CASE NO. 04-1082

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. TATUM, Individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

R. J. REYNOLDS TOBACCO CO., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REQUESTING REVERSAL OF THE DISTRICT COURT'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal cases: Page

Federal Statutes and Regulations:

Other Authorities:

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The amicus curiae, Secretary of the United States Department of Labor (the "Secretary") has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

The Secretary has a particular interest in this case because the district court's ruling undermines the fiduciary's duty under ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to decline to follow the terms of a plan if following them would require the fiduciary to breach his fiduciary duties.

On April 22, 2004, the court granted the Secretary leave to file this brief on or before May 7, 2004.

QUESTIONS PRESENTED

1. Whether amending a plan to require the sale of a particular plan asset is a fiduciary act within the meaning of ERISA section 3(21), 29 U.S.C. § 1002(21).

2. Whether a fiduciary has a duty under ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to ignore the terms of the plan document where those terms require him to violate his fiduciary duties under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

STATEMENT OF THE CASE

Until June 15, 1999, RJR Nabisco Holdings, Inc. ("RJRN") was the parent company of R. J. Reynolds Tobacco Co. ("RJRT"), R. J. Reynolds Tobacco Holdings, Inc. ("RJRTH"), and several Nabisco food companies. Tatum v. R. J. Reynolds Tobacco Co., 294 F. Supp. 2d 776, 778 (M.D. N.C. 2003).[1] The RJRN Capital Investment Plan (the "Plan") was a 401(k) pension plan that had several investment options from which the participants could choose, including the Nabisco Group Holdings Common Stock fund and the Nabisco Common Stock fund (collectively "the Nabisco stocks" or "Nabisco stock funds"). Id.

On June 15, 1999, RJRT and RJRTH were "spun-off" as separate companies. In anticipation of the spin-off, the Plan was amended on June 14, 1999, to create a separate plan known as the R. J. Reynolds Tobacco Capital Investment Plan (the "Tobacco Plan") for the employees of RJRT

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[1] Because it was ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the district court assumed, as we do here, that the allegations in the complaint were true.

and RJRTH after the separation. 294 F. Supp. 2d at 778. Under the terms of the Tobacco Plan, the Nabisco stocks held by the Tobacco Plan were to be "frozen" as of June 15, 1999. Id. With respect to the Tobacco Plan, the June 14, 1999 amendment provided that:

> The Trustee shall maintain the following separate Investment Funds within the Trust Fund: the Interest Income Fund, [the Nabisco stock funds], the Total International Fund, the Conservative Growth Fund, the Moderate Growth Fund and the Growth Fund. All Investment Funds under the Plan are active Funds; provided, however, the [Nabisco stock funds] are frozen and, as of the Effective Date, Participants are prohibited from investing contributions or reallocating amounts held under the Plan to such Funds. In addition, the Trustee shall maintain any other Investment Funds as are designated by the RJR Pension Investment Committee.

Id. at 783 (emphasis added).

In October 1999, the Tobacco Plan participants were notified that the frozen Nabisco stocks would be eliminated from the Tobacco Plan on January 31, 2000. 294 F. Supp. 2d at 778. On November 18, 1999, the Tobacco Plan was amended to specify the investment options effective on February 1, 2000. Id. at 779. The Nabisco stocks were not specified as options. Id. The November 18, 1999 amendment also provided that "the Trustees shall maintain any other Investment Funds as are designated by the RJR Pension Investment Committee." Id. at 783.

In the months after the June 1999 spin-off, the stocks substantially declined in value. 294 F. Supp. 2d at 779. Market analysts rated the stocks

as attractive and recommended that investors buy or hold the stocks. Id. The Tobacco Plan fiduciaries sold the Nabisco stocks on January 31, 2000, when their market prices had declined sixty and forty percent, to $8.50 per share and $30 per share respectively. Id. Because of these record low prices, the sale allegedly caused a substantial loss to the plan. Id. By late June 2000, the price of those stocks rose to $30 per share and $55 per share respectively. Id.

Richard Tatum brought a class action suit on behalf of himself and the other plan participants against the Tobacco Plan fiduciaries alleging that they violated their duties of prudence and loyalty under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), by selling the Plan's Nabisco stocks at a loss on January 31, 2000. 294 F. Supp. 2d at 779. Defendants moved to dismiss and argued that the complaint fails to state a claim because the challenged actions were not subject to ERISA's fiduciary duties or, alternatively, even if the challenged actions were subject to ERISA's fiduciary duties, the complaint fails to state a claim for breach of fiduciary duty. Id. at 780. The district court granted the motion to dismiss on the grounds that the challenged actions were not subject to ERISA's fiduciary duty provisions because they were "performed as part of settlor functions, and were not an exercise of fiduciary discretion." Id. at 783.

The district court began with the proposition that the act of creating or amending a plan is a settlor, not a fiduciary act. 294 F. Supp. 2d at 782, citing Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996). Accordingly, the June 14, 1999 amendments to the original Plan that created the Tobacco Plan and the November 18, 1999 amendment to the Tobacco Plan were settlor functions. Id. at 783. The district court interpreted the November 18 amendment as requiring the sale of the stocks on January 31, 2000. Id. Because the plan documents required the sale, the court concluded that the plan's fiduciaries were obligated to sell the stock and had no discretionary authority as fiduciaries to do otherwise. Id. In the court's view, the decision to sell "was made and effectuated pursuant to settlor authority," and could not be challenged as activity subject to ERISA's fiduciary duties. Id. at 784.

SUMMARY OF THE ARGUMENT

The district court erred in holding that the complaint does not state a claim for relief that appellees violated their duties of prudence and loyalty under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), when they sold the Nabisco stocks on January 31, 2000.

ERISA places few restrictions on plan sponsors in making plan design or settlor decisions such as creating, amending, and terminating a plan and determining eligibility rules and the type and level of benefits. Hughes

Aircraft Co. v. Jacobson, 525 U.S. 432, 443 (1999). Consequently, as explained below, the Supreme Court has long held that when a plan sponsor amends a plan, even to require the sale of a plan asset, the plan sponsor is not generally subject to ERISA's fiduciary duties. Accordingly, even assuming that the plan document was amended to require the sale of the stocks, the plan sponsor's act of amending the plan was not a fiduciary act within the meaning of ERISA section 3(21), 29 U.S.C. § 1002(21).[2] E.g., Hughes, 525 U.S. at 443; Sutton v. Wierton Steel Div. of Nat'l Steel Corp., 724 F.2d 406, 411 (4th Cir. 1983). This Court's decision in Coyne & Delaney Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996), does not require a different conclusion.

Nevertheless, as plan fiduciaries, the appellees who sold the stock had a duty under ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to ignore the terms of the plan if selling the stock on January 31, 2000, would violate their duties of loyalty and prudence under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). E.g., Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 568 (1985); Wright v. Oregon Metallurgical Corp., No. 02-35853, 2004 WL 439861, at *7 (9th Cir. Mar. 11, 2004). Because a

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[2] The Secretary takes no position on the issue of whether the plan was amended to require the sale of the stocks.

person is a fiduciary under ERISA to the extent that he exercises discretionary authority or control over the management or administration of a plan or exercises any authority or control over its assets, ERISA section 3(21), 29 U.S.C. § 1002(21), the sale of plan assets is unquestionably a fiduciary act subject to ERISA's fiduciary responsibility provisions. As discussed in section II, that responsibility includes a duty to refuse to follow the terms of the plan if doing so would be imprudent or otherwise in violation of ERISA. A plan sponsor cannot, as the district court implicitly held, effectively eliminate the fiduciary duties of prudence and loyalty by mandating the sale of a plan asset in the text of the plan.

ARGUMENT

I. The Plan Sponsor's Act of Amending The Plan Was Not A Fiduciary Act

Generally, when a plan sponsor amends an ERISA plan, it does not act as a fiduciary and, therefore, is not subject to ERISA's fiduciary duties. Hughes, 525 U.S. at 443; Lockheed Corp., 517 U.S. at 890; Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995); Sutton v. Wierton Steel Div. of Nat'l Steel Corp., 724 F.2d at 411.[3] "This rule is rooted in the text of

[3] The Department of Labor issued a Field Assistance Bulletin that follows this general rule for trustees of multi-employer plans, but notes an exception where relevant documents (e.g., collective bargaining agreements, trust documents, and plan documents) provide that ERISA's fiduciary duties will

ERISA's definition of a fiduciary." Lockheed, 517 U.S. at 890, citing ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A). The distinction between fiduciary and settlor functions inheres in the structure of ERISA that largely leaves to employers the decision to create and terminate plans and the determination of the type and level of plan benefits offered. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981). A person becomes a fiduciary under ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A), only when he performs certain functions, including the exercise of authority or control over the management or disposition of a plan's assets. Lockheed, 517 U.S. at 890. "'[B]ecause [the] defined functions [in the definition of fiduciary] do not include plan design, an employer can decide to amend an employee benefit plan without being subject to fiduciary review.'" Id., quoting Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498, 505 (2d Cir. 1995).

When a plan sponsor amends a plan, it acts as a settlor establishing the terms that will govern the plan, not as a fiduciary managing the plan assets, administering the plan, or engaging in any other fiduciary function. Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers, 3 F.3d 994, 1001 (7th

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govern activities of the plan trustees that would otherwise be settlor functions. Field Assistance Bulletin 2002-2 (Nov. 4, 2002) available at http://www.dol.gov/ebsa/regs/fabmain.html.

Cir. 1993) ("Managing a plan is some distance from establishing the terms of a plan"), aff'd, 513 U.S. 414 (1995); Musto v. American Gen. Corp., 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be"). Accordingly, when R. J. Reynolds amended the Plan with respect to the Nabisco stocks, it acted as a settlor making a decision as to plan design, not as a plan fiduciary.

Tatum's reliance on Coyne & Delaney, 98 F.3d at 1464-66, to support his argument that the act of amending the plan to require the sale of the stocks was subject to ERISA's fiduciary rules is misplaced. The question in that case was whether the plan sponsor, Coyne & Delaney, had standing to bring suit, which, in turn, required the court to determine whether Coyne & Delaney was a plan fiduciary. Id. at 1464. The Court found that Coyne & Delaney had the "power to appoint, retain and remove the Plan Administrator and Plan Supervisor," id., and held that it "was a fiduciary to the limited extent it exercised its discretionary responsibility 'to monitor appropriately' and remove the Plan Administrator and Plan Supervisor." Id. at 1465-66, quoting Miniat, Inc. v. Global Life Ins. Group, Inc., 805 F.2d 732, 736 (7th Cir. 1986) and Leigh v. Engle, 727 F.2d 113, 135 (7th Cir. 1984).

As settlor, Coyne & Delaney designated particular persons to be the Plan Administrator and Plan Supervisor in the text of the plan itself. Coyne & Delaney, 98 F.3d at 1461. If Coyne and Delaney chose to remove those persons, it did so by amending the plan. Id. The appointment, monitoring, and removal of plan fiduciaries are themselves fiduciary functions. Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988); Miniat, 805 F.2d at 736; Leigh, 727 F.2d at 135; 29 C.F.R. § 2509.75-8 at D-4. Coyne & Delaney thus exercised both the fiduciary discretion to appoint, monitor, and remove the Plan Administrator and Plan Supervisor, and the settlor power to amend the plan to effectuate those decisions. Under ERISA, the employer sponsoring the employee benefit plan is authorized to act in two separate capacities: as the settlor of the trust when it sets up or amends the plan, and as a fiduciary when it administers the plan it has set up. Sutton, 724 F.2d at 410-11. The fact that these two separate functions were performed by one entity did not make the act of amending the plan a fiduciary act.

To be sure, there is somewhat broader language in Coyne and Delaney, which Tatum cites:

> We recognize that plan sponsors such as Delaney are generally free under ERISA to amend plans without triggering fiduciary status. See Lockheed, 517 U.S. at [889], 116 S. Ct. at 1789. However, the power

> (through plan amendment) to appoint, retain and remove plan fiduciaries constitutes "discretionary authority" over the management or administration of a plan within the meaning of § 1002(21)(A).

98 F.3d at 1465 (citations omitted). This language, however, need not be read as indicating that amending a plan to require the sale of the stocks (or to appoint a new fiduciary for that matter) is itself a fiduciary act. For one thing, such a reading blurs the well-established distinction between settlor and fiduciary function, and thereby conflicts with the Supreme Court's rulings in Hughes, Lockheed, and Curtiss-Wright.

Nor is the broad reading urged by Tatum essential to the Court's central holding that the authority to appoint, monitor, and remove plan fiduciaries confers fiduciary status. The fact that the Court recognized that Coyne & Delaney's monitoring and removal authority derived from its power to amend the plan does not mean that this Court considered the act of amending the plan itself to be a fiduciary act. Instead, Coyne & Delaney is best read as standing for the more narrow proposition that the plan sponsor "was a fiduciary to the limited extent it exercised its discretionary responsibility 'to monitor appropriately' and remove the Plan Administrator and Plan Supervisor." 98 F.3d at 1466 (emphasis added; citations omitted).

Therefore, the company's act of amending the plan was not itself a fiduciary act within the meaning of ERISA section 3(21), 29 U.S.C. §

1002(21), and the defendants are not subject to ERISA's fiduciary duties merely by virtue of their involvement, if any, in amending the plan.

II. Even If The Tobacco Plan Required The Sale Of The Nabisco Stocks, The Fiduciaries Had The Duty To Ignore The Plan Document If It Was Imprudent Or Disloyal To Sell

The district court implicitly held that a fiduciary is freed from his fiduciary duties if acting pursuant to plan terms. The court assumed that following the terms of the plan in administering the plan's assets is as much a settlor function as writing the plan. The court's reasoning is flawed because it ignores ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), which requires a fiduciary to follow the terms of the plan document only "insofar as such documents and instruments are consistent with the provisions of [title I] and title IV" of ERISA. While the act of amending the plan to require the sale of the stocks was a settlor function, the fiduciary's decision to sell the stocks in a block on January 31, 2000, was a fiduciary act subject to the duties of prudence and loyalty under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). The plain import of section 404(a)(1)(D) is that a plan sponsor may not simply override ERISA's requirements. To the contrary, section 404(a)(1)(D) provides that the fiduciary must override plan provisions that are not in accordance with ERISA's requirements.

The appellees correctly contend that a fiduciary has a general duty under section 404(a)(1)(D) to administer the plan in accordance with the plan documents, Appellees' Brief at 29, but that is only half the story. The duty to follow plan terms is expressly limited: the plan fiduciary may follow plan terms only "insofar as" they are consistent with ERISA. If obeying a plan provision requires the fiduciary to act imprudently and disloyally in violation of ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), the provision is not consistent with ERISA and the fiduciary has a duty to disregard it. Central States, 472 U.S. at 568 ("trust documents cannot excuse trustees from their duties under ERISA"); Wright, 2004 WL 439861, at *7 ("ERISA requires fiduciaries to comply with a plan as written unless it is inconsistent with ERISA"); Laborer's Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc., 173 F.3d 313, 322 (5th Cir. 1999) ("In case of a conflict, the provisions of the ERISA policies as set forth in the statute and regulations prevail over those of the Fund guidelines"); In re Sears, Roebuck & Co. ERISA Litig., No. 02 C8324, 2004 WL 407007, at *4 (N.D. Ill. Mar. 3, 2004); In re Enron Corp. Sec., Derivative & "ERISA" Litig., 284 F. Supp. 2d 511, 670 (S.D. Tex. 2003) ("an investment fiduciary must disregard plan documents if following their terms would be imprudent"); but see Nelson v. IPALCO Enters., No. IP02-

0477-C-H/K, 2003 WL 402253, at *8 (S.D. Ind. Feb. 13, 2003) ("ERISA should not be construed so as to require the plan administrator to violate clear instructions in the plan").

Two recent cases involving the purchase or sale of stock are instructive. In Enron, the plan required employer contributions to be made "primarily in Enron stock." 284 F. Supp.2d at 669. The court expressly held that the fiduciaries had a duty to disregard this command if it would be imprudent to follow it. Id. at 669-70. Similarly, the Sears plan required employer contributions to be invested exclusively in Sears stock and required that Sears stock be offered as an investment option. Sears, 2004 WL 407007, at *4. The court held plaintiffs stated a claim that the fiduciaries had a duty to override the plan language if it was no longer prudent to acquire Sears stock. Id.

These two recent cases are consistent with a long line of cases holding that fiduciaries must act prudently and solely in the interest of the participants and beneficiaries in deciding whether to purchase or retain employer securities despite plan language requiring the plan to purchase employer securities. See, e.g., Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995); Moench v. Robertson, 62 F.3d 553, 569-72 (3d Cir. 1995); Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 954-56 (D.C. Cir. 1985) (ERISA's

prudence and loyalty requirements apply to all investment decisions made by employee benefit plans, including those made by plans that may invest 100% of their assets in employer stock); Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) ("Though freed by Section 408 from the prohibited transaction rules, ESOP fiduciaries remain subject to the general requirements of Section 404"); Eaves v. Penn, 587 F.2d 453, 459 (10th Cir. 1978) ("While an ESOP fiduciary may be released from certain Per se violations on investments in employer securities . . ., the structure of the Act itself requires that in making an investment decision of whether or not a plan's assets should be invested in employer securities, an ESOP fiduciary, just as fiduciaries of other plans, is governed by the 'solely in the interest' and 'prudence' tests of §§ 404(a)(1)(A) and (B)"); Canale v. Yegen, 789 F. Supp. 147, 154 (D.N.J. 1992); Ershick v. Greb X-Ray Co., 705 F. Supp. 1482, 1487 (D. Kan. 1989) (plan terms authorizing ESOP fiduciary to invest up to 100% of plan assets in employer stock could be followed only if the investment decision was prudent), aff'd, 948 F.2d 660 (10th Cir. 1991); Central Trust Co. v. American Avents Corp., 771 F. Supp. 871, 874-76 (S.D. Ohio 1989) (ESOP trustee properly ignored pass-through voting provisions that would have prevented sale of an ESOP's stock where the trustee determined that such a sale would be prudent); see also DOL Opinion Letter

No. 90-05A, 1990 WL 172964, at * 3 (Mar. 29, 1990) (despite plan provisions to contrary, it is responsibility of fiduciaries to determine, based on all the relevant facts and circumstances, the prudence of investing a large percentage of plan assets in qualifying employer securities); DOL Opinion Letter No. 83-6A, 1983 WL 22495, at *1-2 (Jan. 24, 1983) (same).[4]

As this long and consistent line of cases establishes, the Tobacco Plan fiduciaries had a duty not to sell the stocks in the time and manner in which they sold them if it was imprudent or disloyal under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), even if the plan terms required the sale. The district court's holding to the contrary would undermine the fiduciary's independent responsibility for ensuring that his management of plan assets complies with ERISA's fiduciary standards, thereby nullifying an internal check and balance that is critical to enforcement of ERISA.

For the reasons discussed above, the Secretary disagrees with the defendants' argument that a plan sponsor can effectively eliminate the fiduciary duty of prudence by mandating the sale of a plan asset in the text of the plan. This is not to say, however, that the sale of the Nabisco stocks

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[4] Nelson v. IPALCO Enters., 2003 WL 402253, at *8, the only case holding that no duty to override exists, cannot be squared with the text of ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), and ignores or misconstrues cases discussed above.

was, in fact, imprudent, or that the plaintiffs can prove imprudence merely by showing that the stocks' price had dropped to historic lows as determined in hindsight. See Metzler v. Graham, 112 F.3d 207, 209 (5th Cir. 1997) ("[p]rudence is evaluated at the time of the investment without the benefit of hindsight"). Publicly traded stocks, of course, move both up and down, and it is only in hindsight that one can predict price movements with anything approaching certainty. Markets are generally efficient, and the stock price presumably reflects all of the publicly available information on the stock. As a result, absent inside information, or other unique circumstances, a fiduciary's decision to sell stock cannot be challenged simply because he failed to accurately predict the direction in which the stock ultimately moved. The plan document, however, could not give the plan's fiduciaries a broad exemption from considering the prudence of the sale.[5]

Similarly, even if analysts generally ranked Nabisco stock as a "buy" or "hold" at the time of the stock sale, it does not follow that the fiduciaries breached their obligations by reaching a different conclusion. An analyst's

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[5] It should be noted that there is nothing improper per se about the decision to eliminate an employer stock fund after a spin-off results in a change of employers. Indeed, at the time the fiduciaries sold the stock, it was no longer a "qualifying employer security" within the meaning of ERISA sections 404(a)(2) and 407(d)(5), 29 U.S.C. §§ 1104(a)(2) and 1107(d)(5).

buy or hold rating, in particular, need not be determinative of the appropriate course of action for a specific plan in light of the plan's particular portfolio. Indeed, the National Association of Securities Dealers ("NASD") has cautioned against the exclusive reliance on such recommendations. See NASD Guide To Understanding Securities Analysts Recommendations at http://www.nasdr.com/analyst_brochure.htm (Apr. 26, 2004). In NASD's view, an investor should "[n]ever rely on a rating alone," particularly because analysts do not use a common rating system and the meanings of the ratings therefore vary. Id. ("Clear 'Sell' ratings have grown rare. Some firms no longer even use 'Sell' or any word obviously like it. Frequently, a 'Hold' rating in effect means 'Sell.'").

CONCLUSION

For all the above reasons, the decision of the district court should be reversed and remanded for a determination under Fed. R. Civ. P. 12(b)(6) consistent with the analysis set forth herein.

Dated: May 7, 2004.

Respectfully submitted,

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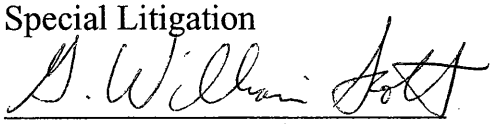

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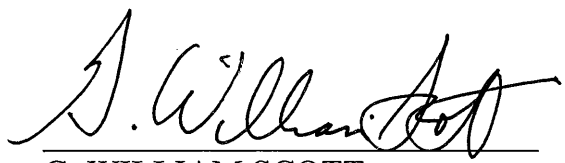
CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7), I certify that the foregoing Brief of the Secretary of Labor As Amicus Curiae In Support Of Appellant And Requesting Reversal Of The District Court's Decision is proportionally spaced, using Times New Roman 14-point font size and meets the 20 page limitation as ordered by the Court.

Dated: May 7, 2004



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of the Secretary of Labor As Amicus Curiae In Support Of Appellant And Requesting Reversal Of The District Court's Decision were mailed to the following by U.S. Mail, postage prepaid, this 7th day of May 2004:

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