock's actual worth to the plan. Cf. Ledbetter v. First State Bank & Trust Co., 85 F.3d 1537, 1545 (11th Cir. 1996) (trustee may be disloyal by diluting the value of a beneficiary's shares in trustee's affiliated company).

Consequently, if the defendants knew or should have known that the Home Depot stock was inflated, it was imprudent for the fiduciaries to buy even a single share at the inflated price. Therefore, diversification is not at issue here; and the limited pass from spreading risk through diversifying a plan's holdings that applies to an EIAP's employer stock holdings is inapplicable.[1] The district court's failure

[1] The difference between the diversification risk and the overpayment risk may be analogized to the difference between having the proverbial "too many eggs in one basket" and having a "bad egg." In the former situation, dropping the basket can be catastrophic regardless of each individual egg's quality; the risk lies in having them all in one place. In the latter situation, it is unwise to buy even a single egg even if each egg is kept in a different basket. With respect to employer stock, ERISA protects EIAP participants from the second but not the first kind of risk. Cf. U.S. Liab. Ins. Co. v. Selman, 70 F.3d 684, 690 (1st Cir. 1995) (recognizing that, under insurance law's "known loss" doctrine, insurance ceases to serve its purpose for risk-spreading via diversification if the insured "knows in advance" "that a specific loss has already happened or is substantially certain to happen").

to distinguish between the diversification risk and the overpayment risk thus misreads the statute. So long as the plaintiffs plausibly alleged that the fiduciaries' continued investment in Home Depot stock was imprudent because the fiduciaries knew or should have known the market price was inflated, dismissal of their fiduciary breach claim was erroneous.

Furthermore, for subject-matter jurisdiction, statutory standing, and exhaustion purposes, this Court had considered the plaintiffs' claims as "plausible" breaches of fiduciary duty and as claims "governed by ERISA," notwithstanding plan documents directing investment in the employer stock. Lanfear, 536 F.3d at 1221-24; Brief of Defendants-Appellees, Lanfear v. Home Depot, Case No. 07-14362, 2007 WL 4559545, at *4 (Dec. 5, 2007) (noting that plan documents mandated employer stock option). By finding no cognizable claim for fiduciary breach under ERISA, the district court's decision is inconsistent with the law of the case. 2010 WL 2427413, at *10-*11; see Piambino v. Bailey, 757 F.2d 1112, 1120 (11th Cir. 1985) ("law of the case doctrine applies to all issues decided expressly or by necessary implication").

B. Plans Cannot Mandate that Fiduciaries Disregard their Statutory Obligation to Act Prudently and Exclusively in the Participants' Interests

The district court erred in suggesting that Moench had properly stated that "where the Plan document requires investment in a company stock fund, a

fiduciary's retention of that fund is 'immune from judicial inquiry.'" 2010 WL 2427413, at *12. If adopted, this holding eliminates fiduciary responsibility for all decisions to invest in company stock whenever plan documents require the stock investment, thereby immunizing fiduciaries from responsibility for even the most imprudent and disloyal investments in such stock.

This holding wrongly overlooks ERISA section 404(a)(1)(D), under which fiduciaries are permitted to follow plan terms only "insofar as such documents and instruments are consistent with the provisions" of Title I of ERISA. 29 U.S.C. 1104(a)(1)(D). Other subsections of 404, itself a part of Title I, impose upon fiduciaries the trust-law duties of loyalty and care. Thus, section 404 requires plan fiduciaries to act exclusively in the interests of the participants and beneficiaries and exercise the level of "care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. 1104(a)(1)(A)-(B). Together, these provisions provide that ERISA's prudence and loyalty provisions cannot be contractually overridden, and require that only those plan terms that are otherwise consistent with ERISA be given effect. See, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 568 (1985); NationsBank, 126 F.3d at 1368-69 & n.15; accord DiFelice, 497 F.3d

at 420; Coleman v. Interco Inc. Divisions' Plans, 933 F.2d 550, 551 (7th Cir. 1991) ("ERISA trumps" divergent plan language).[2]

This Court already reached this same conclusion in NationsBank. NationsBank concerned an employer stock ownership plan ("ESOP"), which is an EIAP that invests "primarily" in "qualifying employer securities." 29 U.S.C. 1107(d)(6). The ESOP's plan documents included a "mirror voting provision" that "instructed [NationsBank] to tender unallocated shares held by the plan in the same proportion as it tenders allocated shares." 126 F.3d at 1357. This Court determined that "ERISA dictates that a mirror voting provision that leads to an imprudent result is invalid as applied. Therefore, the trustee must disregard the provision, just like it would have to disregard any other plan provision controlling the disposition of plan assets which leads to an imprudent result." Id. at 1369 & n.15 (emphasis added) (citing 29 U.S.C. 1104(a)(1)(D)). The Court held that the plan's instructions must yield to the fiduciary's plain statutory duty to independently "determine whether the plan provisions . . . [are] contrary to ERISA" either facially or "as applied," 126 F.3d at 1367-69, and that the fiduciary

[2] Under trust law, trust terms can generally override statutory fiduciary obligations. See Restatement (Third) of Trusts § 91 cmt. a. (2007). ERISA departs from the trust law on these matters. See Harris Trust, 530 U.S. at 250 (trust law is irrelevant if "'it is inconsistent with the language of the statute, its structure, or its purposes'") (citation omitted); S. Rep. No. 93-127, 93rd Cong., 2d Sess. 1974, 1974 U.S.C.C.A.N. 4838, 4864-865 (1973) (ERISA's fiduciary duty provisions, unlike state trust law, bar "deviations" based on settlor's intent).

"was required to override the plan's . . . provision if necessary to achieve a prudent result," id. at 1371. The as applied prudence claim in NationsBank is analogous to the plaintiffs' as applied prudence claim here, alleging that the defendant-fiduciaries, rather than blindly following the Plan's terms, should have independently ascertained the prudence of investing in Home Depot stock when the fiduciaries knew or should have known the market price was artificially inflated. Third Amended Complaint ("Compl."), at 152-54. Despite the plan terms, the fiduciaries had a duty to stop offering the employer stock fund if they had actual or constructive knowledge that the stock was overpriced, making it an imprudent investment.

Other statutory provisions and ERISA's overall structure comport with this straightforward reading of section 404 requirements. ERISA requires that plan assets be managed at all times by fiduciaries, a mandate fundamentally inconsistent with the district court's conclusion that no fiduciary was responsible for assessing the prudence of the employer stock investment because Plan terms required such investments. See generally 29 C.F.R. 2509.75–8 (FR 12-15). Section 402(a)(1) provides that plans must be maintained pursuant to plan documents that provide for "one or more fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. 1102(a)(1). Similarly, section 403(a) mandates that "all assets of an employee benefit plan

shall be held in trust by one or more trustees" who "have exclusive authority and discretion to manage and control the assets of the plan." 29 U.S.C. 1103(a) (emphasis added).[3] Moreover, section 410, 29 U.S.C. 1110, "void[s] as against public policy" "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part." Under these provisions, plan documents can allocate, but not eliminate, fiduciary duties with respect to ERISA plans and the management of their assets. See Levy v. Local Union Number 810, 20 F.3d 516, 519 (2d Cir. 1994).

The Department's longstanding position is that these fiduciary standards apply equally to plan investments in employer stock funds. See U.S. Dep't of Labor Opinion Letter No. 90-05A, 1990 WL 172964, at *3 (Mar. 29, 1990). Likewise, every circuit court to consider the issue recognizes that fiduciaries of plans that own employer stock are under a continuing obligation to consider whether such investment is prudent, notwithstanding plan terms requiring investment in employer stock. See, e.g., Syncor, 516 F.3d at 1102-1103; Harzewski v. Guidant Corp., 489 F.3d 799, 808-09 (7th Cir. 2007); Herman v.

[3] ERISA excepts some assets from the trust requirement, but no such exception applies to employer stock. 29 U.S.C. 1103(b). 29 U.S.C. 1103(a) also provides that trustees may be subject to the directions of named fiduciaries and that investment authority may be delegated to investment managers. They too are plan fiduciaries. In this manner, a plan's stock holdings are always subject to fiduciary authority and control.

Mercantile Bank, N.A., 143 F.3d 419, 421 (8th Cir. 1998); Kuper v. Iovenko, 66 F.3d 1447, 1458-59 (6th Cir. 1995); Fink, 772 F.2d at 954-56; Eaves v. Penn, 587 F.2d 453, 459 (10th Cir. 1978).

ERISA's obligations of prudence and loyalty are "the highest known to the law." ITPE Pension Fund v. Hall, 334 F.3d 1011, 1013 (11th Cir. 2003) (citation omitted). Plan drafters may not opt out of ERISA's fiduciary structure and deprive participants of critical statutory protections by the simple expedient of mandating investment in a particular asset. Cf. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 n.8 (1985) (recognizing that fiduciary oversight is the "crucible" of ERISA's protections). Rather, the plain statutory text, the prevailing case law and the Department's interpretations all support one conclusion: the district court erroneously concluded that the defendants were not fiduciaries and "can not be liable" because the Plan's terms required employer stock investments.[4]

[4] The district court relied on faulty reasoning in dismissing the claims against the Administrative Committee. 2010 WL 2427413, at *9 & n.17. The plan documents did not specifically bar the Administrative Committee from overseeing investment decisions but instead granted the Committee unlimited oversight responsibilities over the entire Plan, Compl., at 27-28, which can be reasonably read to include oversight over investment decisions. See, e.g., Hunt v. Hawthorne Assoc., Inc., 119 F.3d 888, 909-11 (11th Cir. 1997).

II. THE DISTRICT COURT ERRED IN RECOGNIZING A PRESUMPTION THAT THE FIDUCIARIES ACTED PRUDENTLY IN ALLOWING THE PLAN TO PURCHASE EMPLOYER STOCK DESPITE INFLATED PRICES

A. ERISA Does Not Include a Presumption of Prudence for Employer Stock Investments

The "Moench presumption" presumes the prudence of employer stock investments and then requires plaintiffs to overcome the presumption by showing that the investment was, under the circumstances, an abuse of discretion. Moench, 62 F.3d at 571, and its progeny.[5] To this presumption, the district court added an additional requirement that the "presumption of prudence can only be rebutted 'in case of a company on the brink of [financial] collapse.'" 2010 WL 2427413, at *13 (citation omitted). Any form of this presumption, however, contradicts a straightforward reading of ERISA. Other than the requirement to "diversify[] the investments of the plan so as to minimize the risk of large losses," 29 U.S.C. 1104(a)(1)(C), ERISA's fiduciary standards, as previously discussed, are unaltered for plans with employer stock options. NationsBank, 126 F.3d at 1361. In

[5] The Fifth, Sixth, and Ninth Circuits adopted different versions of the Moench presumption. See, e.g., Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir. 2008); Kuper, 66 F.3d at 1457; Quan v. Computer Sciences Corp., --- F.3d ----, 2010 WL 3784702, at *8 (9th Cir. Sept. 30, 2010) (adopting an "impending collapse" version), pet. for rehearing pending. The Seventh Circuit has not explicitly adopted it but agreed with some of its reasoning. See, e.g., Steinman, 352 F.3d at 1103; see also Bunch v. W.R. Grace & Co., 555 F.3d 1, 10 (1st Cir. 2009) (declining to apply presumption to fiduciary's decision against company stock investment).

specifically adopting the "prudent man" standard, defined as the duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing" that a fiduciary in like circumstances "would use in the conduct of an enterprise of like character and with like aims," 29 U.S.C. 1104(a)(1)(B), ERISA stated the applicable standard. There is accordingly no basis for the judicial creation of a new "abuse of discretion" or "brink of financial collapse" framework that precludes the straightforward application of the prudence standard set forth explicitly in ERISA's text. "It is well-established that when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." Lamie v. United States, 540 U.S. 526, 534 (2004).

Here, the district court described the presumption as founded upon the premise that the fiduciaries' continued investment in employer stock was presumptively consistent with the settlor's expectations. 2010 WL 2427413, at *11. ERISA, however, does not contemplate any consideration of a settlor's subjective expectations when applying the prudence standard. See 29 U.S.C. 1104(a)(1)(B) (adopting an objective standard of the "prudent man acting in a like capacity and familiar with such matters"); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (describing ERISA's prudence standard as "an objective standard"); 29 U.S.C. 1110; S. Rep. No. 93-127, supra, n.2 (ERISA's fiduciary duties bar "deviations" based on settlor's intent).

Accordingly, the statute leaves no room for the establishment, as federal common law, of a special presumption of prudence for fiduciaries of EIAPs that own employer stock. See City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 314 (1981); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) ("we cannot create federal common law . . . because ERISA specifically addresses the issue before this court"); 29 U.S.C. 1001(b); H.R. Rep. No. 93-553 (1973) reprinted in 1974 U.S.C.C.A.N. 4639, 4655 (ERISA aims to eliminate "jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary duties"). Emphatically, "[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute," Mertens v. Hewitt Associates, 508 U.S. 248, 259 (1993), nor is it the authority to substitute a court's policy preferences for the statute's plain policy goals.

Thus, even if this Court considers encouraging employers to offer employer stock options as one of ERISA's goals, the Moench presumption is an unsuitable means to achieve it.[6] Not only does the presumption excuse fiduciaries from statutory fiduciary duties unrelated to the limited diversification exemption but it

[6] The Secretary does not quarrel with the view that Congress encouraged plans to facilitate investment in employer stock, other things being equal. Congress, however, explicitly used other means such as favorable tax treatment to encourage plans' ownership of employer stock that are not detrimental to participant interests. See, e.g., Snap-Drape, Inc. v. C.I.R., 98 F.3d 194, 201-02 (5th Cir. 1996).

contravenes ERISA's legislative purpose of protecting retirement savings through the imposition of stringent fiduciary obligations. "The [fiduciary] bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties," including the employer. Hearn v. McKay, 603 F.3d 897, 902 (11th Cir. 2010) (citation omitted); H.R. Rep. No. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4647-648 ("the legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system"); Hall, 334 F.3d at 1013 ("[t]he responsibility attaching to fiduciary status has been described as 'the highest known to law.'") (citation omitted). When Congress deviates from these fiduciary obligations to promote particular plans, it explicitly does so. E.g., Holloman v. Mail-Well Corp., 443 F.3d 832, 837 (11th Cir. 2006) ("[t]op hat plans . . . are excluded from many individual ERISA provisions on the basic assumption that high-level employees . . . do not require the same substantive protections that are necessary for other employees") . Nothing in ERISA implicitly or explicitly singles out fiduciary conduct with regard to employer stock investments for especially limited review at the expense of the participants' interests in statutory safeguards when such assets are most at risk. Cf. 29 U.S.C. 412(a) (requiring plans with employer securities to have a higher

maximum fidelity bond).[7] Non-diverse employer stock investments put "employee retirement assets at much greater risk than does the typical diversified ERISA plan." Feilen, 965 F.2d at 664. In EIAPs, including this Plan, workers' retirement benefits are entirely dependent on the plan investments' earnings. See 29 U.S.C. 1002(34). When such plans disproportionately hold employer stock, loss of the diversification safeguard makes ERISA's other protections, including its standards of prudence, all the more necessary.

Accordingly, this Court should decline to adopt the Moench presumption because it undermines the "protection of the interests of employees and their beneficiaries" and "uniformity in the administration of employee benefit plans." Horton v. Reliance Standard Life Ins. Co., 141 F.3d 1038, 1041 (11th Cir. 1998) (holding that federal common law must promote such interests). At a minimum, there is no rationale for adopting a presumption of prudence where the plaintiff alleges that the fiduciaries knew or should have known that the stock's price was artificially inflated. Such knowledge makes this type of imprudence wholly different from the risk from normal market fluctuations that a failure to diversify

[7] Several ERISA provisions specifically impose restrictions on investments in employer securities inapplicable to any other type of plan investment. See 29 U.S.C. 1106(a)(1)(E)-(a)(2), 1107(a)(1). These rules indicate Congress' concern with the dangers of allowing employer stock investments and underscore that Congress did not intend to relieve fiduciaries of any obligation (other than diversification) relating to those investments.

exacerbates. Even if the presumption were to be applied, the allegations here, if proven, overcome any presumption that the fiduciaries acted reasonably. The fiduciaries' knowledge concerning the stock's inflated price, their conflicting loyalties, and the fact that any overpayment would be categorically imprudent are "changed circumstances" that rebut any presumption barring deviation from the plan's instructions to invest in employer stock. See Moench, 62 F.3d at 572. The employer stock need not become virtually worthless nor must the company face imminent financial collapse in order for such imprudence to be actionable. See In re Ford Motor Company ERISA Litig., 590 F. Supp.2d 883, 907-08 & n.9 (E.D. Mich. 2008) (plaintiff need not allege the company's "impending collapse"); see also Kuper, 66 F.3d at 1457 (adopting a standard based on a totality of circumstances approach). Decisions to the contrary, e.g., Quan, 2010 WL 3784702, at *8, that adopt this restrictive version of the presumption are erroneous.

B. Even Assuming a Presumption of Prudence, It Should Not Apply at the Pleadings Stage

The Moench presumption is a presumption of fact, which involves shifting burdens of proof. See Moench, 62 F.3d at 571 (to rebut the presumption, "plaintiff may introduce evidence") (emphasis added); see generally Konst v. Florida East Coast Ry. Co., 71 F.3d 850, 851 n.1 (11th Cir. 1996) (recognizing that presumptions of fact are rebuttable and "mere inference[s] of fact" that "must be weighed with all the other circumstances of the case" by the fact-finder). Fact-

intensive questions concerning the state of the fiduciary's knowledge and the economic circumstances surrounding the investment may arise when determining whether the presumption applies or has been rebutted. Moench, 62 F.3d at 571.

Invocation of the presumption thus lends itself to evidentiary development but is an inappropriate basis for Rule 12(b)(6) dismissal. Accordingly, inserting the Moench presumption of fact into the pleadings stage is generally inconsistent with Rule 8(a), Fed. R. Civ. P. E.g., In re XCEL Energy, Inc. Sec., Derivative & "ERISA" Litig., 312 F. Supp. 2d 1165, 1179-80 (D. Minn. 2004); see generally Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). The Third Circuit's contrary decision in Edgar v. Avaya is, accordingly, erroneous. 503 F.3d 340, 349 (3d Cir. 2007).

III. THE FIDUCIARIES HAD A DUTY NOT TO MISLEAD PLAN PARTICIPANTS AND TO DISCLOSE INFORMATION IF NECESSARY FOR THE PROTECTION OF RETIREMENT BENEFITS

A. ERISA Imposes upon Fiduciaries a Duty to Provide Truthful Information to Participants

A fiduciary's duty of loyalty includes an "affirmative duty to communicate material facts to the beneficiary which will allow for an informed decision," Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1016 n.10 (11th Cir. 2003) (citation omitted), as well as an obligation not to materially mislead plan participants. Id.; see also, e.g., Jones v. Am. Gen. Life and Acc. Ins. Co., 370 F.3d 1065, 1072 (11th

Cir. 2004); see generally Varity, 516 U.S. at 506; Restatement (Second) of Trusts § 173, cmt. c-d (1959). Inaction or silence may breach this duty as much as affirmative misstatements. Ervast, 346 F.3d at 1016 n.10 (citing authorities); accord Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 381 (4th Cir. 2001).

The plaintiffs properly allege that the defendants knowingly engaged in fiduciary acts when they disseminated falsely optimistic descriptions that artificially inflated the participants' anticipated benefits. See Cotton v. Mass. Mut. Life Ins. Co., 402 F.3d 1267, 1293 (11th Cir. 2005) ("[t]o prevail on a similar theory [to the theory in Varity], the plaintiffs would have needed to show that [the fiduciary], acting in its fiduciary capacity, presented falsely optimistic policy illustrations that it essentially knew overstated the benefits that the policies could be expected to produce"); cf. Lanfear, 536 F.3d at 1223 (recognizing that prudent employer stock investments constitute anticipated "benefits"). Allegations that the defendants here knowingly distributed plan documents with false information and permitted participants to continue to buy the stock at prices artificially inflated by known material misstatements in public filings thus state a viable fiduciary breach claim.

Given these well-established duties, the district court erred in holding that the plan fiduciaries had no affirmative duty to disclose material information about

the Plan's employer stock investments. The court's reasoning that the fiduciaries breached no duties in this case because ERISA's specific reporting and disclosure provisions do not specifically mandate disclosure about the stock's value, 2010 WL 2427413, at *13, is inconsistent with the statement in Varity that "the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime." 516 U.S. at 504.

ERISA's disclosure and reporting provisions require plan sponsors and administrators to disclose to the participants and their beneficiaries information describing and summarizing the benefit plan in "summary plan description" ("SPD") documents. 29 U.S.C. 1021, 1022. Sponsors and administrators are also required to file with the Secretary and make available to participants annual reports describing the benefit plans, and providing other specific information. 29 U.S.C. 1023, 1024. In addition to these specific disclosure and reporting obligations, however, a plan administrator has general obligations under ERISA's fiduciary duty provisions to speak truthfully about benefits and correct misrepresentations when it knows the participants labor under a mistaken understanding. Jones, 370 F.3d at 1072; Hamilton v. Allen-Bradley Co., Inc., 244 F.3d 819, 827 (11th Cir. 2001). The district court thus disregarded this Court's precedents in dismissing claims stating that the defendants had fiduciary obligations to disclose information

beyond the obligations imposed by specific disclosure provisions. See "Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans," 75 Fed. Reg. 64909, 64910 (Oct. 20, 2010) (interpreting ERISA's fiduciary provisions to require "plan fiduciaries [to] take steps to ensure that participants and beneficiaries are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan").

Under the case law, the plaintiffs sufficiently allege that the defendants breached their fiduciary duties by misrepresenting to the participants material information affecting the company stock's investment value, i.e., the company's exposure to improper backdating of stock options and fraudulent RTV chargeback practices.[8] Moreover, even if they had not violated their obligations by affirmatively making misrepresentations to plan participants, the fiduciaries could not stand idly by in mute disregard of the dangers posed by public filings that they knew or should have known to be false. The fiduciaries had an obligation to protect participants from a danger known to the plan's fiduciaries, but not its participants. Jones, 370 F.3d at 1072. Sprague v. Gen. Motors Corp., 133 F.3d 388, 405 n.15 (6th Cir. 1998) upon which the district court mistakenly relied is not

[8] The plaintiffs also plausibly claim that the fiduciaries breached their duty to disclose to other fiduciaries their knowledge about the prudence of company stock investments. See, e.g., Glaziers and Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171, 1181-82 (3d Cir. 1996).

to the contrary. In that case, the Sixth Circuit found the failure to disclose a possible change in benefits was not a breach, while distinguishing cases, like this one, involving a fiduciary's misrepresentations. 133 F.3d at 406. Sprague does not support the conclusion that fiduciaries need never disclose nonpublic financial information about plan investments.

B. Disseminating Misleading SEC Filings in Plan Documents Are Fiduciary Acts Subject to ERISA's Fiduciary Standards

The district court also erroneously concluded that because the alleged misrepresentations were primarily found in SEC filings, there was no breach. 2010 WL 2427413, at *13. The court recognized that the plaintiffs allege the defendant-fiduciaries had disseminated misleading information in these SEC filings. Id. The plaintiff alleged that the plan fiduciaries incorporated these misrepresentations in plan documents. Id. This allegation was sufficient to state a fiduciary breach claim.

The court correctly recognized that a company and its officers do not become ERISA fiduciaries merely by filing SEC forms. 2010 WL 2427413, at *13; see Varity, 516 U.S. at 505. However, the court ignored the fact that when fiduciaries distribute plan documents to participants, Compl., at 157-158, they act as fiduciaries, and breach their fiduciary duties to the extent that they know the documents incorporate misleading information from SEC filings. See In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861, 888 (S.D. Tex. 2004). Whatever

the original source, "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA." Varity, 516 U.S. at 506. Moreover, the defendant-fiduciaries violated their fiduciary duties by failing to protect participants who continued to obtain stock at inflated prices based upon their misrepresentations. Jones, 370 F.3d at 1072.

Defendants could have taken actions consistent with the securities laws. See In re Enron Corp. Securities, Derivative & ERISA Litigation, 284 F.Supp.2d 511, 566 (S.D. Tex. 2003) (securities laws do not prohibit fiduciaries with inside information from disclosing the information to other shareholders and the public, forcing the employer-company to do so, alerting regulatory agencies, or eliminating employer stock as an option); see also Deak v. Masters, Mates and Pilots Pension Plan, 821 F.2d 572, 580 (11th Cir. 1987) (ERISA's obligations are not subordinate to securities law obligations). The Supreme Court recognizes that ERISA's fiduciary duties impose "higher-than-marketplace quality standards." Metro. Life Ins. Co., v. Glenn, 128 S.Ct. 2343, 2350 (2008).

In any event, corporate disclosure obligations to marketplace investors under the securities law are distinct from ERISA's higher-than-marketplace quality standards imposed on behalf of participants in a plan that owns employer stock. This Court distinguished, in Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1050 (11th Cir. 1987), between a breach of fiduciary duty and securities

fraud because "the focus differs for each cause of action" and a fiduciary breach claim may require a lesser evidentiary burden. Accord Harzewski, 489 F.3d at 805 (ERISA does not require proof of fraud). Neither ERISA nor securities law provides that the rights and remedies available to ERISA participants are superseded or limited by the possibility of securities law claims. See Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 705 (7th Cir. 2008). Under the applicable precedents, the plaintiffs properly pled an ERISA misrepresentation claim.

CONCLUSION

For these reasons, the district court's decision should be reversed.

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify that the attached Brief of the Secretary of Labor As Amicus Curiae in Support of the Plaintiff-Appellant contains 6,991 words. The brief has been prepared in a proportionally-spaced typeface using Microsoft XP in Times New Roman 14-point font size.

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