No. 06-15013

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U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: CALPINE CORPORATION ERISA LITIGATION

JAMES PHELPS,
individually, and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

CALPINE CORPORATION, et al.,
Defendants-Appellees.

Appeal from a decision of the United States District
Court for the Northern District of California

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIE SUPPORTING APPELLANTS AND REQUESTING REVERSAL

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STATEMENT OF THE ISSUE

The plaintiff in this putative class action alleges that fiduciaries for the Calpine Corporation Retirement Savings Plan (the Plan), a 401(k) plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq., breached their duties to the Plan and its participants by continuing to offer employer stock as an investment option under the Plan when they had information that the stock price was artificially inflated as a result of misleading and inaccurate financial statements. The question presented is whether, under the circumstances alleged, the district court erred in dismissing the case based on a presumption that the fiduciaries acted prudently when they continued to allow the Plan to purchase the stock at an allegedly inflated price and to maintain the employer-stock fund as one of the investment options for the Plan during the relevant period.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc) (Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets). The Secretary therefore has a strong interest, both with regard to her own litigation and with respect to private litigation, in

ensuring that ERISA is not interpreted to give plan fiduciaries the benefit of a presumption of prudence where they allow the plan to purchase stock of the sponsoring employer at what they know to be inflated values and offer such stock to plan participants as an investment option.

STATEMENT OF THE CASE

1. This ERISA case was brought as a putative class action by James Phelps, an employee of Calpine and participant in the Plan during the relevant time period. The Plan is a 401(k) plan that offers an array of investment options, including an option to invest in Calpine common stock, which was the largest single investment of the Plan during the relevant time period. Phelps sued Calpine itself, which is the designated Plan administrator and a named Plan fiduciary, an Advisory Committee to which Calpine delegated the authority to manage the Plan and its assets, the individual Committee members, and the Directors of the Company, who appointed the members of the Advisory Committee.

Calpine Corporation is an independent power company that develops, acquires and operates power plants and sells electricity. Record Excerpts (R.E.) 16 (Consolidated Complaint for Violations of the Employee Retirement Income Security Act (Jan. 20, 2004) (Consolidated Compl.) ¶ 63). In early 2001, the company announced its intention to increase its power generation ability approximately 15-fold (from 4,273 to 70,000 megawatts by 2005) by building or

acquiring $15 billion in power plants over a four-year period. Id. at 16-17 (Consolidated Compl. ¶¶ 67, 69). To this end, Calpine incurred approximately $8.1 billion in debt in 2000, id. at 17 (Consolidated Compl. ¶ 68) and billions more thereafter. Id. (Consolidated Compl. ¶ 70). The plaintiff claims that Calpine was able to borrow this much money based on the price of its stock "which was artificially inflated from the undisclosed market manipulations of the California energy market and Calpine's improper energy trading transactions." Corrected Amended Consolidated Complaint (May 27, 2005) (Corrected Am. Compl.) ¶ 57. In other words, "if the stock did not perform attractively, it would be difficult for the Company to obtain financing to fund its expansion." R.E. 17 (Consolidated Compl. ¶ 67). To avoid this, Calpine allegedly engaged in a number of prearranged "round-trip" trades with Enron Corporation, that "were essentially negotiated swaps of equivalent amounts of future energy deliveries with no substantive purpose aside from artificially beefing up revenue numbers." Corrected Am. Compl. ¶ 91. According to the Consolidated Complaint, 26 percent of Calpine's revenue in the third quarter of 2001 came from these kinds of trades with Enron. R.E. 21 (Consolidated Compl. ¶ 83). Calpine also allegedly engaged in deceptive practices designed to manipulate the California energy market by increasing the price of energy through the creation of artificial electricity shortages

and to mislead plan participants (and indeed other shareholders) about these practices.

The plaintiff alleges, however, that the company's "plan to use it[s] inflated stock prices as a basis for funding its aggressive physical plant building spree came to a crashing halt," Corrected Am. Compl. ¶ 59, when "on December 9, 2001, reports surfaced regarding Calpine's unlawful use of manipulative energy market transactions with Enron and how this created artificially inflated (and unsustainable) revenue streams for the Company." R.E. 17 (Consolidated Compl. ¶ 70). A few days later, Moody's downgraded Calpine's credit rating on $11.6 billion of debt to "junk." Id. Additionally, Calpine ultimately agreed to pay millions of dollars in fines to California and federal regulators that were investigating allegedly illegal energy pricing and improper energy trade reporting. The price of Calpine stock quickly declined, from $21.37 on December 10, 2001 to $13.20 on December 14, 2001, id. at 17 (Consolidated Compl. ¶ 71), and continued to decline thereafter to $2.23 per share as of May 8, 2005. Corrected Am. Compl. ¶ 57. Because Calpine stock was the largest single investment of the Plan, it lost tens of millions of dollars when the stock price declined.

2. Phelps sued under section 502 of ERISA, alleging that the fiduciaries breached their duties to the Plan with regard to the company stock fund. The plaintiff alleged that the defendants had information that Calpine was engaged in

questionable accounting practices and improper energy trading practices that made Calpine stock an imprudent Plan investment. R.E. 27 (Consolidated Compl. ¶ 99). Thus, in Count I of the Consolidated Complaint, the plaintiff alleged that, because of their knowledge that "Calpine stock was not a suitable and appropriate investment for the Plan," the defendants "breached their duties to prudently and loyally manage the Plan's assets," by continuing "to offer Calpine stock as an investment option for the Plan and to direct and approve Plan investment in Calpine stock, instead of cash or other investments." R.E. 34 (Consolidated Complaint ¶ 129). The plaintiff alleged that defendants breached both their own fiduciary duties of prudence and loyalty, and their duties as co-fiduciaries.[1]

3. The district court dismissed the Complaint on the pleadings against all defendants on all counts in a decision issued on March 31, 2005. With regard to Count I, the court reasoned that because the plaintiff's claim was that defendants were liable for failing to deselect Calpine stock as an option, the claim was "substantively the same as a claim based on failure to diversify the Calpine stock fund." R.E. 627 (March 30, 2005 Order Granting Defendants' Motions to Dismiss

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[1] The plaintiff also alleged that the Director Defendants breached their duties by failing to monitor the Advisory Committee and its members and provide them with accurate information; that the defendants breached their duties of loyalty by misleading Plan participants and failing to provide them with complete and accurate information about Calpine and the value of Calpine stock; and that the Company and Director Defendants breached their duty to avoid conflicts of interest and to promptly resolve them when they continued to allow Company stock as a Plan investment. These issues are not presented on appeal.

Plaintiffs' Consolidated Complaint for Violations of ERISA). Because eligible individual account plans (EIAPs), such as the Calpine Plan, are expressly exempted from ERISA's diversification requirements by section 404(a)(2), 29 U.S.C. § 1104(a)(2), the court stated that the plaintiff's claim that the defendants were liable for failing to deselect Calpine stock "appears inconsistent with the plain meaning of section 404(a)(2)." Id. (citing Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1097 (9th Cir. 2004)).

In any event, the court held that "even if ERISA can be read to impose liability for holding employer stock in an EIAP, plaintiff has not and cannot allege facts that would support a claim that defendants acted imprudently in not stopping continued investment in the Calpine stock fund." R.E. 627 (Dismissal Order). Relying again on Wright, the court held that a fiduciary that invests in employer stock for an EIAP is entitled to a presumption of prudence that can only be overcome by "plead[ing] facts that, if proven, would demonstrate that the fiduciaries knew that the 'company's financial condition is seriously deteriorating and that there is a genuine risk of insider self-dealing.'" Id. at 628 (quoting Wright, 360 F.3d at 1098). The court rejected the plaintiff's contention that, under Wright, allegations of serious mismanagement, without a showing of seriously deteriorating financial conditions, could be sufficient to overcome the presumption. Id. at 629 (Dismissal Order n.6). Taking judicial notice of financial statements that

showed that Calpine was profitable every year from 1998 through 2003, the court concluded that "Calpine was a viable concern throughout the alleged class period and was not in the sort of deteriorating financial circumstances that must be pled to rebut the presumption of prudence" announced in Wright. Id. at 628. For similar reasons, the court concluded that plaintiff's additional allegations that defendants failed to conduct an adequate investigation into the stock were not sufficient to rebut the presumption of prudence. Since, in the court's view, the plaintiff had shown mere fluctuations in the stock price, there was no harm suffered by the Plan and any failure to investigate on the part of the fiduciaries was insufficient to show that the decision to maintain the stock was not reasonable. Id.

SUMMARY OF ARGUMENT

At issue here is whether, and to what extent, a presumption of prudence applies to a decision by fiduciaries to maintain a company stock option in an ERISA defined contribution 401(k) plan, where the fiduciaries had information that the price of the stock is artificially inflated, in this case allegedly due to undisclosed and questionable round-trip energy trades and related questionable accounting practices.

First, no such presumption applies in such a case. Given ERISA's strict application of the traditional fiduciary duties of prudence and loyalty, there is no rationale for applying a presumption of prudence where, as here, the plaintiff

specifically alleged that the fiduciaries had information that the price of the stock was substantially and artificially inflated. It is imprudent to knowingly overpay for any amount of stock for an ERISA plan, and the fiduciaries are not entitled to any presumption to the contrary.

Moreover, even if such a presumption were to be applied, the allegations made in this case – that the fiduciaries knowingly allowed the plan to purchase stock that was overpriced – are sufficient to overcome any such presumption, without the need to additionally allege that Calpine's financial condition was "seriously deteriorating" or that the company faced "impending collapse." ERISA's stringent duties of prudence and loyalty are not limited to avoiding the purchase of worthless assets. If a fiduciary knowingly purchases assets at substantially inflated prices, he causes a loss to the plan and reduces the assets available to fund retirement benefits. Such conduct is wholly inconsistent with the trust ERISA imposes upon fiduciaries, regardless of whether the plan stands to suffer a total or only a partial loss.

This Court's decision in Wright is not to the contrary. In that case, the plaintiffs did not allege that the fiduciaries had acted on inside information and paid too much for company stock, but argued instead that the participants in a stock option plan should have been more broadly permitted to diversify plan investments. Unlike Wright, this case has nothing to do with diversification. The

plaintiff is not alleging that the Plan participants should have been allowed to diversify their investments, but are instead alleging that the stock was purchased for an inflated price based on a corporate plan to inflate revenue.

Finally, a presumption of prudence, which involves shifting evidentiary burdens, has no relevance on a motion to dismiss. Because application of such a presumption would be generally inconsistent with the notice pleading standards of Rule 8(a), Fed. R. Civ. P., numerous courts have properly refused to consider such a presumption in deciding a motion to dismiss. Here the Complaint, which alleges that the defendants breached their fiduciary duties by knowingly allowing the plan to purchase company stock at too high a price, is sufficiently pled to state an ERISA claim for purposes of overcoming a Rule 12(b)(6) motion to dismiss.

ARGUMENT

The District Court Erred In Dismissing The Case Based On A Presumption That The Fiduciaries Acted Prudently In Allowing The Plan To Purchase Employer Stock At Allegedly Inflated Prices And Maintaining The Stock Fund Under The Circumstances Alleged

1. The culmination of a decade of legislative effort, ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983); see also Nachman Corp. v. PBGC, 446 U.S. 359, 361-62 (1980). To prevent the many abuses of employee benefit plans that had taken place, and to safeguard the "soundness and stability" of pension plans, Congress designed

ERISA to establish "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," and to provide "appropriate remedies, sanctions, and ready access to the Federal Courts." 29 U.S.C. § 1001(b); see also 1 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong. 2d Sess. 208 (1976). To this end, ERISA imposes on all ERISA fiduciaries the familiar trust law standards of prudence and loyalty, and provides that plan participants and fiduciaries may bring suit to recover losses stemming from the breach of these standards. 29 U.S.C. §§ 1104, 1109, 1132(a)(2).

Accordingly, as fiduciaries to an ERISA-covered pension plan, the defendants were obligated to comply with ERISA's standard of care, which applies to all fiduciaries, generally without the benefit of any special deference or presumption in their favor. See 29 U.S.C. § 1104. ERISA does not merely require fiduciaries to refrain from conduct that is arbitrary, capricious, or in bad faith, even when making decisions with regard to the stock of the sponsoring employer. Instead, section 404 of the Act mandates that plan fiduciaries 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) and (B).

This standard of loyalty and care is not altered in the case of an individual account plan, which includes the 401(k) plan that is at issue here. All that is

altered is the requirement in section 404 to "diversify[] the investments of the plan so as to minimize the risk of large losses," id. § 1104(a)(1)(C), and the prudence requirement (only to the extent that it requires diversification) with respect to the acquisition or holding of employer securities. Id. § 1104(a)(2). Thus, except for being exempt from diversification requirements, ERISA fiduciaries of 401(k) plans, including those allowing for employer stock purchases, are subject to ERISA's exacting standard of fiduciary care, Eaves v. Penn, 587 F.2d 453, 459-60 (10th Cir. 1978), which has been described as the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). These provisions require the fiduciaries to do more than merely refrain from arbitrary conduct to meet the exacting standards of prudence and loyalty that Congress placed in the statute itself. See Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544, 564 (D. Md. 2003) ("no deference is afforded to the defendant's conduct in cases involving plan administration or management of plan assets"), aff'd, 372 F.3d 261 (4th Cir. 2004). Indeed, none of the cases cited by the district court requires application of a lesser standard under the circumstances alleged here.

The presumption at issue in this case has its origins in the Third Circuit's decision in Moench v. Robertson, 62 F.3d 553, 569 (3d Cir. 1995). In Moench, a plan participant sued an employee stock ownership plan (ESOP) committee for breach of fiduciary duty based on the committee's decision to invest solely in

employer stock during a period in which the employer's financial condition deteriorated. Id. at 558-59. The plaintiff alleged that, although various corporate insiders/committee members began to have doubts about the wisdom of concentrating the plan's investments in employer stock, they collectively did nothing. Id. The Third Circuit confirmed that fiduciaries of ESOPs (which by definition hold company securities) must, like all fiduciaries, act prudently and solely in the interest of the participants and beneficiaries in deciding whether to purchase or retain employer securities under such circumstances. Id. at 569. However, based on the congressional policy favoring ESOPs, which underpins the statutory exemption from diversification, the court held that an ESOP fiduciary that invested plan assets in employer stock during a period of financial instability is entitled to a presumption that he acted consistently with ERISA. Id. at 571. The court reasoned, however, that the presumption can be overcome by establishing that the fiduciary abused his discretion, where continued investment in employer stock would "no longer serve the purpose of the trust, or the settlor's intent." Id. The court found that the factors the plaintiff there alleged (precipitous drop in stock prices, committee members' knowledge of the impending collapse, and their conflicted loyalties as corporate insiders and fiduciaries), if proven, could overcome the presumption. Id. at 571-72. Accordingly, the court reversed the grant of summary judgment for the defendants, stressing the paramount importance

of "vigorously enforcing standards of fiduciary responsibility." Id. at 569 (quoting Donovan v. Cunningham, 716 F.2d 1455, 1466 (5th Cir. 1983)).[2]

The Moench decision in no way supports the district court's dismissal of this case. The question in Moench was not whether the fiduciaries were paying the wrong price for the stock, but was instead whether they should have purchased the stock at all, even if it had been purchased for the right price. Indeed, the Third Circuit later suggested that the Moench presumption did not apply in a case similar to this one involving investment by a 401(k) plan in employer stock that was allegedly "unlawfully and artificially inflated" in value. In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 233, 237-38 (3d Cir. 2005).

Accordingly, the Moench presumption of prudence should not have any applicability in a case, like this one, that challenges the prudence and loyalty of purchasing company stock in light of inside information that the stock's price was "unlawfully and artificially inflated." Schering-Plough, 420 F.3d at 233; see also Horn v. McQueen, 215 F. Supp. 2d 867, 875 (W.D. Ky. 2002) (refusing to extend

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[2] The Sixth Circuit subsequently applied the Moench standard of review in reviewing a fiduciary decision to continue investing a large percentage of ESOP assets in employer securities. Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995); see also Ershick v. United Mo. Bank, 948 F.2d 660, 667 (10th Cir. 1991) (applying similar analysis). However, the Third Circuit has made clear that the Moench presumption does not apply outside its specific context, and does not apply at all to ordinary prudence claims involving matters such as investments of plan assets. In re Unisys Sav. Plan Litig., 173 F.3d 145, 154-55 (3d Cir. 1999) (involving an imprudent investment of plan assets in a life insurance product).

Moench's arbitrary and capricious standard "to the case of an ESOP fiduciary accused of overpaying for employer securities"). In this context, presuming that the fiduciaries acted prudently is unwarranted, and the viability of the company is beside the point.

Moreover, even if such a presumption were to be applied, if proven, the allegations here would necessarily overcome any presumption that the fiduciaries acted reasonably with regard to the company stock. Such allegations therefore suffice to survive a motion to dismiss, and the plaintiff need not allege "impending collapse" of the company. See In re The Goodyear Tire & Rubber Co. ERISA Litig., 438 F. Supp. 2d 783, 794 (N.D. Ohio 2006) (allegations that defendants had knowledge of inflated earnings were sufficient to overcome Moench presumption, and there was no need to plead that the company was on the verge of an impending collapse); In re Sprint Corp. ERISA Litig., 388 F. Supp. 2d 1207, 1224-25 (D. Kan. 2004) (rejecting the "impending collapse" standard and holding that allegations that the fiduciaries knew that the company had misleadingly announced a merger that it knew would not receive the required regulatory approvals were sufficient to state a claim of fiduciary breach); cf. Canale v. Yegen, 782 F. Supp. 963, 968 (D.N.J. 1992) (concluding that plaintiffs stated a claim "where plaintiffs have alleged that the value of the [ESOP's] investment [in company stock] was impaired by the plan fiduciaries' own fraudulent and illegal acts").

ERISA's exacting fiduciary duty provisions not only protect a plan from a decision to buy a worthless asset, but also from a decision to overpay for that asset. Knowingly overpaying for an asset is neither prudent nor in the interest of plan participants and beneficiaries. This follows from the well-established rule in both the ERISA case law and in the trust law that a fiduciary breaches his duties by knowingly paying too much for an asset for the plan, and is personally responsible for the amount of the overpayment. See, e.g., Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992); Restatement (Third) of Trusts § 205 cmt. e (noting that 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"); see also id. illus. 9 ("A is trustee for B of $100,000. By the terms of the trust he is directed to invest the money in land. He purchases Blackacre for $25,000, although if he had not been negligent he could have purchased it for $15,000, its fair value. A is liable for $10,000."). Whether the plan gets nothing in return for its payment or too little, the breach is the same. Thus, in Feilen, the Eighth Circuit correctly held that the fiduciaries of an ERISA plan violated ERISA both when they caused the plan to pay too much for employer stock and when they allowed the plan to pay the obligations of another corporation without consideration. 965 F.2d at 671. In both cases, the fiduciary has acted in a fundamentally imprudent (and perhaps disloyal) manner. Cf. Department of

Labor Field Assistance Bulletin 2004-03 (Dec. 17, 2004) ("if a directed trustee has non-public information indicating that a company's public financial statements contain material misrepresentations that significantly inflate the company's earnings, the trustee could not simply follow a direction to purchase that company's stock at an artificially inflated price").

Nor does the Ninth Circuit's application of the Moench presumption in Wright support the dismissal here. In Wright, several participants brought suit alleging that the plan fiduciaries violated their duties of prudence and loyalty by refusing to amend an ERISA-covered stock bonus plan or otherwise allow the plan participants to sell a greater percentage of their company (Oremet) stock than the percentage (85% annually) authorized by the plan. 360 F.3d at 1095-96. They sued after the sponsoring company merged with another company and the value of the stock shares declined substantially. Id. at 1096. In affirming the district court's dismissal of the case at the motion to dismiss stage, the Ninth Circuit focused on the facts alleged by the plaintiffs there – that the defendants acted imprudently in declining to allow participants to direct sale of the up to 100% of the employer stock in their individual accounts before the price declined subsequent to the merger. In that context, where the basis of the complaint was a failure to permit additional diversification, the Court reasoned that it was appropriate to decide the case at the motion to dismiss stage because the facts "effectively preclude a claim

under Moench, eliminating the need for further discovery." Id. The court noted that the "published accounts of Oremet's earnings and financial fundamentals during the relevant period, attached to the complaint, demonstrate that Oremet was far from the sort of deteriorating financial circumstances involved in Moench and was, in fact, profitable and paying substantial dividends throughout that period." Id. at 1098-99. Moreover, the Court noted that, rather than rising slightly and then eventually declining, the stock could as easily have continued to rise in price following the merger. Id. at 1099. Because ERISA requires fiduciaries to act reasonably, not presciently, the Court concluded that the "Moench standard does not compel fiduciaries to permit further diversification of EIAP pension plans upon each subsequent rise in share value attributed to a merger or, for that matter, any other major corporate development." Id.

The Wright decision is plainly distinguishable and does not support the dismissal here for two reasons. First, the plaintiffs in Wright sued merely because they thought the defendants acted imprudent in maintaining the then current levels of investment in company stock when they should have predicted a rise and then a decline in the price of the stock when a company merger took place. There was no allegation that the price of the stock was inflated. While the Secretary does not necessarily disagree with the application of some presumption of prudence in such

a context, there is no cause to apply such a standard where, as here, there are allegations of inside information that the value of the stock is overstated.

Second, and perhaps more fundamentally, this Court treated the Wright case as essentially presenting a diversification claim and decided the case with that understanding. This is because the allegations in Wright were not that the company stock was overpriced or imprudent for the plan to have at all, but that the plan participants should have been more broadly permitted to diversify plan investments. In such a context, it makes sense that ERISA section 404(a)(1)(C) may insulate the defendants from a breach of fiduciary duty claim for refusing, in essence, to override plan terms preventing further diversification of plan assets. But the statutory pass from diversification, by its terms, only applies to the diversification requirement itself and to prudence "only to the extent that it requires diversification." 29 U.S.C. § 1104(a)(2). It therefore should have no relevance at all in a case like this, which is about the prudence of the continued purchase of company stock at the market price during a period when, according to the allegations, the fiduciaries had knowledge that the publicly-stated financial information for the company was inaccurate and that the price was artificially inflated due to market manipulations. Such allegations have nothing to do with diversification and, if proven, would establish the imprudence of purchasing any amount of employer stock that is fraudulently inflated. See Schering-Plough, 420

F.3d at 233; Horn, 215 F. Supp. 2d at 875. Simply put, ERISA permits certain types of plans to invest in company stock despite the inherent risks associated with non-diversification; but it does not encourage investment under any circumstances in company stock that the plan fiduciaries know to be overpriced. To the contrary, such investment is illegal always.

2. The district court erred in dismissing the case for another reason. Even assuming that Moench has some applicability in the context of a case such as this, a presumption, by its nature involves a shifting burden of proof, which is an evidentiary matter, not a pleading requirement. There is no reason to insert the Moench presumption into the pleading stage, and doing so is generally inconsistent with the notice pleading requirement of Rule 8(a), Fed. R. Civ. P. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). Numerous cases have properly refused to apply Moench when deciding a motion to dismiss under Rule 12. See, e.g., In re Goodyear, 438 F. Supp. 2d at 794; In re Elec. Data Sys. Corp. "ERISA" Litig., 305 F. Supp. 2d 658, 670 (E.D. Tex. 2004) ("The Court holds that requiring Plaintiffs to affirmatively plead facts overcoming the ESOP presumption violates Rule 8(a)'s notice pleading requirement . . . . Thus, the Court rejects . . . Defendants' argument that Plaintiffs must plead facts rebutting the ESOP presumption."); In re XCEL Energy, Inc. Sec., Derivative & "ERISA" Litig., 312 F. Supp. 2d 1165, 1179-80 (D. Minn. 2004); Stein v. Smith, 270 F. Supp. 2d 157,

172 (D. Mass. 2003); Rankin v. Rots, 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003); In re Ikon Office Solutions, Inc. Sec. Litig., 86 F. Supp. 2d 481, 492 (E.D. Pa. 2000). Other courts, while stopping short of a categorical rule against applying Moench at the motion to dismiss stage, have correctly found allegations similar to the ones made in this case to be sufficient to "clear the Rule 12(b)(6) hurdle." LaLonde v. Textron, Inc., 369 F.3d 1, 6, 7 (1st Cir. 2004) (plaintiffs alleged that "Textron artificially inflated its stock price by concealing" numerous problems at the company that were also the subject of a shareholders' derivative action against the company); Sprint, 388 F. Supp. 2d at 1223-24; In re Honeywell Int'l ERISA Litig., No. 03-1214, 2004 WL 3245931, at *11 n.16 (D.N.J. June 14, 2004). Unlike the situation in Wright where it was clear from the pleadings that the plaintiffs had not stated a claim, here the complaint is sufficiently pled for purposes of Rule 12(b)(6), and the case ought to proceed to the merits stage.[3]

[3] With regard to Count II, the court held that the plaintiff had not alleged any facts to support a claim that the Company and the Director Defendants failed to periodically review the performance of the Advisory Committee members. R.E. 629 (Dismissal Order). Moreover, the court held that, even if they had so alleged, the claim would still fail as a matter of law because the plaintiff had not pled facts sufficient to overcome the Wright presumption. Id. at 629-630. While we take no view on the court's factual finding with regard to periodic review, to the extent that the court relied on the Wright presumption, such a presumption has no applicability on a motion to dismiss, as we have discussed above.

CONCLUSION

For the reasons stated above, the Secretary of Labor urges this Court to reverse the district court's decision dismissing this suit.

Respectfully submitted,

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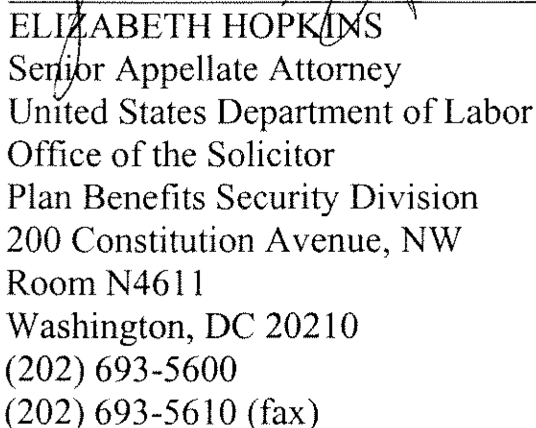

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CERTIFICATE OF SERVICE

I hereby certify that 2 copies of the Brief of the Secretary of Labor as Amicus Curie Supporting Appellant and Requesting Reversal were mailed, via federal express overnight courier service, on the 15th day of November, 2006, to the following parties:

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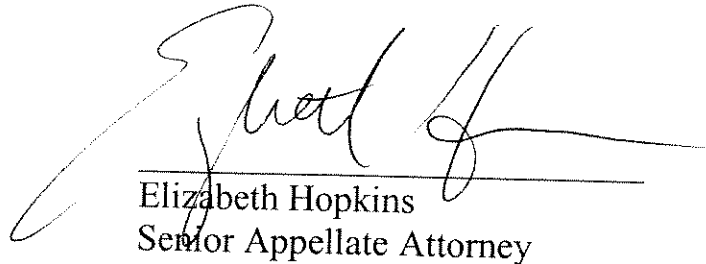

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FORM 8. Certificate of Compliance Pursuant To Fed. R. App. P. 32(A)(7)(C) and Circuit Rule 32-1 for Case Number

06-15013

I certify that:

X Amicus Brief

X Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R.32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points and contains 7000 words or less

11/15/06
Date

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