

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

IN RE LEHMAN BROTHERS SECURITIES  
AND ERISA LITIGATION

C.A. No. 09 MD 2017

This Document Applies To:  
*In re Lehman Brothers ERISA Litigation*,  
C.A. No. 08 Civ. 5598 (LAK)

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY**

In further support of their Opposition to Defendants' Motion to Dismiss the Consolidated Amended Complaint ("Pls. Opp.") [Master Dkt. No. 111], Plaintiffs respectfully submit the recent decision in *In re Hartford Fin. Svc. Grp. Inc. ERISA Litig.*, 08-CV-01708 (PCD) (D. Conn. Jan. 13, 2010) ("*Hartford*") (attached as Exhibit A).

In *Hartford*, after analyzing directly analogous facts and allegations, the court denied the defendants' motion to dismiss the complaint, holding that the *Moench* presumption applies only to "fiduciaries who, by terms of the plan, were restricted to investment in the employer's stock." *Hartford* at 2. The court also rejected the defendants' argument that that the plan was an ESOP because it was designed to invest primarily in company stock, finding that although labeled an "ESOP," "[t]he Plan here imposes no such obligation on defendants. They were not restricted to investments in [company] stock." *Id.* The court further held, "Where the fiduciary is not absolutely required to invest in employer securities, but is more than simply permitted to make such investments..... there may come a time when such investments no longer serve the purposes of the trust or the settlor's intent. This is the case at hand and forecloses defendants' reliance on an exclusive and restricted investment discretion." *Hartford* at 2 (internal quotations, citation omitted).



**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on January 20, 2010, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

/s/ Rachel S. Poplock  
Rachel S. Poplock

# Exhibit A

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

IN RE HARTFORD FINANCIAL SERVICES :  
 :  
GROUP, INC. : 3:08CV-1708(PCD)

**MEMORANDUM OF DECISION ON DEFENDANTS' TO DISMISS**

Plaintiffs are individual participants in the Hartford Investment and Savings Plan (“Plan”) as employees of the Hartford Financial Services Group, Inc (“Hartford”). Plaintiffs allege, for themselves and a class including all participants, added to the complaint as a class action, that defendants, violated duties as fiduciaries by their actions in relation to the stock of Hartford as a Plan asset held through the Hartford Common Stock Fund. The claim is that by purchasing and retaining Hartford stock, failing to counter foreseeable deterioration of the value of Hartford stock, and misinforming participants as to the Plan’s financial stability despite the adverse impact of actual and foreseeable deterioration of the value of the Hartford stock, the Plan’s asset value fell markedly, adversely affecting participants’ stake and their realization of benefits to accrue under the Plan. The claims are allegedly authorized by the Employee Retirement Income Security Act (“ERISA”) 29 U.S.C. SS 502(a)(2) et seq, 404 and DOL regulations, 29 C.F.R 2550.

Hartford’s stock allegedly became an imprudent investment between December 10, 2007 and the complaint, dated March 23, 2009, as a result of investment in mortgage backed securities and financially unstable companies, loss in capital value, decline in earnings, an adverse impact on its annuity business all with an adverse effect on Plan assets value. Defendant’s investment decisions are the basis for claims of liability for resulting losses.

Defendants claim the complaint fails to state a cause of action because the plan is an Employee Stock Option Plan (“ESOP”) which offers employees the opportunity to invest in their employer’s stock. The fiduciaries are claimed to be entitled to a presumption of prudence in their conduct related to the Hartford stock as they were fulfilling that purpose as provided in the Plan. They cite Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995). That case does not support the claim as it would pertain to fiduciaries who, by terms of the plan, were restricted to investment in the employer’s stock and their fulfillment of that plan purpose gave rise to the presumption. The Plan here imposes no such obligation on defendants. They are not restricted to investments in Hartford stock. Article 8 as found in the version of the Plan in effect on December 10, 2007 as well as in the amendments to the plan effective on January 1, 2008 and January 1, 2009, Exs. 1 and 2 to defendants’ Memorandum in Support of their motion to dismiss. Fiduciaries are noted to be obliged to invest in conformance with the terms of the plan/trust. *Id.* at 571. Where “the fiduciary is not absolutely required to invest in employer securities but is more than simply permitted to make such investments.....” “there may come a time when such investments no longer serve the purposes of the trust or the settlor’s intent.” *Id.* That is the case at hand and forecloses defendants’ reliance on an exclusive and restricted investment discretion.

Defendants also claim that the complaint fails to cite facts to support the several cited observations about Hartford’s financial instability. Whether the observers validly voiced concern about that instability are questions of fact as to whether defendants should have taken note of the observations and inquired as to their validity and taken action to protect the Plan’s assets if the observations were shown to be valid. That situation could give rise to a duty to inquire and it would not necessarily permit fiduciaries to sit idly by to see if such facts are brought to light.

Defendants also assert the lack of any basis for a finding of a conflict of interest but as

noted in Moench, investment in Hartford stock when its finances are unstable would potentially create a conflict of interest in the dual roles of defendants as fiduciaries and their several positions with Hartford which give rise to loyalties to their employer, potentially at odds with their obligations to the Plan's beneficiaries. See Moench 63 F.3d @ 571.

Lastly defendants rely on Bell Atlantic Corp. V. Twombly, 550 U.S. 544, 556-57 (2007) and argue that the complaint does not allege fact sufficient to "state a plausible claim for violations of ERISA." See also Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1950 (2009).

The extensive detail in the Consolidated Class Action Complaint, dated March 23, 2009, is found to comply, more than amply, with the obligation to allege sufficient facts to support a finding of a plausible cause for relief.

For all the foregoing reasons, defendants' Motion to Dismiss [doc. no. 55] is denied.

Dated at New Haven, Connecticut this 13<sup>th</sup> day of January, 2010.

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/s/  
PETER C. DORSEY  
UNITED STATES DISTRICT JUDGE