No. 11-11607

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

v.

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

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate and Special Litigation

SARAH KAY MARCUS
Attorney
U.S. Department of Labor
Office of the Solicitor
P.O. Box 1914
Washington, D.C. 20013
(202) 693-5696

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Breeden, Frances L.

Borzi, Phyllis C., Assistant Secretary for Employee Benefits Security of the United States Department of Labor

Castle, Steve

Chancy, Mark A.

Ciolko, Edward W.

Clay, Danielle

Correll, Alston D.

Dierker, David F.

Duffy, Caitlin

Erwin, Dennis

Fearon, Stephen J., Jr.

Fisch, William B.

Fistel, Michael I., Jr.

Gainey & McKenna

Goljan, Joseph

Gyandoh, Mark K.

Hauser, Timothy D., Counsel for Amicus Curiae Department of Labor

Hart, Milledge A.

Hellman, Paul J.

Holzer, Corey D.

Holzer Holzer & Fistel, LLC

Houghton, Kenneth

Hughes, David H.

Humann, L. Phillip

Ivester, M. Douglas

Kapilashrimi, Sunil

Kessler Topaz Meltzer & Check, LLP

Klein, Michael J.

Kuntz, Thomas G.

Lange, Donna D.

Lanier, J. Hicks

Lienhard, Jerome T., II

Marcus, Sarah K., Counsel for Amicus Curiae Department of Labor

Martin, Judge Beverly B.

McKenna, Thomas J.

Meltzer, Joseph H.

Miller, Gregory L.

Mills, Edwin J.

Minor, G. Gilmer, III

Panther, Thomas E.

Pickens, Betty L.

Prince, Larry I.

Reagan, Phyllis

Rogers, William H., Jr.

Royal, Frank S.

Shults, Christopher J.

Smith, M. Patricia, Solicitor of Labor

Smothermon, Donna

Solis, Hilda, U.S. Secretary of Labor

Spiller, Nathaniel I., Counsel for Amicus Curiae Department of Labor

Stone, William W.

Story, Judge Richard W.

Stull, Stull & Brody

Squitieri & Fearon, LLP

SunTrust Banks, Inc. (STI)

SunTrust Banks, Inc. 401(k) Plan

SunTrust Banks, Inc. 401(k) Plan Committee

SunTrust Investment Sub-Committee

The SunTrust Board of Directors

Trau, Chrys

Verrilli, Donald B., Jr., Solicitor General

Wells, James M., III

Whisby, Demetria

Dated: August 12, 2011

/s/ Sarah Kay Marcus
SARAH KAY MARCUS

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STATEMENT OF THE ISSUE

This case, on interlocutory appeal, involves claims 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 question presented in defendants' appeal (No. 11-11607) 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.[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 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 uphold the district court's correct decision in In re SunTrust Banks, Inc. ERISA Litig., 749 F. Supp. 2d 1365 (N.D. Ga. 2010), refusing to dismiss a claim that ERISA Plan fiduciaries breached their duties by failing to disclose to Plan participants information regarding SunTrust's precarious financial status and the

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[1] Plaintiffs' cross-motion for interlocutory appeal was also granted (No. 11-11608). The Secretary previously filed an amicus brief in support of plaintiffs' opening brief addressing the issues raised in that appeal.

resulting high risk of investing in SunTrust stock. 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.[2] Accordingly, 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, including at investor conferences on May 15 and November 15, 2007, that it had taken a "disciplined approach to credit risk management" such that it was not exposed to risk of significant loss. Compl. ¶¶ 140, 154-57, 163, 200. These representations allegedly "boosted" the price of SunTrust stock. Id. ¶¶ 156, 158. But Plaintiffs assert 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. Id. ¶¶ 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

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[2] 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).

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 duties of prudence and loyalty for failing to disclose the risk of investing in SunTrust, Compl. ¶¶ 269, 274, which the district court called the "Participant Disclosure Claim," SunTrust, 749 F. Supp. 2d at 1369. Defendants moved to dismiss plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(6).

2. The district court denied defendants' motion to dismiss as to the participant disclosure claim. The court rejected defendants' argument that the claim was barred because ERISA does not impose a broad duty of disclosure. SunTrust, 749 F. Supp. 2d at 1376-77. Although in one Northern District of Georgia case, the court had held that "there is no general fiduciary duty of disclosure under ERISA," id. at 1376 (quoting Mellot v. ChoicePoint, Inc., 561 F. Supp. 2d 1305, 1318 (N.D. Ga. 2007), vacated pursuant to settlement), the district court here was persuaded by "other decisions from this District [that] have allowed such claims to proceed," id. at 1377 (citing In re Coca-Cola Enters. Inc. ERISA Litig., Master File No. 1:06-CV-0953, 2007 WL 1810211, at *11, 14 (N.D. Ga.

June 20, 2007); Hill v. BellSouth Corp., 313 F. Supp. 2d 1361, 1368-69 (N.D. Ga. 2004)).

The court also rejected defendants' argument that a statement in the summary plan description that the employer stock fund was "'a high risk investment' that 'carrie[s] more risk than the other investment options because it depends on the performance of only one company'" satisfied defendants' duty of disclosure. Id. The court concluded that "this warning . . . cannot satisfy Defendants' duty to disclose material negative information to Plan Participants, particularly when, as Plaintiffs allege, Defendants were aware of the deteriorating nature of the Company and its Stock." Id.[3]

Defendants filed a motion for interlocutory appeal of the denial of its request for dismissal of the participant disclosure claim. After the district court certified its decision for interlocutory appeal, this Court accepted it for review, together with a cross-motion by plaintiffs that is being separately briefed. See supra, n.1.

[3] Although the court declined to dismiss this portion of plaintiffs' complaint with regard to the other defendants, it dismissed the participant disclosure claim against SunTrust because it believed the company was not a Plan fiduciary for this purpose. SunTrust, 749 F. Supp. 2d at 1378. The district court also dismissed plaintiffs' "False Information Claim," which rested on allegations that defendants incorporated misleading representations in the company's SEC filings into Plan documents, because "[e]ven assuming that an ERISA claim may be based on false and misleading SEC filings incorporated into Plan documents, Plaintiffs' Complaint fails to identify any false or misleading statements contained within any of the incorporated SEC filings." Id. at 1375-76 & n.13. No party has appealed these portions of the district court's opinion.

SUMMARY OF THE ARGUMENT

The district court was correct to decline to dismiss plaintiffs' participant disclosure claim. Under ERISA, defendants were obligated to truthfully communicate to participants' information material to the protection of their Plan investments. Defendants' arguments to the contrary do not have merit. Here, plaintiffs plausibly alleged that defendants not only failed to adequately warn Plan participants of the risk of investing in SunTrust stock, but also misled them concerning that risk. They have therefore sufficiently stated a claim that defendants failed to adhere to their disclosure obligations as fiduciaries under ERISA. Defendants will have ample opportunity to marshal evidence and defend against this claim on the merits, but they were properly denied dismissal on the pleadings.

ARGUMENT

THE DISTRICT COURT CORRECTLY DECLINED TO DISMISS PLAINTIFFS' CLAIM ARISING FROM DEFENDANTS' FAILURE TO DISCLOSE INFORMATION TO PLAN PARTICIPANTS

1. ERISA includes an affirmative duty to inform participants of material, harmful facts

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). Plan fiduciaries must, accordingly, act with complete loyalty toward participants and beneficiaries, and "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).

This duty to act prudently, in the exclusive interest of participants and beneficiaries, applies to the fiduciaries' disclosure obligations as well as to their management of plan investments. As acknowledged by this Court, under ERISA, a fiduciary has "a negative duty not to misinform" and also "an affirmative duty to inform when the trustee knows that silence might be harmful." Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1016 n.10 (11th Cir. 2003) (citation omitted); see also id. ("[A]n ERISA fiduciary . . . has an affirmative duty to communicate material facts to the beneficiary which will allow for an informed decision." (citation omitted)); Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1072 (11th Cir. 2004) (reaffirming that "an ERISA participant has a right to accurate information, and that an ERISA plan administrator's withholding of information may give rise to a cause of action for breach of fiduciary duty" (citation omitted)). This duty is in accordance with the common law of trusts: a trustee "is under a duty

to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person." Restatement (Second) of Trusts § 173, cmt. d (1959).

Other Circuits have similarly recognized fiduciaries' obligation to disclose material information necessary to protect plan participants from injury. Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750-51 (D.C. Cir. 1990) ("The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA. . . . A fiduciary has a duty not only to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the [fiduciary] relationship. For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer."); accord Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 644 (8th Cir. 2007); Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 115 (1st Cir. 2002); Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d 371, 380 (4th Cir. 2001); Krohn v. Huron Memorial Hosp., 173 F.3d 542, 548 (6th Cir. 1999); Barker v. American Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995); Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3rd Cir. 1993); Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991-92 (7th Cir. 1993).

Under this controlling case law, plaintiffs' allegations are sufficient to survive a motion to dismiss. The complaint alleges that defendants failed to disclose to Plan participants negative information that they knew or should have known regarding SunTrust's heavy exposure to the subprime market; as a result, participants could not make informed decisions about whether to continue to invest in SunTrust stock. Compl. ¶¶ 253, 274. Accordingly, dismissal of this claim is not warranted. See Glaziers & Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171, 1181-82 (3d Cir. 1996) (holding that whether information a fiduciary did not disclose to plan participants was of the sort that "in the exercise of 'care, skill, prudence and diligence,' [the fiduciary] was required by Section 404(a) to disclose is a factual question to be determined by the fact finder"). Instead, discovery should be permitted to go forward, as the district court intends, regarding what the fiduciaries knew or should have known compared to what they said or omitted to say to plaintiffs during the class period about SunTrust's lending practices. Following discovery, the court may determine on the merits whether defendants violated their duties of prudence and loyalty as alleged in the participant disclosure claim.

2. The Court should not be persuaded by defendants' arguments to the contrary

a. ERISA's reporting requirements do not relieve fiduciaries of their duty to disclose

Defendants incorrectly assert that the formal reporting and disclosure obligations of ERISA sections 101 through 111, 29 U.S.C. §§ 1021-1031, limit the obligations of ERISA fiduciaries to disclose information to plan participants and beneficiaries. (Brief of Defendants-Appellants ("Def. Br.") at 14-19.) There simply is no such limitation in the text of ERISA's reporting provisions or in any other section of the Act, as is evident from defendants' failure to cite such statutory language. Instead, ERISA expressly imposes on plan fiduciaries broad obligations of prudence and loyalty, without any qualification of the sort defendants seek to invent. See 29 U.S.C. §§ 1104(a)(1)(A) and (B). Under these provisions, a prudent and loyal fiduciary could not simply stand mute while plan participants made critical plan investment decisions based upon information that the fiduciary knew to be incomplete and misleading. Accordingly, as explained above, numerous circuit court opinions make clear that ERISA's more general fiduciary obligations impose a duty on fiduciaries to disclose material information in appropriate circumstances. See supra, pp. 6-8; see also Hamilton v. Allen-Bradley Co., Inc., 244 F.3d 819, 827 (11th Cir. 2001) (holding that "failure to disclose information" to a plan participant "is . . . a breach of a fiduciary duty"). This

disclosure obligation accords with the common law of trusts, see supra, pp.7-8, and exists separately from, and in addition to, the specific reporting and disclosure duties that ERISA elsewhere imposes on plan administrators, such as the requirement to file annual reports or to furnish summary plan descriptions to plan participants.

Consistent with this precedent, in a recent regulation, the Secretary made clear that the scope of required disclosure is not limited by ERISA's reporting requirements. See Final Rule, Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,910 (Oct. 20, 2010) (preamble discussion 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").[4]

[4] The Secretary's view on this issue is entitled to deference. Cf. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 875, 877-80, 120 S. Ct. 1913, 1922-24 (2000) (deferring to an agency's comments in the preamble accompanying the promulgation of a rule).

b. Existing circuit court precedent does not compel dismissing plaintiffs' claim

Defendants point to two cases from other circuits, Edgar v. Avaya, Inc., 503 F.3d 340 (3rd Cir. 2007), and Howell v. Motorola, Inc., 633 F.3d 552 (7th Cir. 2011), in asking this Court to reverse the district court and hold that plan fiduciaries have no disclosure obligations outside of ERISA's specific reporting regime. (Def. Br. at 20-22.) In fact, however, these cases recognize the "affirmative duty to inform" that arises from ERISA section 404 fiduciary requirements. Edgar, 503 F.3d at 350 (quoting In re Unisys Sav. Plan Litig., 74 F.3d 420, 440 (3d Cir. 1996)); see also Howell, 633 F.3d at 571 ("A violation of ERISA's disclosure requirement . . . arises under the general fiduciary duties imposed by ERISA § 404(a)(1)"). To the extent Edgar (on the pleadings) and Howell (at summary judgment) nonetheless concluded that the plaintiffs in those cases had failed to adequately plead or prove violations of any such obligation, they are factually distinguishable from this case. Cf. Howell, 633 F.3d at 572 (distinguishing Seventh Circuit decisions finding sufficient evidence of disclosure violations).

Here, in contrast to Edgar and Howell, the district court denied defendants' motion to dismiss because plaintiffs specifically and plausibly alleged that defendants knew or should have known that SunTrust's stock price, and thus the value of plaintiffs' pensions, would decrease "immensely" because of SunTrust's

subprime loans and other risky lending practices but did not inform Plan participants of this significant risk, and indeed misled both the participants and the public. SunTrust, 749 F. Supp. 2d at 1366; Compl. ¶¶ 157, 253. Surely, if these allegations are true, this specific, known, high risk of loss is the sort of information that would affect the investment decisions of plan participants, and is thus material information that fiduciaries are duty-bound to disclose. Indeed, the need for disclosure is especially clear on the facts of this case, where plaintiffs have alleged that it was the defendants' own deliberate efforts to conceal SunTrust's problematic lending practices that created the risk of a falling stock price in the first place. Allowing plaintiffs an opportunity to prove the merits of their disclosure claim, as the district court decided was appropriate in light of plaintiffs' serious allegations of imprudent nondisclosure, fully comports with ERISA's participant-protective purposes and prudence requirements.[5] Accordingly, this Court not only has been given no reason to upset the district court's fact-based determination, but, as a legal matter, should emphatically decline defendants' invitation to dilute (if not implicitly overrule) the disclosure principle expressed in this Circuit's Ervast and Jones decisions.

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[5] Because Howell was decided at summary judgment, the plaintiffs in that case had the opportunity to prove the merits of their disclosure claim, but in the court's judgment failed to do so.

c. The securities-law disclosure regime has no bearing on the duties imposed by ERISA

The Court should also reject defendants' argument that ERISA-imposed disclosure requirements conflict and interfere with disclosure requirements under securities laws. (Def. Br. at 23-29.) As a general matter, "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." Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483 (1974); see also Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 705 (7th Cir. 2008) ("Unless one law expressly repeals or supersedes another, or the two create inconsistent demands, both must be enforced.").

The obligations and purposes of ERISA and the securities laws are completely congruent in the context of this case. Neither the securities laws nor ERISA permits regulated parties to mislead investors, and both legal regimes authorize full public disclosure of the true facts about a company's financial condition. See, e.g., Horton v. Reliance Standard Life Ins. Co., 141 F.3d 1038, 1041 (11th Cir. 1998) (referring to ERISA's goal of protecting the interests of plan participants and beneficiaries); SEC v. Sw. Coal & Energy Co., 624 F.2d 1312, 1318 (5th Cir. 1980) (describing one goal of the federal securities laws as "to promote or require sufficient disclosure of information to allow those in securities markets to make intelligent investment decisions"). Under both sets of laws,

taking action to ensure that SunTrust's exposure to subprime lending was fully and properly disclosed to the company's investors, including its Plan investors, would have constituted compliance. See In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 565-66 (S.D. Tex. 2003) (holding that plan fiduciaries can discharge their obligations under both ERISA and securities law by publicly disclosing material inside information); accord Pension & Emp. Stock Ownership Plan Admin. Comm. of Cmty. Bancshares, Inc. v. Patterson, 547 F. Supp. 2d 1230, 1247 (N.D. Ala. 2008); Kling v. Fidelity Mgmt. Trust Co., 323 F. Supp. 2d 132, 143 n.10 (D. Mass. 2004); In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig., 312 F. Supp. 2d 1165, 1182 (D. Minn. 2004). As the district court explained in Enron:

> Defendants' argument that despite the duty of loyalty, a fiduciary should make no disclosure to the plan participants, because under the securities laws he cannot selectively disclose nonpublic information, translates in essence into an argument that the fiduciary should both breach his duty under ERISA and, in violation of the securities laws, become part of the alleged fraudulent scheme to conceal Enron's financial condition to the continuing detriment of current and prospective Enron shareholders, which include his plan's participants. This Court does not believe that Congress, ERISA or the federal securities statutes sanction such conduct or such a solution, i.e., violating all the statutes and conning the public. As a matter of public policy, the statutes should be interpreted to require that persons follow the laws, not undermine them. They should be construed not to cancel out the disclosure obligations under both statutes or to mandate concealment, which would only serve to make the harm more widespread; the statutes should be construed to require, as they do, disclosure by Enron officials and plan fiduciaries of Enron's concealed, material financial status to the investing public generally, including plan participants, whether "impractical" or not, because continued silence and deceit would only

encourage the alleged fraud and increase the extent of injury.

In re Enron, 284 F. Supp. 2d at 565 (S.D. Tex. 2003).

Publicly disclosing information about the risks of SunTrust stock would have met ERISA's "higher-than-marketplace quality standards." Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 115, 128 S. Ct. 2343, 2350 (2008). ERISA's standards are, in any event, distinct from, yet consistent with, securities-law duties. See, e.g., Harzewski v. Guidant Corp., 489 F.3d 799, 805 (7th Cir. 2007) (explaining that the requirements for proving securities fraud and breach of fiduciary duty under ERISA are distinct); Krohn, 173 F.3d at 547 ("[A] fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements or omission were made negligently or intentionally.").[6]

Neither ERISA nor the securities laws require plan fiduciaries to cause the purchase of stock they know to be inflated by material misstatements, to mislead plan participants and the broader investing public, or to help conceal important information from investors. Defendants' suggestion that disclosure would have constituted prohibited insider trading (Def. Br. at 23-24) is incorrect insofar as they were not required to choose between silence or misleading participants and public investors, on the one hand, and, on the other, selectively disclosing the truth only

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[6] Defendants could also have alerted the appropriate regulatory agencies, such as the SEC and the Department of Labor, to the misrepresentations. See In re Enron, 284 F. Supp. 2d at 566 (S.D. Tex. 2003).

to Plan participants. Rather, to comply with their ERISA and securities-law duties, they need only have ensured public disclosure of SunTrust's subprime lending practices and refrained from additional purchases until the misinformation was corrected. See In re Enron, 284 F. Supp. 2d at 566; Condus v. Howard Sav. Bank, 781 F. Supp. 1052, 1056 (D.N.J. 1992); see also S.E.C. v. Adler, 137 F.3d 1325, 1333 (11th Cir. 1998) (explaining that under securities laws, "a corporate insider has a duty to disclose material nonpublic information or to abstain from trading on the information" (citation omitted)).

If the Plan's fiduciaries had publicly disclosed the truth about SunTrust's subprime lending practices, the Plan's participants may well have bought less SunTrust stock, and the stock they did buy would not have been artificially inflated by incomplete and misleading disclosures. Plan fiduciaries, therefore, harm plan participants by ignoring misleading and incomplete statements about a company's financial condition for the sake of maintaining the illusion of higher Plan asset values. Instead, such fiduciary misconduct can result in the continued purchase of stock at inflated prices (resulting in a clear overpayment loss); prevent the company and its officers from timely confronting and addressing the hard financial realities that they are trying to hide from the public; and simply postpone or exacerbate the day of reckoning that finally comes when the true facts come to light. Defendants' reliance on Edgar to further contend that, if the price of the

stock was artificially inflated by public misstatements, public disclosure would have caused a drop in the stock price that would lower the accounts of participants who were holding the stock (Def. Br. at 24), is accordingly misguided. In any event, the scope and amount of plaintiffs' losses are damage issues to be decided after the development of evidence, rather than on a motion to dismiss. The plaintiffs have adequately alleged a breach and resulting losses, and they should be permitted to proceed to discovery on the merits of their claims.

CONCLUSION

For these reasons, the portion of the district court's decision denying defendants' motion to dismiss as to plaintiffs' participant disclosure claim should be affirmed.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate & Special Litigation

/s/ Sarah Kay Marcus
SARAH KAY MARCUS
Attorney
U.S. Department of Labor
Plan Benefits Security Division
200 Constitution Ave. NW N-4611
Washington, DC 20210

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,243 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Sarah Kay Marcus
SARAH KAY MARCUS
Attorney

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CERTIFICATE OF SERVICE

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 12th day of August, 2011, upon:

Edward W. Ciolko
Mark K. Gyandoh
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087

David Tetrick, Jr.
Darren A. Shuler
Michael B. Wakefield
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309-3521

Michael I. Fistel, Jr.
William W. Stone
HOLZER HOLZER &
FISTEL, LLC
200 Ashford Center North
Suite 300
Atlanta, Georgia 30338

Stephen J. Fearon, Jr.
Caitlin Duffy
SQUITIERI & FEARON, LLP
32 East 57th Street, 12th Floor
New York, New York 10022

Edwin J. Mills
Michael J. Klein
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017

Dated: August 12, 2011

/s/ Sarah Kay Marcus
SARAH KAY MARCUS