No. 11-11608

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM B. FISCH, et al.,
Plaintiffs-Appellants,

v.

SUNTRUST BANKS, INC., et al.,
Defendants-Appellees,

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 Plaintiffs-Appellants

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TABLE OF CONTENTS

Page

Certificate of Interested Persons and
Corporate Disclosure Statement C-1of 4

Table of Authorities ii

Statement of Issues.. 1

The Secretary's Interest 1

Statement of the Case... 2

Summary of the Argument... 6

Argument.. 7

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM THAT DEFENDANTS VIOLATED THEIR DUTY OF PRUDENCE BY CONTINUING TO ALLOW INVESTMENTS IN SUNTRUST STOCK... 7

A. The Plaintiffs' allegations support a claim for breach if fiduciary duty of prudence that is district from the duty of diversification... 7

B. Plaintiffs' claim should not be dismissed on the basis of the presumption of prudence for investment in employer stock, which this Circuit should reject. 13

Conclusion 23

Certificate of Compliance

Certificate of Service

TABLE OF AUTHORITIES

Federal Cases:

Basic Inc. v. Levinson,
485 U.S. 224, 108 S. Ct. 978 (1988)..21

Chao v. Hall Holding Co.,
285 F.3d 415 (6th Cir. 2002)..19

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,
472 U.S. 559, 105 S. Ct. 2833 (1985) 19 n.7

DiFelice v. U.S. Airways, Inc.,
497 F.3d 410 (4th Cir. 2007)..16

Edgar v. Avaya, Inc.,
503 F.3d 340 (3d Cir. 2007)... 14 n.6, 15

Fink v. Nat'l Sav. & Trust Co.,
772 F.2d 951 (D.C. Cir. 1985) 9, 10

Galbraith v. County of Santa Clara,
307 F.3d 1119 (9th Cir. 2002)..21

Herman v. NationsBank Trust Co.,
126 F.3d 1354 (11th Cir. 1997).. 15, 18

Horton v. Reliance Standard Life Ins. Co.,
141 F.3d 1038 (11th Cir. 1998)..16

In re Ford Motor Co. Litig.,
590 F. Supp. 2d 883 (E.D. Mich. 2008).. 12, 18

In re SunTrust Banks, Inc. ERISA Litig.,
749 F. Supp.2d 1365 (N.D. Ga. 2010) .... 2 & passim

ITPE Pension Fund v. Hall,
334 F.3d 1011 (11th Cir. 2003)..14

Federal Cases--(continued):

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,
510 U.S. 86, 114 S. Ct. 517 (1993) 9

Kirschbaum v. Reliant Energy,
526 F.3d 243 (5th Cir. 2008) 11, 12, 14 n.6, 15

Konst v. Fla. E. Coast Ry. Co.,
71 F.3d 850 (11th Cir. 1996) 21

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995) .... 9 & passim

Martin v. Feilen,
965 F.2d 660 (8th Cir. 1992) 10, 19

Mertens v. Hewitt Assocs.,
508 U.S. 248, 113 S. Ct. 2063 (1993) 16

Miskel v. Karnes,
397 F.3d 446 (6th Cir. 2005) 21

Moench v. Robertson,
62 F.3d 553 (3d Cir. 1995) .... 2 & passim

Nachwalter v. Christie,
805 F.2d 956 (11th Cir. 1986) 16

Quan v. Computer Scis. Corp.,
623 F.3d 870 (9th Cir. 2010) 14 n.6, 15, 16

Sec'y of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) (en banc) 2

Smith v. Delta Air Lines, Inc.,
422 F. Supp. 2d 1310 (N.D. Ga. 2006) 12, 13

Swierkiewicz v. Sorema N.A.,
534 U.S. 506, 122 S. Ct. 992 (2002) 21

Federal Cases--(continued):

Texas Dep't of Community Affairs v. Burdine,
450 U.S. 248, 101 S. Ct. 1089 (1981) 21

State Cases:

First Ala. Bank, N.A. v. Spragins,
475 So. 2d 512 (Ala. 1985) 10

In Re Estate of Janes,
681 N.E. 2d 332 (N.Y. 1997) 10

Federal Statutes:

Employee Retirement Income Security Act of 1974 (Title I),
as amended, 29 U.S.C. § 1001 et seq.:

Section 2(a), 29 U.S.C. § 1001(a) 7, 18

Section 2(b), 29 U.S.C. § 1001(b)...7

Section 3(21), 29 U.S.C. § 1003(21)...18

Section 401, 29 U.S.C. § 1101 1

Section 402(a), 29 U.S.C. § 1102(a) 18

Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A)...8

Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).......................... 8, 14, 16, 17

Section 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C) 8

Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).............. 8, 18, 18 n.7, 19 n.7

Section 404(a)(2), 29 U.S.C. § 1104(a)(2)...................................... 3 & passim

Section 407(d)(3), 29 U.S.C. § 1107(d)(3) 3, 9

Section 407(d)(6), 29 U.S.C. § 1107(d)(6) 8 n.4

Miscellaneous:

Fed. R. Evid. 301 21

Fed. R. App. P. 29(a) 2

Fed. R. Civ. P. 12(b)(6)..4

Restatement (Third) of Trusts § 205 cmt. e (2007) 20

U. S. Dep't of Labor Field Assistance Bulletin 2004-03 (Dec. 17, 2004) 20

STATEMENT OF ISSUES

This case, on interlocutory appeal, involves allegations of fiduciary breach brought by participants in the SunTrust Banks, Inc. 401(k) Savings Plan ("Plan") concerning the Plan's investment in SunTrust stock. The questions presented in plaintiffs' appeal (No. 11-11608) are:

1. Whether plaintiffs' claim that defendants were imprudent in maintaining SunTrust stock as an investment option was a diversification claim barred by ERISA where plaintiffs had alleged that the price of the stock was artificially inflated and investment in it was unduly risky.

2. Whether, if plaintiffs' claim is proper under ERISA, defendants are entitled to a rebuttable presumption that they acted prudently by investing in employer stock.[1]

THE SECRETARY'S INTEREST

As the head of the federal agency with primary responsibility for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 et seq., the Secretary of Labor has a strong interest in ensuring that courts correctly

[1] Defendants' cross-motion for interlocutory appeal was also granted (No. 11-11607). The issue in that appeal is whether defendants, as Plan fiduciaries, had an affirmative duty to disclose accurate information about the financial condition of SunTrust to participants in the Plan. We will file a separate brief on that issue after plaintiffs-cross-appellees file their response to the defendants-cross-appellants' opening brief.

interpret the statute. See Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc). Here, the Secretary has a strong interest in asking this Court to correct two aspects of the district court's decision, In re SunTrust Banks, Inc. ERISA Litig., 749 F. Supp. 2d 1365 (N.D. Ga. 2010). First, the court misinterpreted plaintiffs' claim for breach of the duty of prudence as instead alleging a breach of the duty to diversify, therefore erroneously concluding that the claim is barred by ERISA. Second, in correctly rejecting a presumption of prudence, first established by the Third Circuit in Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), that the Eleventh Circuit has not adopted, the court relied on erroneous reasoning. The Secretary submits this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

1. SunTrust Banks, Inc. is a lender with billions of dollars in residential real estate loans and home equity lines of credit, largely in the southeastern United States. Compl. ¶¶ 147-51. The ten individuals who filed this suit are participants in the SunTrust Plan whose Plan accounts held shares of SunTrust stock. Id. ¶¶ 20-29. They purport to represent a class of persons who were participants in or beneficiaries of the Plan, and whose accounts included investments in SunTrust stock, at any time between May 15, 2007 and the present ("class period"). Id. ¶ 10; SunTrust, 749 F. Supp. 2d at 1368. Defendants are various individuals and entities

associated with the Plan, including SunTrust, company directors, and the SunTrust Benefits Plan Committee. Compl. ¶¶ 30-64; SunTrust, 749 F. Supp. 2d at 1368-69.

The Plan is a defined contribution plan that provides for matching contributions and allows participants to direct and manage the allocation of funds in their individual accounts among investment options selected by the Plan Committee. Compl. ¶¶ 65, 72, 74. The Plan mandated that SunTrust stock be included as an investment option for Plan participants. SunTrust, 749 F. Supp. 2d at 1368. Under ERISA, an individual account plan that is either invested primarily in employer stock or that, as here, provides explicitly for the acquisition and holding of such stock is an eligible individual account plan ("EIAP"). 29 U.S.C. § 1107(d)(3). ERISA exempts EIAPs from its diversification provision with respect to employer stock but does not otherwise exempt fiduciaries of EIAPs from its prudence requirements. Id. § 1104(a)(2).

Throughout the class period, SunTrust stock was an investment option for Plan participants. Compl. ¶ 75. At the end of 2006, approximately 49% of the Plan's assets were invested in SunTrust stock. Id. ¶ 76.

According to plaintiffs' complaint, as the mortgage market collapsed in 2007, SunTrust repeatedly made public representations that it had taken a "disciplined approach to credit risk management" such that it was not exposed to risk of significant loss. Id. ¶¶ 140, 154-57, 163, 200. These representations "boosted" the price of SunTrust stock. Id. ¶¶ 156, 158. Plaintiffs allege, however, that in fact SunTrust had invested heavily in subprime and other risky mortgages, so the representations were false and the resulting increase in stock price was inflated or artificial. Compl. ¶¶ 146, 148, 153-57. Because of SunTrust's risky lending practices, according to plaintiffs' complaint, "Defendants knew or should have known that SunTrust's stock price would suffer immensely." Id. ¶ 157. Defendants allegedly did not, however, inform Plan participants of the risk of investing in SunTrust stock. Id. ¶ 253. Plaintiffs allege that SunTrust's reassurances that it had taken a conservative approach artificially inflated the stock price to $77.69 on the first day of the class period before it dropped, following revelations about SunTrust's true financial status, to $20.99 on October 23, 2009 – a decline of 73%. Id. ¶ 237.

Plaintiffs filed suit against defendants on July 11, 2008. Their complaint included various claims of fiduciary breach. Of relevance here is one of those claims, which plaintiffs asserted against all defendants: breach of the fiduciary duty of prudence for maintaining SunTrust stock as an investment option for Plan participants and thereby failing to protect participants from losses, id. ¶¶ 270-71, which the district court called the "Investment Claim," SunTrust, 749 F. Supp. 2d at 1369. Defendants moved to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

2. The district court granted defendants' motion to dismiss the imprudent investment claim. The court held that, even though plaintiffs did not directly allege that defendants failed to diversify the Plan, their allegations of imprudence nevertheless amounted to a diversification claim. SunTrust, 749 F. Supp. 2d at 1373-74.[2] The Plan, as an EIAP with employer stock holdings, was exempt from diversification claims under ERISA section 404(a)(2), 29 U.S.C. § 1104(a)(2).[3] Id. In dismissing the claim as barred by that exemption, the court observed that "the rebuttable presumption framework set forth in Moench v. Robertson," which it said "runs counter to the plain language of ERISA," does not apply because ERISA permits no claim for breach of the duty of diversification and therefore "there need be no presumption regarding the facts underlying such a claim." SunTrust, 749 F. Supp. 2d at 1374 (citing other Northern District of Georgia decisions). Although the point did not affect the dismissal, the court noted, however, that "Plaintiffs'

[2] The court first dismissed the investment claim against all defendants other than the Plan Committee, concluding that because SunTrust and other named defendants did not select plan investments—only the Plan Committee had that authority—they were not fiduciaries for purposes of this claim. SunTrust, 749 F. Supp. 2d at 1373.

[3] Section 404(a)(2) provides that "[i]n the case of an eligible individual account plan . . . , the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities." 29 U.S.C. § 1104(a)(2).

argument that it was imprudent to continue to hold or further invest in SunTrust stock in light of the facts alleged in the Complaint is persuasive." Id. at 1374 n.9.

Plaintiffs filed a motion for interlocutory appeal as to the dismissal of the investment claim. After the district court certified its decision for interlocutory appeal, this Court accepted it for review, together with a cross-motion by defendants that is being separately briefed. See supra, n.1.

SUMMARY OF THE ARGUMENT

The district court erred with respect to plaintiffs' investment claim. First, the court misconstrued plaintiffs' allegations as constituting a claim for failure to diversify investments. ERISA allows, and plaintiffs pled, a claim for breach of the fiduciary duty of prudence based on an imprudent selection of an unreasonably risky investment option for the SunTrust Plan. That the Plan is an EIAP does not immunize defendants from this type of claim, nor turn a claim that the fiduciaries overpaid for stock they, as company insiders, knew or should have known to be inflated into a claim that they merely failed to diversify the Plan's holdings in that stock.

Second, although the court correctly concluded that Moench does not apply to plaintiffs' claim, its rationale was flawed. The presumption of prudence adopted in Moench, and variations on it adopted by other courts, is inconsistent with ERISA because such presumption deviates from the statute's explicit prudence standard without any legal basis and, as construed by some courts, thereby impermissibly heightens the pleading standard participants in EIAPs must meet. The presumption is inconsistent with ERISA not because it assumes the existence of statutorily barred diversification claims against fiduciaries of EIAPs but because application of the prudence requirement in the statute does not call for either a burden-shifting evidentiary standard or heightened pleading standard. Especially because it is never prudent for fiduciaries to knowingly pay too much for a plan asset, employer stock or otherwise, the district court should have permitted the plaintiffs' investment claim to go forward under the statutory prudence standard without employing the presumption of prudence framework favoring defendants.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM THAT DEFENDANTS VIOLATED THEIR DUTY OF PRUDENCE BY CONTINUING TO ALLOW INVESTMENT IN SUNTRUST STOCK

A. Plaintiffs' allegations support a claim for breach of the fiduciary duty of prudence that is distinct from the duty of diversification.

1. ERISA safeguards 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, section 404(a) of ERISA, titled "Prudent man standard of care," places a set of obligations on fiduciaries that embody the bedrock trust law duties of prudence and loyalty.

Id. § 1104(a). First, plan fiduciaries must act "for the exclusive purpose: of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." Id. § 1104(a)(1)(A). Second, fiduciaries must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Id. § 1104(a)(1)(B). Third, fiduciaries must "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." Id. § 1104(a)(1)(C). Finally, fiduciaries must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Titles I and IV of ERISA]." Id. § 1104(a)(1)(D).

ERISA includes one limited exception to these requirements: as to EIAPs, "the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of" employer stock. Id. § 1104(a)(2).[4] The SunTrust Plan appears to fall within the statutory definition of an EIAP because it is an individual account 401(k) savings plan that "explicitly provides for

[4] The same exception applies to Employee Stock Option Plans ("ESOPs"), a form of individual account plan that is designed to invest primarily in employer stock. 29 U.S.C. § 1104(a)(2); see also id. § 1107(d)(6) (defining ESOP). There is no suggestion that the Plan here is an ESOP.

acquisition and holding of" employer stock. Id. § 1107(d)(3) (defining EIAP); see also SunTrust, 749 F. Supp. 2d at 1368 (quoting Plan document provision requiring inclusion of the SunTrust stock fund as an investment option). Defendants are therefore exempt from the obligation to limit the percentage of Plan holdings invested in SunTrust stock. But see Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995) (adopting a presumption of reasonableness but concluding that "the Plan may not be interpreted to include a per se prohibition against diversifying an ESOP"); Moench, 62 F.3d at 669-70 (noting that courts "have held that notwithstanding ERISA's diversification provisions, an ESOP fiduciary must diversify if diversification is in the best interests of the beneficiaries" (citing, e.g., Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 955-56 (D.C. Cir. 1985))).

As is plain from the text of ERISA, however, defendants are not exempt from fulfilling the other responsibilities of fiduciaries, including the obligation to act prudently with respect to the Plan in all ways other than by diversifying assets. The statutory exemption's caveat that EIAP fiduciaries need not meet the prudence requirement "only to the extent that it requires diversification" can have no other meaning. 29 U.S.C. § 1104(a)(2) (emphasis added). Reading it otherwise would improperly expand the statutory exemption. See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 97, 114 S. Ct. 517, 524 (1993) (noting in discussing a different exemption within ERISA that courts are "inclined, generally, to tight reading of exemptions from comprehensive schemes of this kind," and that "when a general policy is qualified by an exception, the Court 'usually read[s] the exception narrowly in order to preserve the primary operation of the [policy]'" (citation omitted)). The diversification exemption does not relieve a fiduciary of the obligation to "discharge his duties respecting the plan solely in the interests of plan participants and beneficiaries and in a prudent fashion." Kuper, 66 F.3d at 1458; accord Martin v. Feilen, 965 F.2d 660, 665 (8th Cir. 1992); Fink, 772 F.2d at 955; see also In Re Estate of Janes, 681 N.E. 2d 332, 336-38 (N.Y. 1997) (differentiating between the "hazard" of concentration that diversification protects and other risks of loss that prudence safeguards); First Ala. Bank, N.A. 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). Thus, the requirement of prudently selecting investment options remains as to EIAPs even though fiduciaries of such plans are not bound to diversify those investments.

2. The district court erred by construing plaintiffs' investment claim as asserting a failure to diversify Plan assets. Plaintiffs do not allege that defendants should have purchased different stock to diversify the plan's assets. Rather, they allege that defendants' purchase of any SunTrust stock at an artificially inflated price boosted by misrepresentations of SunTrust's financial condition and lending

practices was imprudent, and that holding on to the stock during the class period was likewise imprudent in light of defendants' knowledge of SunTrust's heavy investments in subprime and other risky mortgages. Compl. ¶¶ 146, 148, 153-57, 265-74. According to plaintiffs' complaint, for instance, defendants knew or should have known that SunTrust falsely portrayed itself as having a "disciplined approach to credit risk management" that shielded it from the mortgage and credit crisis affecting other banks, which raised the price of SunTrust stock. Id. ¶¶ 140, 154-58, 163, 200; see also id. ¶¶ 270-73 (alleging that "SunTrust Stock was not a suitable and appropriate investment for the Plan," because "Defendants failed to take into account the changing risk profile of the SunTrust Stock investment as a result of . . . the Company's deteriorating financial circumstances"). These allegations amount to a claim that investing in even one share of SunTrust stock violated the duty of prudence, regardless of the extent of the Plan's overall holdings. Diversification is therefore not the issue here, and the district court erred in failing to recognize the distinction between plaintiffs' claim and one based on failure to diversify.

The district court's conclusion is contrary to a multitude of existing precedent. Many circuit and district courts have considered claims under ERISA for fiduciary breach alleging imprudent selection or retention of employer stock as an investment option for EIAPs. See, e.g., Kirschbaum v. Reliant Energy, 526

F.3d 243, 249 (5th Cir. 2008) (addressing a claim that it was imprudent for fiduciaries of an EIAP to continue to permit investment in employer stock where the price of that stock was allegedly artificially inflated by first noting that the relevant count of plaintiffs' complaint "states a claim for more than failure to diversify"); Kuper, 66 F.3d at 1459 (adopting a presumption to be used in considering claims for breach of the duty of prudence when plaintiffs allege that the fiduciary of a plan investing primarily in employer stock has continued to so invest when changed circumstances had made such investment imprudent); Moench, 62 F.3d at 571 (creating similar presumption for such circumstances); In re Ford Motor Co. Litig., 590 F. Supp. 2d 883, 901 (E.D. Mich. 2008) (describing plaintiffs' claim for breach of the duty of prudence against fiduciaries of an ESOP and explaining that the claim is not barred by the diversification exemption).[5] But no circuit court has endorsed the theory that these claims are barred because they are masked diversification claims.

Furthermore, the district court's reliance on a district court case, Smith v. Delta Air Lines, Inc., 422 F. Supp. 2d 1310 (N.D. Ga. 2006), was misplaced. Smith rejected the reasoning of various circuit courts in favor of what it called a

[5] Moreover, as discussed infra, pp. 19-20, ERISA fiduciaries have a responsibility, separate from the duty to diversify and pursuant to the duties of prudence and loyalty, to avoid knowingly overpaying for assets. The loss resulting from such overpayment is neither caused by a diversification violation, nor would it be corrected by diversifying the diminished pool of assets into other investments.

"strict application of [29 U.S.C. §] 1104(a)(2)," the exemption to the diversification requirement for EIAPs. Smith, 422 F. Supp. 2d at 1327-29. This reasoning, in addition to being contrary to the majority of existing precedent, is unpersuasive. It is not "strict" to read more into a statute than the plain meaning of its text bears. As explained, ERISA section 404(a)(2) specifically and explicitly exempts EIAP fiduciaries from the duty of prudence "only to the extent" that duty encompasses a requirement to diversify. 29 U.S.C. § 1104(a)(2) (emphasis added). Neither the opinion in Smith nor in this case explains how allegations of imprudent investment are in fact disguised allegations of a failure to diversify. The facts support the opposite conclusion. The validity of plaintiffs' claim that the stock purchases were imprudent does not turn on the size of the purchases, their relationship to the Plan's other investments, or the degree of the Plan's diversification or lack of diversification as a result of the purchases. If plaintiffs' allegations are true, the stock purchases were imprudent regardless of the Plan's level of concentration in employer stock or the risks posed by the lack of diversification.

B. Plaintiffs' claim should not be dismissed on the basis of the presumption of prudence for investment in employer stock, which this Circuit should reject.

The presumption of prudence adopted by the Third Circuit provides that "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision." Moench, 62 F.3d at 571. This Circuit, which has yet to decide whether to adopt such a presumption, should reject it as inconsistent with ERISA and, in any event, inappropriate in a case alleging that fiduciaries knowingly overpaid for employer stock at an inflated price.

1. Although some circuits have adopted a presumption of prudence where EIAP fiduciaries invest in employer securities, this Court should decline to do so.[6] The presumption has no basis in the text of ERISA. As explained above, ERISA section 404 sets forth clear and high standards of fiduciary duty. 29 U.S.C. § 1104(a)(1)(B) (requiring a fiduciary to "discharge his duties with respect to the plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"); see also ITPE Pension Fund v. Hall, 334 F.3d 1011, 1013 (11th Cir. 2003) ("The responsibility attaching to fiduciary status has been described as 'the highest known to law.'" (citation omitted)). This high standard "applies to all employee

[6] With some variations in scope and application, the Fifth, Sixth, and Ninth Circuits have adopted the presumption. See Kirschbaum v. Reliant Energy, 526 F.3d 253, 254 (5th Cir. 2008); Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995); Quan v. Computer Scis. Corp., 623 F.3d 870, 883-86 (9th Cir. 2010). The Third Circuit reaffirmed Moench's presumption, and in some respects extended it, in Edgar v. Avaya, 503 F.3d 340, 345-48 (3d Cir. 2007).

benefit plans," including plans that provide for non-diversified investment in employer stock. Herman v. NationsBank Trust Co., 126 F.3d 1354, 1360 (11th Cir. 1997) (emphasis added).

Application of a presumption of prudence to investment by EIAPs in employer stock effectively substitutes a new standard governing fiduciary conduct for the prudence standard the statute mandates. Rather than simply assess whether plan fiduciaries acted prudently when they invested in employer stock, as the statute provides, the courts that have adopted the presumption have typically fashioned a new, significantly lower, standard for assessing fiduciary conduct. See Quan v. Computer Scis. Corp., 623 F.3d 870, 882 (9th Cir. 2010) (applying a standard under which "[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment" but rather the plaintiff must also plead and show dire circumstances, such as a threat to the viability of the company or the loss of almost all of the stock's value); Kirschbaum, 526 F.3d at 255 (holding that where "[t]here is no indication that [the employer]'s viability as a going concern was ever threatened, nor that [its] stock was in danger of becoming essentially worthless," the presumption of prudence was not rebutted); Edgar v. Avaya, Inc., 503 F.3d 340, 348 (3d Cir. 2007) (holding that a decrease in stock price following an announcement of lower earnings than the employer had projected despite having information that allegedly made the projection unreasonable did not "create[] the type of dire situation" that would rebut the presumption of prudence).

Under ERISA § 404(a)(1)(B), however, a plaintiff states a claim simply by alleging facts sufficient to show that the fiduciary failed to act prudently. Thus, the Ninth Circuit erred when it held that plaintiffs must prove "more than that the company's stock was not a 'prudent' investment." Quan, 623 F.3d at 882. The creation of a new standard in contravention of the statutory standard is error. See DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 422-23 (4th Cir. 2007) ("ERISA itself sets forth the only test of a fiduciary's duties."). Adopting a presumption of prudence to displace a statutory standard amounts to the inappropriate creation of federal common law. See Mertens v. Hewitt Assocs., 508 U.S. 248, 259, 113 S. Ct. 2063, 2070 (1993) ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." (citation omitted)); Horton v. Reliance Standard Life Ins. Co., 141 F.3d 1038, 1041 (11th Cir. 1998) (explaining that courts may only adopt federal common law where ERISA is silent and in advancement of "ERISA's scheme and goals" of "protection of the interests of employees and their beneficiaries" and "uniformity in the administration of employee benefit plans" (citations omitted)); Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986) (holding that "we cannot create federal common law" where "ERISA specifically addresses the issue before this court"). Where, as here, the district court found the plaintiffs' allegations of imprudence to be "persuasive," SunTrust, 749 F. Supp. 2d at 1374 n.9, there is no room in ERISA for the court to nevertheless presume away the violation.

Neither ERISA's text nor its remedial purposes suggest that a prudent fiduciary would ignore all but the most dire financial circumstances in making investment decisions. There is no reference to "imminent collapse" or "dire circumstances" in the statute, and nothing to suggest that fiduciaries are under any circumstances authorized to act heedless of all but the most catastrophic risks. In this case, "a prudent person acting in a like capacity and familiar with such matters," 29 U.S.C. § 1104(a)(1)(B), would not have invested in SunTrust stock if, as alleged, he knew or should have known that the stock was artificially inflated, investors were being materially misled, and the stock was unduly risky. Applying the statutory standard, the plaintiffs stated a claim. There is no basis for the Court to substitute a new, less protective standard for the one expressly set forth in the statute.

Furthermore, if defendants argue to this Court, as they did below, that the Plan documents leave fiduciaries no discretion regarding investment in SunTrust stock, this argument too must fail. Defendants' position is directly inconsistent with ERISA, which requires that plan fiduciaries follow plan documents only "insofar as such documents and instruments are consistent with the provisions" of the statute. 29 U.S.C. § 1104(a)(1)(D). Thus, as this Court, among others, has recognized, a fiduciary must "disregard any . . . plan provision controlling the disposition of plan assets which leads to an imprudent result." Herman, 126 F.3d at 1369 n.15; see also Kuper, 66 F.3d at 1457; Moench, 62 F.3d at 569 ("[C]ases addressing the duties of ESOP fiduciaries in this area generally have allowed ERISA's strict standards to override the specific policies behind ESOPs."). Moreover, eliminating fiduciary responsibility for all decisions to invest in company stock whenever plan documents require such investment, thereby immunizing fiduciaries from liability for even the most imprudent and disloyal investments, would leave plans without functioning fiduciaries with respect to the fundamental purpose of safeguarding plan assets for the protection of participants' retirement funds. 29 U.S.C. §§ 1001(a), 1003(21), 1102(a); cf. In re Ford, 590 F. Supp. 2d at 889 ("ERISA would be almost impotent if it permitted settlors to exempt their fiduciaries from its requirements with a simple stroke of the pen.").[7]

[7] For this reason, we disagree with the focus in Moench and other cases adopting the presumption as to whether continued investment in company stock is consistent with the plan sponsor's intent. See Moench, 62 F.3d at 571 (stating that the plaintiff must show that the plan's fiduciaries "could not have believed reasonably that continued adherence to the [plan document]'s direction was in keeping with the settlor's expectation of how a prudent trustee would operate"). Such an approach draws on an inapt analogy to private-law trusts, such as spendthrift trusts, unilaterally established by a settlor for one or more beneficiaries. Because ERISA is a federal law designed to protect the benefits that workers have earned, settlor intent is not preeminent; instead section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), prohibits fiduciaries from following plan provisions that would violate Title I of

2. Even if a presumption in favor of the purchase of employer stock would be appropriate in some cases, it would be inappropriate here, where the Plan invested in employer stock at an allegedly artificially high price based on misrepresentations about the company's financial status that defendant-fiduciaries knew or should have known about. Overpayment for stock artificially inflated in value is categorically imprudent. When plan fiduciaries cause a plan to pay too much for stock, the amount of the overpayment is a dead loss to the plan. As a result of the overpayment, the plan has fewer assets than it otherwise would have had, regardless of whether the plan buys one share of stock or many shares. See Chao v. Hall Holding Co., 285 F.3d 415, 442-43 (6th Cir. 2002) ("At the time the ESOP acquires the stock, it is in the ESOP participant's best interest to do so at the lowest price possible. The lower the price of the stock, the more shares that can be purchased by the ESOP, assuming the investor will invest the same amount without regard to the price per share. Further, a higher return on investment can be generated with a lower purchase price."); Feilen, 965 F.2d at 671 (holding that fiduciaries breached their duties under ERISA by, inter alia, "pa[ying] too much

ERISA, including their duty of prudence. Under the plain language of section 404(a)(1)(D), "a fiduciary may only follow plan terms to the extent that the terms are consistent with ERISA." Kuper, 66 F.3d at 1457. In other words, "trust documents cannot excuse trustees from their duties under ERISA." Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 568, 105 S. Ct. 2833, 2839 (1985); cf. In re Ford, 590 F. Supp. 2d at 918 ("ERISA would be a dead letter if fiduciaries could simply replace the actual standards imposed by ERISA with a less onerous one of their own making.").

for the [employer] stock purchased"); Restatement (Third) of Trusts § 205 cmt. e (2007) (explaining 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"); cf. U.S. Dep't of Labor Field Assistance Bulletin 2004-03 (Dec. 17, 2004) (stating that a directed trustee cannot, with knowledge of material misrepresentations that significantly inflate a company's earnings, "simply follow a direction to purchase that company's stock at an artificially inflated price").

Here, the complaint plausibly asserts that defendants knew or should have known that SunTrust had made risky loans and was therefore in a precarious financial situation, but as a result of misrepresenting that the bank had made only conservative loans, the price of SunTrust stock was artificially high. Compl. ¶¶ 140, 146, 148, 154-57, 163, 200. Accordingly, plaintiffs have sufficiently stated a claim that defendants breached the duty of prudence bestowed on them under the Plan and by ERISA.

3. Even if the presumption of prudence for investment in employer stock applies to the SunTrust Plan, the evaluation of whether plaintiffs rebutted that presumption should not occur until they have had an opportunity to develop their evidence. As applied to judicially created presumptions, "'[t]he word "presumption" properly used refers only to a device for allocating the production

burden.' . . . Usually, 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 Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8, 101 S. Ct. 1089, 1095 n.8 (1981) (emphasis added) (citation omitted); see also Basic Inc. v. Levinson, 485 U.S. 224, 245, 108 S. Ct. 978, 990-91 (1988) ("[P]resumptions are . . . useful devices for allocating the burdens of proof between parties."); Miskel v. Karnes, 397 F.3d 446, 455 (6th Cir. 2005) ("Presumptions 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); Fed. R. Evid. 301 ("In 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, but 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."); cf. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 998 (2002) (explaining that because "[t]he prima facie case under [the burden-shifting framework applied in Title VII discrimination cases] operates as an evidentiary standard, not a pleading requirement, it should not be transposed into a rigid pleading standard"); Konst v. Fla. E. Coast Ry. Co., 71 F.3d 850, 851 n.1 (11th Cir. 1996) (explaining 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).

Consistent with this general law, the presumption of prudence as envisioned in Moench and Kuper is properly understood as an evidentiary standard, not a pleading requirement. Kuper, 66 F.3d at 1460 ("On the other hand, defendants presented evidence . . . ."); Moench, 62 F.3d at 571 ("In attempting to rebut the presumption, the plaintiff may introduce evidence . . . ."). Therefore, courts misunderstand the function of presumptions and misapply Moench when they invoke the presumption of prudence, or find a failure to rebut, to dismiss otherwise plausible claims of imprudence on the pleadings. Instead, 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. Accordingly, it would be improper to apply the presumption of prudence in ruling on defendants' motion to dismiss.

CONCLUSION

For these reasons, the portion of the district court's decision dismissing plaintiffs' investment claim should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,566 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that one copy of the foregoing Brief of the Secretary of Labor As Amicus Curiae in Support of the Plaintiffs-Appellants were served by UPS overnight courier service, this 15th day of July, 2011, upon:

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