Case Nos. 10-4163, 10-4198

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANN I. TAYLOR

Plaintiff-Appellant, Cross-Appellee,

v.

KEYCORP; THOMAS C. STEVENS; HENRY L. MEYER, III; KEYCORP TRUST OVERSIGHT COMMITTEE; KATHLEEN EGAN; JEFFREY B. WEEDEN; THOMAS W. BUNN; THOMAS E. HELFRICH; ROBERT L. MORRIS

Defendants-Appellees, Cross-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE SUPPORTING PLAINTIFF-CROSS-APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the district court correctly held that plaintiff alleged sufficient facts to state an ERISA fiduciary breach claim.

2. Whether the district court correctly held that the plan fiduciaries had an affirmative duty to disclose accurate information about the sponsoring company's rapidly deteriorating financial condition.

STATEMENT OF INTEREST

As the federal agency with the primary responsibility for Title I of ERISA, the Secretary of Labor has a strong interest in ensuring that courts correctly interpret ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc). The central issue in this case is the scope of the "presumption of prudence" that the Court applies to plans that authorize or mandate investment in the employer's own stock. Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995). In applying Kuper, the district court here correctly refused to apply an "impending collapse" standard for rebutting the "presumption of prudence" to dismiss the plaintiff's claims of fiduciary breach stemming from the plan's allegedly imprudent investment in employer stock. Taylor v. KeyCorp, 678 F. Supp. 2d 633, 639-640 (N.D. Ohio 2009). The Secretary submits this amicus brief in support of the plaintiff-cross-appellee because, consistent with Kuper, she has a strong interest in fostering valid claims of fiduciary breach otherwise

authorized by statute and in ensuring that this evidentiary presumption is not applied prematurely at the pleadings stage to bar such claims. Likewise, the brief presents arguments in support of the district court's holding correctly denying a motion to dismiss the plaintiff's misrepresentation claims based on misleading statements in securities filings incorporated into plan documents. The Secretary files this brief pursuant to her authority under Fed. R. App. P. 29(a).

BACKGROUND

The KeyCorp 401(k) Savings Plan (the "Plan") includes KeyCorp ("KeyCorp") stock among its investment options. Compl. at ¶¶ 2, 54. 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. 678 F. Supp. 2d at 636; Compl. at ¶¶ 24-39. Plaintiff Ann Taylor, a Plan participant, brings this case as a putative class action and alleges that the defendant-fiduciaries imprudently allowed investment in KeyCorp stock that they knew was overvalued because of misrepresentations about KeyCorp's extensive homebuilder construction loans. E.g., Compl. at ¶¶ 4-6, 84-110, 173-176, 203. Despite knowledge concerning the loans' high default risk and the downturn in real estate markets nationwide and particularly in KeyCorp's territories, the defendant-fiduciaries continued to make and tout these loans. Id. Similarly, Taylor alleges that the defendant-fiduciaries misled participant-investors

concerning KeyCorp's risk of liability from the use of legally questionable tax and accounting practices. Compl. at ¶¶ 84-85, 111-172. Taylor further alleges that the defendants' misrepresentations inflated the price of KeyCorp stock, and subsequent disclosures caused an almost 78% decline in the stock price (from $38.03 to $8.48). Compl. at ¶ 186.

Taylor claims that ERISA's prudence standard required defendants, as fiduciaries to the Plan, to take steps to withdraw KeyCorp stock as an investment option for participants during this period or disclose the true extent of KeyCorp's risk exposure and financial health. 678 F. Supp. 2d at 638. Taylor also claims that defendants misinformed participants of KeyCorp's risks related to these practices. Id. at 642.

The defendants moved to dismiss under Rule 12(b)(6), arguing that the presumption of prudence bars the prudence claim. The district court first denied the motion, rejecting defendants' argument that the complaint "must have alleged extreme circumstances such as Key[Corp] was no longer viable or that it could not weather the economic crisis in order to overcome the presumption." 678 F. Supp. 2d at 639. Instead, the court found that "in this case, Plaintiffs have alleged facts supporting their assertion that Defendants knew of KeyCorp's high-risk conduct which exposed it to extraordinary risks. . . Plaintiffs further allege that Defendants' high risk conduct, as detailed in the extensive consolidated complaint, brought low

a respected franchise, requiring a government bailout and a huge dividend reduction." Id. at 640. The court considered these allegations plausible and sufficient to overcome the Kuper presumption. Id. The court also rejected defendants' argument that the misrepresentation claim should be dismissed because the representations were made in securities filings and only incorporated by reference into the summary plan description ("SPD").[1] Id. at 642.

The defendants then moved to dismiss under Rule 12(b)(1) on constitutional standing grounds. The court granted the motion, concluding that Taylor did not suffer an injury. The plaintiff appealed the Rule 12(b)(1) dismissal. Prior briefing in this case presented and addressed the constitutional standing issues. The Secretary filed a separate amicus brief in support of the plaintiff-appellant with respect to those issues. Brief for the Secretary of Labor as Amicus Curiae Supporting Appellant, Taylor v. KeyCorp, No. 10-4163 (filed on 01/12/2011).[2]

[1] See 29 U.S.C. § 1022 (defining the "summary plan description").

[2] Per instructions from the case manager, the Secretary addressed the constitutional standing issues in an earlier brief, and now files a separate brief supporting the cross-appellee on issues raised in the cross-appeal.

SUMMARY OF THE ARGUMENT

I. The district court correctly concluded that the plaintiff adequately pled that the defendants breached their fiduciary duties in both the prudence and misrepresentation claims. In this Court, a plaintiff rebuts the presumption of prudence by showing that a prudent fiduciary would not invest in the stock under the prevailing circumstances. Kuper, 66 F.3d at 1459. The district court correctly concluded in this case that plaintiffs were not required under Kuper to plead additional allegations that the sponsoring employer was on the verge of a "drastic, extreme or impending collapse." 678 F. Supp. 2d at 639-640. Additionally, the Kuper presumption is an evidentiary presumption, and as such, the district court also correctly concluded that the presumption did not provide grounds for dismissal at the pleading stage.

II. The district court correctly concluded that the plaintiff adequately pled the misrepresentation claims because "a fiduciary has an obligation to convey complete and accurate information to its beneficiaries." Id. at 641. The Secretary agrees with the district court's holding that because "ERISA fiduciaries are liable for making misrepresentations in plan documents, they should also be prohibited from incorporating into plan documents other documents [including SEC filings] that make material misrepresentations about the company and then disseminating those misrepresentations to plan participants." Id. at 642.

ARGUMENT

I. THE PRESUMPTION OF PRUDENCE ADOPTED IN KUPER DOES NOT WARRANT DISMISSAL IN THIS CASE

A. The Applicable Legal Framework

Congress enacted ERISA expressly to safeguard the "financial soundness" of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b). To this end, ERISA imposes on all fiduciaries the familiar trust law duties of prudence and loyalty, and holds plan fiduciaries personally liable for "any losses to the plan" caused by any breach of these duties. 29 U.S.C. §§ 1104, 1109, 1132(a)(2). Thus, ERISA section 404 requires fiduciaries for all plans to act "for the exclusive purpose" of paying plan benefits and defraying reasonable expenses, and with the same level of care that "a prudent man acting in like capacity and familiar with such matters would use" in similar circumstances. 29 U.S.C. § 1104(a)(1)(A), (B).

Generally speaking, the fiduciary duty to act prudently encompasses a duty to diversify a plan's investments "to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C). Congress, however, eliminated the duty to diversify and the duty of prudence to the extent that it requires diversification with respect to investments in employer stock to encourage such investment by employee stock ownership plans

("ESOPs"), see 29 U.S.C. § 1107(d)(6), and other "eligible individual account plans" ("EIAPs"), see 29 U.S.C. § 1107(d)(3). 29 U.S.C. § 1104(a)(2).

In adopting a presumption of prudence for employer stock investments, this Court has made clear that "ESOPs cannot override ERISA's goal of ensuring the proper management and soundness of employee benefit plans." Kuper, 66 F.3d at 1457. Consequently, although this Court will "review an ESOP fiduciary's decision to invest in employer securities for an abuse of discretion" and "presume that a fiduciary's decision to remain invested in employer securities was reasonable," plaintiffs can "rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Id. at 1459 (citations omitted). But, as this Court also recognized, ERISA does not otherwise modify, eliminate or change section 404's standards of loyalty and care. Id. at 1458. Accordingly, ESOP fiduciaries, like all fiduciaries, owe "an unwavering duty to act both as a prudent person would act in a similar situation and with single-minded devotion to those same plan participants and beneficiaries," and they may offer and retain a plan's investment in company stock only if a prudent fiduciary in similar circumstances would do the same. Id. (citations omitted).

Here, the district court decision was appropriately guided by these legal principles. 678 F. Supp. 2d at 639 & n.1 ("ESOPs are still governed by ERISA

requirements for fiduciaries" including "the prudent man obligation which imposes an obligation to act both as a prudent person would act in a similar situation and with single-minded devotion to the plan"). As the district court held, plaintiffs pled facts that, taken as they must to be true at this stage of the proceeding, are sufficient to support their claim that the defendants breached their fiduciary duties under ERISA. 678 F. Supp. 2d at 640; see Bloemker v. Laborers' Local 265 Pension Fund, 605 F.3d 436, 443 (6th Cir. 2010) ("[a]ssuming the truth of [the plaintiff's] allegations, as we must on a motion to dismiss"). These allegations in the complaint more than sufficed to avoid dismissal based on the rebuttable presumption of prudence that this Court uses as an evidentiary burden-shifting device once all the facts are before it. 678 F. Supp. 2d at 640.

B. "Impending Collapse" Is Not Necessary To Rebut The Presumption, Which In Any Event Does Not Apply Or Is Rebutted Whenever A Fiduciary Knowingly Pays An Inflated Price For Employer Stock

1. Under this Court's approach, a plaintiff may rebut the presumption of prudence by showing that the fiduciary failed to act as a fiduciary in like circumstances would reasonably act and thus did not meet the statutory standard of prudence. As explained below, infra pp. 14-16, it is never prudent for a fiduciary knowingly to pay for stock, including employer stock, more than it is worth due to fraud on the market, or to ignore the danger of significant losses until just before the company is on the verge of total, imminent collapse. Accordingly, this Court

should not adopt the "verge of collapse" or "impending collapse" standard advocated by the defendants, Defendants' (Second) Brief, at 72, and indeed doing so would be inconsistent with Kuper's application of the statutorily-derived prudence standard. Compare Kuper, 66 F.3d at 1459 (plaintiffs can "rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision"); DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 423-424 (4th Cir. 2007) ("ERISA itself sets forth the only test of a fiduciary's duties"), with Quan v. Computer Sciences Corp., 623 F.3d 870, 882 (9th Cir. 2010) (to rebut the presumption, plaintiffs must show that the company is on the brink of collapse or is undergoing serious mismanagement, and "[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment").

As the district court recognized, Kuper's statutorily-based approach to determining prudence violations in employer stock cases cannot be squared with an extra-statutory "impending collapse" standard, under which a showing of imprudence is not enough. 678 F. Supp. 2d at 639-640; accord Sims v. First Horizon Nat'l Corp., No. 08-2293-STA-CGC, 2009 WL 3241689, at *24 & n.38 (W.D. Tenn. Sept. 30, 2009) (listing cases). No decision from this Court has ever hinged the pleading of a prudence claim solely on the financial circumstances of the company in which the plan owns stock or described the company's financial

circumstances as a required element of a fiduciary breach claim under ERISA. E.g., Gregg v. Transp. Workers of Am. Int'l, 343 F.3d 833, 840 n.3 (6th Cir. 2003); Chao v. Hall Holding Co., Inc., 285 F.3d 415, 426 (6th Cir. 2002).

Moreover, only Congress has the ability to establish pleading and proof requirements for particular claims, which courts are not free to alter. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 (2007). In ERISA, Congress plainly exercised that authority by imposing identical fiduciary standards of prudence on all ERISA fiduciaries, including fiduciaries in employer-stock plans. S. Rep. No. 93-127, reprinted in 1974 U.S.C.C.A.N. 4838, 4863, 4866 (1973) ("the core principles of fiduciary conduct . . . place a . . . duty on every fiduciary"). Because the statute defines the prudence obligation even for fiduciaries of employer stock plans in terms of "a prudent fiduciary acting under similar circumstances," Kuper, 66 F.3d at 1459, there is no statutory gap to fill and no basis to require an "impending collapse" pleading requirement found nowhere in the statute.

Thus, reading Kuper to call for an "impending collapse" standard would be contrary to numerous Supreme Court decisions that cabin the federal courts' discretion to adopt federal common law. "Federal courts . . . are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." City of Milwaukee v. Illinois and Michigan, 451 U.S. 304,

312 (1981). They should only resort to federal common law when "compelled to consider federal questions which cannot be answered from federal statutes alone." Id. at 314 (citations omitted). In the ERISA context in particular, "the authority of courts to develop a 'federal common law' . . . is not the authority to revise the text of the statute." Mertens v. Hewitt Assocs., 508 U.S. 248, 259 (1993) (citations omitted); see also Flacche v. Sun Life Assur. Co. of Canada (U.S.), 958 F.2d 730, 735 (6th Cir. 1992) (courts' federal common law-making powers under ERISA is "limit[ed] [to] the development of federal common law [in] areas where the statutes are silent or ambiguous"). Because the statute clearly and unambiguously articulates a prudent man standard of fiduciary behavior, carving out only a limited exception to the diversification requirement for plans that authorize or require investment in employer stock, there is simply no justification to formulate and substitute a more forgiving standard, untethered to the statute, that would allow even imprudent investments in company stock so long as the company was not facing "impending collapse." Cf. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514-515 (1993) ("nothing in law would permit us to substitute for the required [statutory] finding . . . [a] much different (and much lesser) finding"); accord Shinseki v. Sanders, 129 S. Ct. 1696, 1704-1705 (2009); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid,

mechanized, or ritualistic'") (citation omitted); Hall Holding Co., 285 F.3d at 437 (rejecting the argument that because a "hypothetical reasonable fiduciary" would purchase the stock, the fiduciary is presumed to be prudent).

Indeed, such a court-created rule would, in a fundamental way, convert Kuper's flexible presumption into a "safe harbor," see Quan, 623 F.3d at 881-883, or "prudence per se" rule in all but the most extreme cases, in contradiction to the participant-protective prudent man rule that Congress purposely incorporated into ERISA from the law of trusts, which the Supreme Court instructs courts to consider first when construing the statute. See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000); Hall Holding Co., 285 F.3d at 426 (describing an ERISA fiduciary's duties as "the highest known to the law") (citation omitted). The "prudent investor rule" of trust law rejects any legal determination that "classif[ies] specific investments or courses of action as prudent or imprudent in the abstract." Restatement (Third) of Trusts § 90 cmt. e (2007); accord Chase v. Pevear, 419 N.E.2d 1358, 1365 (Mass. 1981) ("[t]he [prudence] standard avoids the inflexibility of definite classification of securities") (citation omitted); In re Estate of Lieberman, 909 N.E.2d 915, 924 (Ill. Ct. App. 2009) (rejecting the argument that investments permitted by statute are per se prudent).

Certainly, contrary to the defendants' argument, see Defendants' Brief, at 63-64, the mere specter of increased litigation cannot, as the Supreme Court has

repeatedly held, justify judicial modification of statutory pleading and proof requirements. Swierkiewicz, 534 U.S. at 514-515; accord Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 n.12 (2007). The defendants' other policy arguments based on the special nature of employer-stock cases are equally unavailing. Compare Defendants' Brief, at 61-64, with Jones v. Bock, 549 U.S. 199, 212 (2007) ("courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns"); id. at 224 ("[w]e once again reiterate . . . that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts"). The defendants' quest to impose an additional special "impending collapse" requirement in these employer stock cases flatly contravenes these governing authorities.[3]

[3] Even assuming arguendo that this Court adopts an alternative "impending collapse" standard, it should not apply this alternative standard on a motion to dismiss. The court must infer all alleged facts in favor of the plaintiff even with respect to whether specific legal standards should apply, such as the presumption of reasonableness. See Swix v. Daisy Mfg. Co., Inc., 373 F.3d 678, 686-687 (6th Cir. 2004) (presuming that the factual allegations are true when deciding which legal standard -- a "reasonable child" versus "reasonable adult" standard -- should apply at the pleadings stage). As the plaintiff here alleged facts that a prudent person "acting under similar circumstances would have made a different investment decision," the presumption and its corollary "abuse of discretion" standard should not prevail over the normal, statutorily prescribed prudence standard. Kuper, 66 F.3d at 1459. The complaint clearly "alleged facts supporting their assertion that Defendants' knew of KeyCorp's high-risk conduct which exposed it to extraordinary risks.…[and] as detailed in the extensive consolidated complaint, [Defendants' high risk conduct] brought low a respected franchise,

2. In any event, a presumption of prudence does not apply or is rebutted in this case where artificial inflation is alleged. The Third Circuit correctly suggested that a presumption of prudence does not apply in a similar case involving a 401(k) plan's investment in employer stock alleged to be "unlawfully and artificially inflated" in value. In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 233, 237-238 (3d Cir. 2005); see also In re Syncor ERISA Litig., 516 F.3d 1095, 1103 (9th Cir. 2008) (declining to adopt the presumption because there was an issue of genuine material fact as to whether "the fiduciaries breached the prudent man standard by knowing of, and/or participating in, the illegal scheme while continuing to hold and purchase artificially inflated Syncor stock for the ERISA Plan").

Accordingly, any presumption of prudence should not apply to a case, like this one, that challenges the prudence of purchasing company stock in light of information that the stock's price was "unlawfully and artificially inflated." Schering-Plough, 420 F.3d at 233. In this context, presuming that the fiduciaries acted prudently is unwarranted, and the company's viability is irrelevant. Knowingly overpaying for an asset is neither prudent nor in the interest of plan participants and beneficiaries. See, e.g., Martin v. Feilen, 965 F.2d 660, 671 (8th

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requiring a government bailout and a huge dividend reduction." 678 F. Supp. 2d at 640. Coupled with the alleged 78% decline in stock price, these extensive allegations present a plausible fiduciary breach claim.

Cir. 1992); accord Hall Holding Co., 285 F.3d at 443-444 ("the money paid for the [employer] stock was a form of deferred compensation for the participants . . . [h]owever, because the [plan] overpaid for the shares of [employer] stock, it suffered a loss"). This follows from the well-established rule that a fiduciary breaches his duties by knowingly paying too much for an asset for the plan. See Feilen, 965 F.2d at 671; Restatement (Third) of Trusts § 205 cmt. e, illus. 9. Whether the plan gets nothing in return for its payment or too little, the breach is the same. Cf. U.S. Dep't 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").

Amicus Curiae Macy's Inc. ("Macy's") is clearly off base in arguing that "the text of ERISA itself belies the 'artificial inflation'" theory. See Brief for Macy's Inc. as Amicus Curiae Supporting Appellees-Cross-Appellants, Taylor v. KeyCorp, No. 10-4163, at 11 (filed 04/20/2011) ("Macy's Brief"). As support, Macy's primarily cites 29 U.S.C. § 1002(18) and 29 U.S.C. § 1108(e)(1), which simply provide that if a fiduciary pays market price on a publicly traded market, he is not subject to a per se prohibition on the purchase of employer stock as a prohibited transaction under ERISA section 406, 29 U.S.C. § 1106. These provisions do nothing to

contradict that it is inherently imprudent, under a fiduciary's general obligations under ERISA section 404, 29 U.S.C. § 1104, to knowingly pay too much for that stock, since a prudent person familiar with such matters would never buy stock at a price he knows or should know reflects a fraud on the market. See Hall Holding Co., 285 F.3d at 425; accord Dep't of Labor, Office of Pension and Welfare Benefit Programs Op. No. 2002-04A, 2002 WL 32063460, at *4 (June 7, 2002) ("the fact that a transaction is exempt under section 408(e) is not determinative of whether a fiduciary has met its fiduciary obligations under ERISA"); cf. Bank of New York v. Janowick, 470 F.3d 264, 269 (6th Cir. 2006) (recognizing that Department of Labor Advisory Opinions are worthy of "some deference").

C. The *Kuper* Presumption Does Not Apply At The Pleadings Stage

Under Federal Rule Evidence 301, "[i]n all civil actions and proceedings . . . a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption."[4] The presumption of prudence adopted in Kuper is no exception to this rule, insofar as it does not substantively change ERISA's prudence standard or its treatment of employer stock investments. See supra, pp. 7, 10-12.

[4] Rule 301 further provides that a presumption "does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally set." Fed. R. Evid. 301.

Instead, consistent with the above-stated Rule, the Kuper presumption, which, significantly, was applied at summary judgment, involved shifting evidentiary burdens of proof. Kuper, 66 F.3d at 1451-452. Kuper consistently described the presumption as evidentiary in nature. E.g., id. at 1460 ("[o]n the other hand, defendants presented evidence . . .") (emphasis added). Under its burden-shifting evidentiary framework, the plaintiff's rebuttal may be based on discovery as well as anticipated in the pleadings. Id. Nothing in Kuper, therefore, allows a court the right to dismiss at the pleadings stage rather than let the plaintiff go forward with evidence amassed during discovery or at trial "to rebut or meet the presumption." Fed. R. Evid. 301.

The Kuper presumption explicitly deals with a fiduciary's prudence obligations for employer stock funds. 66 F.3d at 1458. Kuper recognized that these prudence claims have three components: "plaintiff must show [1] a causal link between the [2] failure to investigate and the [3] harm suffered by the plan." Id. at 1459 (brackets added); see Whitfield v. Lindemann, 853 F.2d 1298, 1304-1305 (5th Cir. 1988).[5] Kuper did not discuss or modify the evidentiary burdens

[5] The Fifth Circuit in Whitfield, 853 F.2d at 1304-1305, referencing trust law, stated generally in an ERISA case that:

> Section 212, cmt. e, of the Restatement (Second) of Trusts provides that a 'trustee is not liable for a loss resulting from the breach of trust if the same loss would have been incurred if he had committed no breach of trust.' . . . [The majority rule,] once the existence of a loss

imposed on elements [2] and [3]; however, it clearly did apply a special presumption to element [1] for ESOP cases, concerning whether the alleged loss can be causally linked to the alleged violation. Id. at 1459-1460 ("[i]nstead, to show that an investment decision breached a fiduciary's duty to act reasonably in an effort to hold the fiduciary liable for a loss attributable to this investment decision, a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan"). In fact, the district court's decision affirmed by this Court in Kuper dealt exclusively with the burden-shifting framework applicable to loss causation issues in these cases. See Kuper v. Quantum Chemicals Corp., 852 F. Supp. 1389, 1397 (S.D. Ohio 1994) ("[v]arious authorities have conflicted in the manner in which they have allocated the burden of proof on the issue of causal connection. . . .Even assuming that the burden falls upon the defendant. . .") (citing Whitfield, 853 at 1304-1305). See generally In re Unisys Savings Plan Litig., 173 F.3d 145, 160 n.23 (3d Cir. 1999) (reading Kuper as a case about evidentiary burdens on showing loss causation); Romberio v. Unumprovident Corp., 385 Fed. App'x 423, at 429 (6th Cir. Jan 12, 2009) (unpublished); id. at 444 (Clay, J., dissenting) (interpreting Kuper as dictating evidentiary burdens for showing loss causation).

> has been established, [is that] the burden is on the trustee to show that there was no causal relation between his breach and the loss, i.e., that the loss would have occurred regardless of the breach.

Consequently, the Kuper presumption incorporates a special rule specific to these employer stock cases that has the singular effect of shifting the burden of production to the plaintiffs on the issue of loss causation. See id. For ERISA cases not involving the presumption, "to the extent that there is any ambiguity in determining the amount of loss in an ERISA action, the uncertainty should be resolved against the breaching fiduciary." Sec'y of U.S. Dep't of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002) (agreeing with "several circuits [that] have held that, in measuring a loss, the burden of persuasion should be placed on the breaching fiduciary"); see also id. ("[t]o the extent that the amount of the loss caused by the defendants' breach of fiduciary duty was at all ambiguous, the district court did not err in resolving that uncertainty against the defendants").[6] While the Kuper presumption does not shift the ultimate burden of persuasion on loss issues, see Federal Rule of Evidence 301, it does put the initial burden of production on the plaintiffs and thus permits courts in an employer stock case to resolve any uncertainty, after discovery, on loss causation against the plaintiffs

[6] See Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599, 602 (8th Cir. 1995) ("[t]o the extent that there are ambiguities in determining loss, we resolve them against the trustee in breach"); Kim v. Fujikawa, 871 F.2d 1427, 1430-1431 (9th Cir. 1989) ("[i]n determining the amount that a breaching fiduciary must restore to the [benefit fund] as a result of a prohibited transaction, the court should resolve doubts in favor of the plaintiffs") (internal quotation marks omitted); Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985) ("once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer"); see also Whitfield, 853 F.2d at 1304-1305.

rather than the breaching fiduciary. Compare McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995) (placing the burden of production and persuasion on the defendants to rebut the prima facie case in respect to loss causation) with Kuper, 66 F.3d at 1460 ("[i]n light of defendants' evidence, plaintiffs' allegations are insufficient to rebut the presumption"). Kuper held that the plaintiff failed to rebut the presumption in that case only because "plaintiffs have failed to present sufficient evidence" to overcome the burden of production for loss causation within the Kuper framework. Id.

Accordingly, Kuper's evidentiary burden-shifting framework is consistent with the well-established definition of "presumption." E.g., Basic Inc. v. Levinson, 485 U.S. 224, 245-246 (1988) ("presumptions are . . . useful devices for allocating the burdens of proof between parties"); Miskel v. Karnes, 397 F.3d 446, 455 (6th Cir. 2005) ("[p]resumptions are evidentiary devices that enable a factfinder to presume the existence of an 'ultimate' or 'elemental' fact upon proof of 'evidentiary' or 'basic' facts"); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1126 (9th Cir. 2002) (putting the onus on the plaintiff to produce evidence and prove causation to rebut presumption that prosecutors acted within the law). "The word 'presumption' properly used refers only to a device for allocating the production burden . . . [u]sually, assessing the burden of production helps the judge determine whether

the litigants have created an issue of fact to be decided by the jury." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (emphasis added).

This evidentiary presumption does not, however, eliminate the general rules of notice pleading under Rule 8, which require courts to take the factual allegations as true and resolve inferences in the plaintiff's favor. See Swierkiewicz, 534 U.S. at 514; Back v. Hall, 537 F.3d 552, 558 (6th Cir. 2008) (refusing to apply standards applicable at summary judgment in a First Amendment case to defeat the plaintiff's claim on its pleadings); Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 615 (6th Cir. 2004) (reviewing the pleading of proximate causation solely under Rule 8) (citing Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 256 (1994)); Galbraith, 307 F.3d at 1126; see also Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (holding that plaintiffs need only plead facts that give defendants a "fair notice" of "facts indirectly showing unlawful behavior" but need not "rebut" "lawful reasons" for such behavior); Lindsay v. Yates, 498 F.3d 434, 439-440 & n.6 (6th Cir. 2007) (recognizing continued validity of Swierkiewicz).

At the pleadings stage, the plaintiff thus does not bear the added burden of countering this evidentiary presumption in the complaint even if an evidentiary presumption like the Kuper presumption is imposed on plaintiffs during later stages of the litigation. See, e.g., Boltz-McCarthy v. Boltz, No. 10–CV–00215, 2011 WL 1361913, at *2 (D. Vt. Apr. 11, 2011) ("courts have refused to consider

presumptions in favor of the defendant on a motion to dismiss since presumptions are evidentiary standards that are inappropriate for evaluation at the pleadings stage") (quoting 5B C. Wright & A. Miller, Federal Practice and Procedure § 1357 (3d ed. 2006)); accord Galbraith, 307 F.3d at 1126. Imposing such an additional burden on plaintiffs would not only be inconsistent with the Federal Rules, it would be inconsistent with Congress's intent to eliminate, through ERISA, the "jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary duties." H.R. Rep. No. 93-553 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655.

For these reasons, district courts in this Circuit properly refuse to insert the Kuper presumption into the pleadings stage. E.g., In re Regions Morgan Keegan ERISA Litig., 741 F. Supp. 2d 844, 849-51 (W.D. Tenn. 2010) (listing cases). To hold otherwise would effectively require this Court to presume prudence as a matter of law for the purposes of dismissal of employer-stock claims under Rule 12(b)(6). See Winnett v. Caterpillar, Inc., 553 F.3d 1000, 1005 (6th Cir. 2009) ("[g]enerally speaking, Rule 12(b)(6) permits a defendant to seek relief on the ground that a cause of action fails as a matter of law, regardless of whether the plaintiff's factual allegations are true or not"). But, as previously stated, courts cannot use evidentiary presumptions to presume what Congress requires the courts to determine. See supra, pp. 9-13.

The defendants' end goal is clear: the improper transformation of the evidentiary Kuper presumption into a "substantial shield to liability" to be applied at the pleading stage to dismiss claims of imprudence involving employer stock before the plaintiff has had the opportunity, through discovery, to marshal the available evidence rebutting any presumption of prudence. Defendants' Brief, at 59. Aside from the impropriety of such judicial creations, Mertens, 508 U.S. at 259; Milwaukee, 451 U.S. at 314, governing precedent makes clear that plaintiffs need not rebut even more well-established shields from liability such as qualified immunity in their pleadings. See Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[w]e refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense"); Goad v. Mitchell, 297 F.3d 497, 501-502 (6th Cir. 2002). Instead, consistent with analogous case-law, Kuper should be read as establishing an evidentiary framework for allocating burdens of production at the summary judgment stage. Under this proper interpretation, the district court correctly declined to apply the presumption to the pleadings stage.

Regardless, the complaint clearly "alleged facts supporting their assertion that Defendants' knew of KeyCorp's high-risk conduct which exposed it to extraordinary risks." 678 F. Supp. 2d at 640. The complaint alleges that KeyCorp was reduced to accepting a government bailout and a huge dividend reduction as a result of undisclosed high risk conduct. Id. Moreover, according to the complaint,

the defendants' misrepresentations artificially inflated the stock price. Coupled with the alleged 78% decline in stock price, these extensive allegations should, at the very least, present a plausible fiduciary breach claim and, as the district court held, id., should rebut the Kuper presumption, allowing the case to go forward on the merits.

II. PLAINTIFF PROPERLY PLED BREACHES OF ERISA DISCLOSURE DUTIES

Plaintiff Taylor alleges that the defendants here knowingly distributed plan notices, specifically those communicated in SPDs, with false information and permitted participants to continue to buy the stock at prices artificially inflated by known material misstatements in public SEC filings. Specifically, she alleges that the defendants knowingly engaged in fiduciary acts when they disseminated falsely optimistic descriptions that artificially inflated the participants' anticipated benefits, which they failed to correct. 678 F. Supp. 2d at 641-642.

A fiduciary's duty includes an obligation to convey complete and accurate information to plan participants, as well as a "negative duty not to misinform." James v. Pirelli Armstrong Tire Corp., 305 F.3d 439, 452 (6th Cir. 2002); accord Krohn v. Huron Memorial Hosp., 173 F.3d 542, 548 (6th Cir. 1999) ("affirmative duty to inform when the trustee knows that silence might be harmful"); see generally Varity Corp. v. Howe, 516 U.S. 489, 506 (1996). The district court thus correctly held that "since it is universally accepted that ERISA fiduciaries are

liable for making misrepresentations concerning plans, they should also be prohibited from incorporating into plan documents other documents that make material misrepresentations about the company and then disseminating those misrepresentations to plan participants." 678 F. Supp. 2d at 642.

The fact that the alleged representations were primarily found in SEC filings and incorporated into SPDs does not detract from the validity of the plaintiff's misrepresentation claim. The fiduciaries could not stand idly by in tacit disregard of the dangers posed by public filings that they knew or should have known to be materially false. "[A] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in pursuing . . . benefits to which she may be entitled." Krohn, 173 F.3d at 547.

When fiduciaries communicate plan information to participants, they act as fiduciaries, and breach their fiduciary duties to the extent that they know the communications pass on, by incorporation, misleading information from SEC filings or other non-plan documents. Id. (citing authorities); see also In re Regions, 741 F. Supp. 2d at 853-854 (listing cases). 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 warn participants who

continued to obtain stock at inflated prices based upon their misrepresentations. Pirelli, 305 F.3d at 454-455; Krohn, 173 F.3d at 547.

Sprague v. General Motors Corp., 133 F.3d 388, 405 n.15 (6th Cir. 1998), which the district court correctly distinguished, is not to the contrary. 678 F. Supp. 2d at 641. This Court in Pirelli specifically recognized that "when [an] employer on its own initiative provides false and misleading information about the future benefits of a plan . . . Sprague explicitly allows for a breach of fiduciary duty claim under such a circumstance." 305 F.3d at 454-455. Consequently, Sprague does not support the conclusion that fiduciaries need never correct misleading public information through the use of nonpublic financial information about plan investments. The fiduciaries had an obligation to protect participants from a danger known to the plan's fiduciaries, but not its participants. Krohn, 173 F.3d at 551. This Court's post-Sprague cases are thus clear that plaintiffs may, as here, allege misrepresentation under ERISA's general fiduciary obligations in section 404. See Gregg, 343 F.3d at 847.[7]

[7] Contrary to the discussion in Macy's Brief, at 13, the Department of Labor's regulations that concern "investor education," 29 C.F.R. § 2509.96-1(d), are irrelevant for determining whether a fiduciary breaches his duties under ERISA section 404. "Investor education" just refers to certain general categories of financial information whose dissemination does not render someone a fiduciary. Id. The Department is clear that general fiduciary obligations require persons who are fiduciaries to speak truthfully about plan investments and benefits, and not to mislead participants or withhold material information about, for instance, the purchase of inflated stock. See, e.g., Fiduciary Requirements for Disclosure in

In response to these authorities, the defendants and Macy's argue that the fiduciary obligations under section 404 concerning misrepresentations and disclosure are displaced by corporate obligations under the securities laws and would allegedly conflict with the prohibitions against insider trading. Defendants' Brief, at 75-76; Macy's Brief, at 18-23. Defendants, however, 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). Indeed, because insider trading requires the buying or selling of stock, it is never a violation of insider trading prohibitions to refuse to purchase additional stock. Condus v. Howard Sav. Bank, 781 F. Supp. 1052, 1056 (D. N.J. 1992). The Supreme Court also recognizes that ERISA's fiduciary duties impose "higher-than-marketplace quality standards." Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 115 (2008). Thus, corporate disclosure obligations to marketplace investors under the securities law are distinct from ERISA's higher-than-

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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").

marketplace standards imposed on behalf of participants in a plan that owns employer stock. E.g., Krohn, 173 F.3d at 547 ("a fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omissions were made negligently or intentionally"); Harzewski v. Guidant Corp., 489 F.3d 799, 805 (7th Cir. 2007) (ERISA does not require proof of fraud); see also Smith v. American Nat'l Bank and Trust Co., 982 F.2d 936, 943 (6th Cir. 1992) (distinguishing between fiduciary misrepresentation and securities fraud claims). 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); see generally Morton v. Mancari, 417 U.S. 535, 551 (1974) ("when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

Analogously, in NLRB v. Amax Coal Co., 453 U.S. 322, 330-333 (1981), the Supreme Court rejected the Third Circuit's alteration of ERISA's duty of loyalty through the creation of federal common law. The Third Circuit had ruled that because employers appointed the plan's trustees to be their "representatives" for collective bargaining purposes under the Labor Management Relations Act ("LMRA"), the trustees were obligated under the LMRA to serve the employers'

interests in ERISA plan administration despite their duty of loyalty to participants under ERISA. Id. at 328, 334. The Court, however, declined to dilute ERISA's loyalty requirement based on an asserted conflict with the LMRA. Id.

The defendants request this Court to dilute ERISA's fiduciary duties based on a presumed conflict, not with the LMRA, but with the securities law and its insider trading rules. Defendants' Brief, at 75-76. As in Amax, 453 U.S. at 336-337, the conflict in this case is more imagined than real because ERISA fiduciaries can, and indeed must, take action to prevent loss to participants in similar circumstances, and they may do so without running afoul of securities laws.

CONCLUSION

For these reasons, the Secretary respectfully requests that this Court affirm the district court's decision declining to grant the defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the fore going brief complies with the type-volume limitations provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 6,992 words of Times New Roman (14 point) regular type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

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Dated: May 20, 2011

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