10-792-cv(L)

10-934-cv (CON)

In the

United States Court of Appeals

for the

Second Circuit

Patrick L. Gearren, on behalf of themselves and a class of persons similarly situated, Jan Deperry, on behalf of themselves and a class of persons similarly situated, Mary Sullivan, Individually and on behalf of all others similarly situated, Harvey Sullivan, Individually and on behalf of all others similarly situated, Cynthia Davis, Individually and on behalf of all others similarly situated,

Plaintiffs - Appellants

v.

The McGraw-Hill Companies, Incorporated, The Pension Investment Committee of McGraw-Hill, Marty Martin, The Board of Directors of The McGraw-Hill Companies, Incorporated, Winfried Bischoff, Douglas N. Daft, Linda Koch Lorimer, Harold McGraw, Hilda Ochoa-Brillembourg, Michael Rake, James H. Ross, Edward B. Rust, Kurt L. Schmoke, Sidney Taurel, John Does 1-20, Robert J. Bahash, Henry Hirschberg, Alex Maturri, James H. McGraw, IV, David L. Murphy, John C. Weisenseel, Kathleen A. Corbet, Phil Edwards, Pedro Aspe, Robert P. McGraw,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE AMICUS[1]

This case is of a type that has become ubiquitous over the past several years – a "stock drop" case, in which plaintiffs claim fiduciary breaches in connection with a decline in value of employer stock held in an ERISA plan. What is special about this case, however, are the very fundamental questions that the Court is being asked to address, and that will dictate both the outer bounds of the obligations imposed on the fiduciaries of plans holding employer stock and the procedural framework for pleading these types of fiduciary breach claims. As a result, this case is likely to have far-reaching consequences for fiduciaries of ERISA plans within the jurisdiction of the Second Circuit, including the fiduciaries of many plans sponsored by members of this *amicus*, the Chamber of Commerce of the United States of America (the "Chamber").

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members sponsor Employee Stock Ownership Plans ("ESOPs") or other individual account plans

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[1] All parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. Pro. 29(a). This brief was not authored in whole or in part by any party's counsel, and money was contributed to fund its preparation solely by the *amicus* and its members. *See* Loc. R. 29.1(b).

that contain employer stock funds as an investment vehicle, and all of these members may potentially be affected by the Court's decision.

The reasons why the District Court's decision is correct are explained in detail in the Brief for Defendants-Appellees. For the sake of efficiency and convenience, the relevant facts as laid out in that brief are incorporated here by reference. The Chamber files this brief *amicus curiae* to aid the Court in its understanding of the nature of the fiduciary duties at issue, the importance of the questions to be decided by the Court, and the deleterious impact that a reversal could have on all plans containing employer stock.

ARGUMENT

I. WHEN PLAN TERMS REQUIRE AN EMPLOYER STOCK FUND, FIDUCIARIES LACK DISCRETION WITH RESPECT TO MAINTENANCE OF THAT FUND.

The language of the McGraw-Hill plan is specific, clear, and mandatory – it says, "the Plan *shall* offer [] the 'Stock Fund' which will be invested primarily in the Common Stock of the Corporation." A 979, § 8.1 (emphasis added). Where, as here, an ERISA plan is designed to require that employer stock be offered as an investment option, *i.e.*, the stock fund is "hard-wired" into the plan, the fiduciary has no discretion to dispense with the fund. But "discretion" is fundamental to the very definition of a fiduciary; under ERISA, "a person is a fiduciary with respect to a plan to the extent [] he exercises any discretionary authority or discretionary

control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A) (2010). Absent that discretion, there is no "fiduciary function" that could give rise to liability – because the fiduciary lacks discretion, no fiduciary obligations can or should be implicated by the maintenance of that fund pursuant to the mandatory plan terms.

While no Court of Appeals has yet to be presented with this precise issue, the Third, Fifth, and Ninth Circuits have each indicated a predisposition, if the appropriate facts were before it, to adopt a rule that no fiduciary function is implicated in continuing to offer employer stock where the stock fund is hard-wired into the plan. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254-55 (5th Cir. 2008); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 346 (3d Cir. 2007); *Wright v. Ore. Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004). Several district courts have held this rule to be the law, and have applied it accordingly. *See, e.g.*, *In re Citigroup ERISA Litig.*, No. 07 Civ. 9790, 2009 WL 2762708, at *7-8 (S.D.N.Y. Aug. 31, 2009) (where plain language of plan required that the employer stock fund "shall be permanently maintained as an Investment Fund under the Plan," there was "no discretion whatsoever to eliminate [employer] stock as an investment option, and defendants were not acting as fiduciaries"), *appeal pending*, 09-3804-cv (2d Cir.); *In re ING Groep, N.V. ERISA Litig.*, 48 Emp. Ben. Cas.

2594, 2600 (N.D. Ga. 2010) (because employer stock investment option was mandated by the plan, "defendants did not act as fiduciaries with regard to the decision to offer [employer] stock as an investment option"); *Urban v. Comcast Corp.*, No. 08-773, 2008 WL 4739519, at *12 (E.D. Pa. Oct. 28, 2008) ("where a plan's settlor mandates investment in employer securities, the plan fiduciaries are 'immune from judicial inquiry' related to such investments") (citation omitted). These courts have plainly reached the correct result.

The fiduciary obligations imposed by ERISA are rooted in trust law. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). In trust law, mandatory terms in a trust are permissible, and the trustee is bound to follow mandatory terms to the letter. Restatement (Third) of Trusts § 91 & cmt. e. Mandatory terms thus "displac[e] the normal duty of prudence" that is imposed on trustees. *Id.*; *see Edgar*, 503 F.3d at 346 ("[I]f the trust 'requires' the trustee to invest in a particular stock, then the trustee is 'immune from judicial inquiry.'"). ERISA's definition of a fiduciary function springs naturally from this principle by requiring that the actor be exercising *discretion* in the performance of his duties with respect to administration of the plan, and imposing fiduciary obligations only to the *extent* of that discretion. *See* 29 U.S.C. § 1002(21)(A). It follows axiomatically that where the terms of an ERISA plan do *not* allow for the exercise

of discretion or independent judgment on the part of the fiduciaries, there is no "fiduciary function" that could give rise to fiduciary liability.

The propriety of this rule is evident when one considers that the decision to mandate an employer stock fund in the first instance implicates no fiduciary duties. A plan sponsor is free to design a plan as an employee stock ownership plan, or as a defined contribution plan that includes an employer stock fund, completely free from fiduciary liability. Designing a plan is a settlor, not a fiduciary function. *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-45 (1999); *Lockheed v. Spink*, 517 U.S. 882, 890 (1996). It would make no sense to allow employers free rein to prescribe employer stock funds, and at the same time impose on fiduciaries a burden to constantly second-guess the employer's non-fiduciary design choice under penalty of fiduciary liability. Imposing such an obligation would directly undercut the right of the sponsor to design its plan free from fiduciary considerations.

A rule to the contrary would, moreover, stand the role of the fiduciary on its head, converting the fiduciary to a sort of free-ranging ombudsman charged with righting all wrongs. If fiduciary status required the actor to ignore the terms of the plan (no matter how clear and exact) at any time the fiduciary judged it imprudent to follow them, the slippery slope of nonsensical consequences could be quite steep. Suppose, for example, that the plan specified that investment directions

could be changed quarterly. Would the plan administrator, as a fiduciary, nevertheless be required to permit monthly or weekly or daily changes, overriding the terms of the plan because he deemed limiting the frequency of investment changes "imprudent?" Or suppose the plan permitted no more than one loan at a time to participants. Would the plan administrator, as a fiduciary required to act solely in the best interest of the participants, have to permit multiple loans notwithstanding the terms of the plan, if limiting participants to one loan was not in their best interest? Or suppose the settlor designed the plan to provide only for lump sum distributions. Would the plan administrator, as a fiduciary acting solely in the interest of the participants, have to permit the purchase of an annuity whenever he judged it in the best interest of a particular participant not to provide him with a lump sum amount that he might squander away? These examples demonstrate the absurdity of a rule that would require fiduciary second-guessing of plan terms mandated by the sponsor.

Fiduciary liability should extend only to those functions that the plan commits to the discretion of the fiduciary. ERISA dictates exactly that: a fiduciary shall discharge "his duties with respect to a plan" in a prudent manner, 29 U.S.C. § 1104(a)(1), and his duties, in his fiduciary capacity, are only those where "discretionary" authority or control are exercised, 29 U.S.C. § 1002(21)(A). If the plan forecloses a fiduciary's discretion with respect to a particular subject, there is

no discretionary duty to which the obligation of prudence can attach. If the plan document commands, as a matter of plan design by the plan sponsor as it does here, that participants have the option to invest in employer stock, then there is no discretion in any plan fiduciary to eliminate that option.

The District Court rejected this conclusion, believing it to be inconsistent with language in § 404 of ERISA that requires fiduciaries to act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with [ERISA]*." 29 U.S.C. § 1104(a)(1)(D) (2010) (emphasis added). The court below inferred from this language that even if the plan requires maintenance of an employer stock fund, ERISA nevertheless requires the plan's fiduciaries to examine the stock fund routinely to determine whether, at any given point in time, its maintenance continues to be consistent with ERISA. The problem with this approach is that Congress has made clear that offering investment in an employer stock fund – even though, by definition, it is inherently risky – *is* consistent with ERISA. *See In re Citigroup*, 2009 WL 2762708, at*7-8.

Indeed, for decades Congress has recognized, blessed, and encouraged ESOPs and employer stock investment options in individual account plans. *See Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003); *Grindstaff v. Green*, 133 F.3d 416, 422 (6th Cir. 1998); *Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). And Congress has specifically exempted them from fundamental

requirements under ERISA such as the duty to prudently diversify and the prohibited transaction rules. 29 U.S.C. §§ 1104(a)(2), 1108(e) (2010). This is because, to put it simply, ESOPs and employer stock funds are unique. Unlike traditional retirement plans, they are not designed with the primary purpose of guaranteeing retirement benefits, but rather are designed primarily to invest in the employer's securities. *See Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995); *Donovan*, 716 F.2d at 1458. Congress deemed encouraging employer stock ownership to have value apart from augmenting a retirement portfolio, such as providing employees with voting rights and increased motivation that may improve productivity, and providing the employer with another tool of corporate financing. *See Steinman*, 352 F.3d at 1103; *Moench*, 62 F.3d at 569; *Largest Study Yet Shows ESOPs Improve Performance and Employee Benefits*, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/main/article.php/id/25/ (last visited July 22, 2010).

In order to preserve the ability to offer employer stock investment without frustrating its purpose, Congress has made clear that it views and treats such funds differently:

> The Congress is deeply concerned that the objectives sought by [the series of laws encouraging ESOPs] will be made unattainable by the regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to

> implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590 (1976)), *quoted in Moench*, 62 F.3d at 569. "Congress, believing employees' ownership of their employer's stock a worthy goal, has encouraged the creation of ESOPs both by giving tax breaks and by waiving the duty ordinarily imposed on trustees by modern trust law." *Steinman*, 352 F.3d at 1103.

The Department of Labor has voiced fears that adoption of the rule advocated by the Chamber would completely "immunize" fiduciaries and nullify ERISA's prudence requirement. *See Brief of Amicus Curiae Hilda L. Solis, Sec'y of the United States Dep't of Labor, in Support of Appellant Requesting Reversal*, *filed in In re Citigroup*, No. 09-3804-cv, at 6-7. These fears are hugely overstated. While fiduciaries would not have an obligation to second-guess the plan's settlor with regard to offering an employer stock investment option, their duties *would* require that they otherwise act in the best interests of the plan and the participants. This might require, for example, that the fiduciaries of a 401(k) plan issue periodic and specific communications to the participants regarding the risks attendant to investing in employer stock and the wisdom, in general, of diversifying their investments. Fiduciary obligations of truthfulness and appropriate disclosure would also still be in place. And liability could be imposed if the fiduciary charged imprudent fees, or acquired stock for prohibited reasons. The only thing

exempted from the fiduciary's obligations would be the ability to question the prudence of maintaining the stock fund within the plan as dictated by the settlor. Because the decision in the first instance to design a plan containing a stock fund does not implicate fiduciary obligations, it makes abundant sense that where the plan expressly requires the continued maintenance of that fund, the maintenance also should fall outside the scope of a fiduciary's discretionary tasks.

Finally, a rule that would make the fiduciary obligation so utterly consuming and cumbersome as to require rampant second-guessing of mandated plan terms would jeopardize the future existence of plans that offer employer stock. Employer stock funds are widely utilized by employers and the thousands of members of the Chamber. The most current statistics from the National Center for Employee Ownership reveal that there are well over 11,000 plans whose assets are primarily invested in employer stock (through both ESOPs and employer stock funds contained in other types of defined contribution plans) – plans that cover nearly 18 million employee participants and have total assets of more than $1 trillion. *See* A Statistical Profile of Employee Ownership, Nat'l Ctr. for Emp. Ownership, http://www.nceo.org/main/ article.php/id/2/ (last visited July 22, 2010). Likewise, employer stock funds are popular among employees, who appreciate being able to have more of a participatory role in their employer, such as through stock voting rights, than they would otherwise have. And, as noted

above, Congress itself has sought to encourage the growth of employee plans that invest in employer stock. A rule that inappropriately subjects the continued maintenance of employer stock funds to fiduciary review will threaten the popularity – if not the very existence – of these plans.

II. THE DISTRICT COURT'S DECISION APPLYING THE *MOENCH* PRESUMPTION OF PRUDENCE SHOULD BE AFFIRMED.

The District Court was reluctant to adopt a bright line rule that the McGraw-Hill fiduciaries lacked actionable discretion with respect to the employer stock fund "hard-wired" into the terms of the McGraw-Hill plan, but by affording the plan's fiduciaries the benefit of the *Moench* presumption that maintenance of the employer stock fund was prudent, it nevertheless applied an appropriate level of deference in the review of the defendants' actions. *See Moench*, 62 F.3d at 571. This level of deference is the minimum necessary to effectuate Congressional intent and the terms of the statute and, accordingly, the decision of the court below should be affirmed.

Whether by a bright line rule or a presumption, fiduciaries must be entitled to deference when they act consistently with plan terms. To hold otherwise would vitiate the distinct roles of settlor and fiduciary and undermine the plan sponsor's prerogative to design a plan in the manner it wishes, free from fiduciary constraints. If fiduciaries had a continuing obligation to evaluate and modify a plan's design, the initial design – and the sponsor's intent – would both be

rendered meaningless. The sponsor could write the plan to say that it "*shall* include an employer stock fund," but if the fiduciaries are held to have an obligation to evaluate for themselves whether offering an employer stock fund at any given time is prudent, that mandatory language might just as well be revised to a permissive "*may* include," such that the plan designed by the sponsor might never actually be effectuated.

As the Supreme Court noted in *Bruch*, "ERISA abounds with the terminology and language of trust law," and "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." 489 U.S. at 111 (citing Restatement (Second) of Trusts § 187 (1959)). Consequently, if the Court concludes that a fiduciary possesses discretion with regard to maintaining an employer stock fund (even in a plan that ostensibly requires it), then the Court must apply a deferential presumption of prudence to the fiduciary's exercise of that discretion. Applying the presumption of prudence in this situation is consistent with, and akin to, using an "abuse of discretion" standard to review decisions of the plan's fiduciaries concerning plan interpretation. *See Conkright v. Frommert*, 130 S. Ct. 1640, 1651 (2010). There is no rational reason to show less deference to fiduciaries who are acting consistently with unambiguous plan provisions than to fiduciaries who are exercising discretion regarding the interpretation of ambiguous plan terms.

The presumption is also necessary to avoid putting fiduciaries in an impossible "Catch-22," where continuing to offer employer stock during a financial crisis exposes them to imprudent investment claims, while divesting the stock in contravention of plan terms exposes them to imprudent divestiture claims. This is precisely what happened to W. R. Grace, whose 401(k) plan fiduciaries were sued by one class of participants who claimed the fiduciaries breached their duties by failing to eliminate employer stock from the plan when the company's financial misfortunes sent it into bankruptcy, and by a second class of participants who claimed the fiduciaries violated their duties by divesting the employer stock (at a price in excess of market) while the company was in bankruptcy. *Compare Evans v. Akers*, 534 F.3d 65 (1st Cir. 2008), *with Bunch v. W. R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009). Adoption of the *Moench* presumption of prudence should largely eliminate this Catch-22, while also serving several other legitimate goals. By making the plan terms paramount, the presumption will give fiduciaries clear guidance as to their duties with respect to employer stock investments, will give priority to the settlor's design goals, and will aid in effectuating Congress's stated intent to encourage investment in employer stock.

It is also important that the presumption of prudence not be easily rebutted. The threshold for overcoming the presumption must be sufficiently high to encompass only extraordinary circumstances that would not have been foreseen by

the sponsor in the plan design, *i.e.*, facts and circumstances so extreme as to justify requiring the fiduciary to disregard and act in direct contravention of clear plan mandates. To hold otherwise would eviscerate the sponsor's ability to design its plan as it wishes, a bedrock principle in ERISA. *See*, *e.g.*, *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1498 (3d Cir. 1994) ("an employer is free to develop an employee benefit plan as it wishes" because "ERISA's concern is with the *administration* of benefit plans and not with the precise design of the plan." (citations omitted) (emphasis in original)). Thus, a mere showing that the stock price declined – even substantially – cannot be enough, because any equity investor expects to see prices rise and fall periodically over time, and consequently, a drop in stock price is hardly an unforeseen circumstance. Instead, the presumption should be rebuttable only by a showing of extreme circumstances; for example, that the fiduciary knew or should have known that the circumstances of the company were so "dire" that the stock was in severe and imminent danger of being rendered "entirely worthless." *See Edgar*, 503 F.3d at 348-49; *Kirschbaum*, 526 F.3d at 255.[2]

[2] The Department of Labor advocates a much lower threshold, arguing that it should be sufficient to overcome the presumption – or that the presumption should not apply at all – where it is alleged that the fiduciaries knew that the stock price was "artificially inflated." *Brief of Amicus Curiae Hilda L. Solis, Sec'y of the United States Dep't of Labor in Support of Appellants Requesting Reversal,* at 18. The premise of the Department's argument is that the fiduciary has knowledge of non-public information indicating that the market has overpriced the stock – and

Finally, the *Moench* presumption makes sense only if it is applied at the initial pleading stage. As noted above, the presumption embodies a deferential standard of review; it is not just a question of "who bears the burden of proof." Fiduciaries who act consistently with plan terms should not be hauled into federal court and subjected to the rigors of discovery, motions practice, and trial before they are shown any deference. Accordingly, plaintiffs must be required to plead sufficient facts at the outset to rebut the presumption that the fiduciary acted prudently in following plan terms.

Indeed, pleading facts adequate to rebut the presumption is required by the pleading standard articulated by the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). In *Iqbal* and *Twombly*, the Supreme Court made clear that a plaintiff must allege in his complaint sufficient facts supporting the elements of the asserted claim such that a "plausible" claim has been stated. *Iqbal*, 129 S. Ct. at 1949. In the context

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thus, it argues, offering the stock as an investment option in the plan is imprudent because it is imprudent to overpay for plan assets. *See id.* The Department's perspective, however, wholly disregards the securities laws that prohibit insider trading. Even if the fiduciaries could be demonstrated to have non-public, materially adverse knowledge, they could not act on that knowledge to divest the stock without violating the securities laws. Moreover, given the ease with which a plaintiff could allege that a plan's fiduciaries "knew" the stock was overvalued, sometimes based on nothing more than hindsight and the fact that its price subsequently declined, the Department's advocated standard would amount to no standard at all.

presented here, the elements of the claim necessarily include the extreme factual circumstances necessary to rebut the presumption of prudence, *i.e.*, facts that would not have been anticipated by the settlor, such as facts supporting a plausible claim that the employer stock was in severe and imminent danger of being rendered "entirely worthless." *Edgar*, 503 F.3d at 348-49; *Kirschbaum*, 526 F.3d at 255. If these critical facts and circumstances do not exist, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (internal quotation marks and citations omitted).

III. AN ERISA FIDUCIARY'S DISCLOSURE OBLIGATIONS SHOULD NOT BE BROADENED SO AS TO OVERLAP THE DISCLOSURE OBLIGATIONS IMPOSED BY THE SECURITIES LAWS.

The District Court appropriately rejected the plaintiffs' claims for breach of fiduciary duty based on the defendants' alleged misrepresentations and failure to make affirmative disclosures about employer financial performance that may have an impact on stock prices. These claims demonstrate the need for this Court to strike a clear dividing line between ERISA and the securities laws. The positions advanced by the plaintiffs and the Department of Labor would render the securities laws that already govern disclosure obligations to the investing public meaningless and redundant – in favor of an all-encompassing ERISA umbrella triggered only by the fact that some ERISA plan participants (a subset of all investors) have

invested in employer stock. Congress has not prescribed this result and this Court should not broaden ERISA's role so significantly.

As a preliminary matter, no court has held that an ERISA misrepresentation claim can be based solely on statements made in SEC filings incorporated by reference into a plan's summary plan description, as the plaintiffs contend here. To the contrary, courts faced with such claims have routinely dismissed them. *See, e.g.*, *Edgar*, 503 F.3d at 349-50; *Kirschbaum*, 526 F.3d at 257; *In re Lehman Bros. Sec. and ERISA Litig.*, No. 09-MD-2017, 2010 WL 354937, at *4 (S.D.N.Y. Feb. 2, 2010); *In re Citigroup*, 2009 WL 2762708, at *22-24. Representations made in corporate securities filings are by definition made in the company's corporate capacity, *i.e.*, as a settlor, and not in its capacity as an ERISA fiduciary. *See Kirschbaum*, 526 F.3d at 257; *see also Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) (an employer is not deemed to be acting in a fiduciary capacity merely "because it ma[kes] statements about its expected financial condition or because an ordinary business decision turn[s] out to have an adverse impact on the plan" (citation omitted)). Incorporation of these securities filings by reference into plan summaries simply ensures that plan participants have similar access to information as other types of investors; it does not suddenly transform the disclosures from corporate acts to fiduciary acts. *Kirschbaum*, 526 F.3d at 257. In fact, the securities laws *require* the incorporation of the SEC filings into plan documents

(*see* SEC Form S-8 at 8 available at www.sec.gov/about/forms/forms-8.pdf; *Registration and Reporting Requirements for Employee Benefit Plans*, 46 S.E.C. 518, 1990 WL 310688 (1990)), so it could hardly be said that their inclusion was a discretionary act giving rise to fiduciary liability under ERISA. *See* 29 U.S.C. § 1002(21)(A) (a "fiduciary" must have "discretionary control").

But it is the claim for breach of an alleged duty to make an affirmative disclosure of corporate financial information that is most troubling. Plaintiffs are asking the Court to layer additional duties (and a remedy) pursuant to ERISA on top of the already extensive statutory scheme created by the securities laws. This is simply wrong. First, an affirmative duty to disclose corporate information is not found anywhere in the text of ERISA. ERISA provides extensive reporting and disclosure requirements with respect to plan benefits, benefit distributions, and other issues, but none with respect to corporate financials. Well-accepted principles of statutory interpretation dictate that Congress's failure to include in the statute an obligation to disclose company financial information must be construed as an intent to foreclose increasing the fiduciary's role in that manner under ERISA. *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (a "familiar principle" of statutory interpretation is that "the mention of one thing implies the exclusion of the other"). Consistent with this principle of statutory interpretation, this Court has held it "inappropriate to infer an unlimited

disclosure obligation on the basis of [ERISA's] general provisions that say nothing about disclosure." *Board of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997).

Second, broadening disclosure obligations of ERISA fiduciaries to include a duty to disclose company financial information when employer stock is held in the plan would impinge upon the securities laws that already occupy the field. ERISA itself prohibits this: "nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (2010). Where a matter is governed by another body of federal law, such as the securities laws here, that other body of federal law cannot be displaced by additional or different liabilities imposed by ERISA. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831-32 (2003) ("the scope of permissible judicial innovation [under ERISA] is narrower in areas where other federal actors are engaged"); *Baker v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004) (rejecting the notion of a fiduciary duty of disclosure because to hold otherwise would risk "disturbing the carefully delineated corporate disclosure laws").

Securities laws governing corporate disclosure obligations are well-developed and well-equipped to provide appropriate remedies for any disclosure failures relating to employer stock. The Securities Exchange Act of 1934

expressly prohibits false and misleading statements in SEC filings, 15 U.S.C. § 78a-7811 (2010), and Rule 10b-5 makes it unlawful for anyone "to make any untrue statement of a material fact or to omit to state a material fact necessary" with respect to the offering of securities, 17 C.F.R. § 240.10b-5 (2010). Further, the Securities Exchange Act provides that investors harmed by violations of these and other securities laws may recover monetary damages to compensate them for their losses. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972). A second remedy to be provided by ERISA is simply unnecessary. Indeed, ERISA "stock drop" class actions are more often than not paralleled by securities class actions, and the plan participants who make up the ERISA class are also plaintiffs in the securities action, making it especially superfluous to layer on additional disclosure obligations in this context.[3]

Broadening ERISA's scope to provide duplicate remedies already provided in the securities field is not only irrational, it could also have potentially serious

[3] Requiring special disclosures to plan participants under ERISA that may not align with securities disclosure obligations would have the irrational result of treating plan participants differently than other classes of the investing public. The Department of Labor argues that the way to address this disparity is for ERISA fiduciaries simply to make the disclosures to the entire general public. *Brief of Amicus Curiae Hilda L. Solis, Sec'y of the United States Dep't of Labor in Support of Appellants Requesting Reversal,* at 26. But this truly begs the question regarding ERISA's role, where another body of federal law already has the field covered. It would make no sense whatsoever to hold that ERISA imposes broader duties of disclosure to the investing public with respect to employer stock than the securities laws require, such that ERISA would, in effect, trump the securities laws in an area so uniquely within the latter's sphere of influence.

practical consequences for ERISA plans. If there are to be double avenues of recovery available to all participant investors, along with the associated costs of double litigations and exposure for multiple class action attorneys' fees, ERISA sponsors might well conclude that the cost of offering employer stock is simply too high. Similarly, company representatives who might otherwise serve as ERISA fiduciaries, faced with a bombardment of multiple liabilities for the same action, may conclude their risks are simply too high. The result of these increased risks and costs may very well be the curtailing of employer stock as an investment option in ERISA plans, which would be directly contrary to Congress's explicit and expressed intent to encourage employees' investment in their employers through these vehicles.

For all of the foregoing reasons, the Court should decline the invitation to expand and increase the disclosure obligations under the securities laws, solely on behalf of a single group of investors – employee plan participants – through the application of ERISA. The District Court correctly rejected the plaintiffs' invitation to do so, and this Court should do so as well.

CONCLUSION

For the reasons stated herein, the Chamber respectfully requests that this Court affirm the judgment of the District Court.

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I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this Brief of Amicus Curiae Chamber of Commerce of the United States of complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 4,897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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