No. 10-11948-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KENT SEWRIGHT and DEADRE D. DIGGS,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ING GROEP, N.V., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
Case No. 1:09-CV-0400-JEC

Amici Curiae Brief of the Securities Industry and Financial Markets Association and Chamber of Commerce of the United States of America in support of Appellees

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the Movants, *Amici Curiae* the Securities Industry and Financial Markets Association ("SIFMA") and the Chamber of Commerce of the United States of America ("Chamber"), submit this Certificate of Interested Persons and Corporate Disclosure Statement. SIFMA and the Chamber are non-profit corporations. They have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

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OTHER AUTHORITIES

Employee Ownership, *A Brief Overview of Employee Ownership in the U.S.*, available at http://www.nceo.org/main/article.php/id/52 (last visited Feb. 7, 2011) 8

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, despite clear congressional intent to promote employee stock ownership, the duty of prudence under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*, bars a fiduciary from allowing plan participants to continue to invest in employer stock in accordance with the requirements of a plan document and requires plan fiduciaries to override both the terms of the plan and the participants' elections to invest in employer stock.

2. Whether a presumption of prudence that applies to a plan fiduciary's decision to continue to offer an employer stock fund as an investment alternative, as mandated by the plan, is properly considered at the pleadings stage.

3. Whether ERISA requires a fiduciary to make disclosures about employer stock that participants may purchase under the plan, even where such disclosures are in contravention of other federal law.

STATEMENT OF IDENTITY AND INTEREST[1]

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks and financial asset

[1] In accordance with Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored the brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting this brief, and no other individual or entity contributed money that was intended to fund preparing or submitting of this brief.

managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of 3 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 that contain employer stock funds as an investment vehicle.

SIFMA and the Chamber have an interest in this case because the issues to be decided by this Court are vitally important to the continued availability of employer stock funds as investment alternatives for 401(k) plan participants. Employers in general and the financial services industry in particular are uniquely interested in the outcome of this case as a result of: (1) their longstanding involvement in creating employer stock funds and providing financial advice to their clients who offer such funds as an investment option in their retirement plans, and (2) the widespread use of employer stock funds by their members in their own

retirement plans. SIFMA and the Chamber are interested in ensuring that Congress's longstanding encouragement of employer stock funds is not undermined by reversal of the District Court's decision. Pursuant to its motion for leave, *see* Fed. R. App. P. 29(b), SIFMA and the Chamber respectfully submit this brief as *amici curiae* in support of Appellees.

I. SUMMARY OF ARGUMENT

Reversal of the District Court's decision is both unwarranted on the law and unwise as a matter of policy. Appellants, along with the Department of Labor ("DOL") as their *amicus curiae,* ask this Court to impose a new fiduciary obligation under ERISA on employers who administer 401(k) plans that include employer-issued stock funds as an investment option. Appellants argue that ERISA should now be interpreted to require those employers, irrespective of the language in the plan, to eliminate that investment option and/or to compel involuntary divestiture of shares of such stock held by participants in the plan, whenever the plan's fiduciaries should have reason to believe the price of the shares may decline. Appellants contend that the conduct of the plan's fiduciaries in this respect should be judged in hindsight, thus making fiduciaries who turn out not to be clairvoyant about the stock market subject to personal liability. No appellate court has endorsed the arguments made by Appellants and DOL, and this Court should likewise decline their invitation.

Reversal of the District Court's opinion, and the consequential elimination of the well-settled presumption of prudence extended to employers in these circumstances, would leave 401(k) plan managers with an untenable Hobson's choice. They could ignore the plan documents and face inevitable liability for breach of ERISA's unambiguous obligation to comply with the terms of the plan, or they could choose to follow the plan terms and face liability under the novel theory asserted by Appellants. Many employers facing this dilemma would simply abandon employer stock funds as an investment option in their plans. That outcome would be tragic, given the well-recognized virtues of employer stock funds as valuable tools for savings and economic growth.

Appellants' view of the statements made in the employer's filings with the Securities and Exchange Commission ("SEC"), if accepted, would cause considerable and unnecessary turmoil. For more than 70 years, the securities laws have provided comprehensive and plenary regulation of the securities industry, including a means for protecting investors, including 401(k) plan participants. For good reason, no court has ever held that ERISA provides an alternative means of addressing conduct subject to the securities laws.

II. STATEMENT OF FACTS

This case arises out of claims brought by a putative class of current and former participants in the ING Americas Savings Plan and ESOP ("ING Plan"), a

plan sponsored by defendant ING North America Insurance Corporation, from June 1, 2007 to the present. *In re ING Groep N.V. ERISA Litig.*, 48 Emp. Ben. Cas. [BNA] 2594, 2595 (N.D. Ga. 2010) ("Op."). The ING Plan is an "employee benefit plan," as defined in 29 U.S.C. § 1002(2)(A), and an "eligible individual account plan" ("EIAP"), as defined in 29 U.S.C. § 1107(d)(3). Op. at 2596. Appellants voluntarily participated in the ING Plan and could manage and direct the investments in their own accounts, including investment in ING stock ("Company Stock"). *Id.* The ING Plan mandates that Company Stock will always be an investment option. *Id.*

The District Court granted Defendants' motion to dismiss the Complaint. Op. at 2603. In doing so, the District Court joined numerous courts in this Circuit and elsewhere in applying a presumption of prudence to a plan fiduciary's decision to continue to offer an employer stock fund as an investment alternative where the plan mandates that option. Op. at 2600. The District Court concluded that the plaintiffs "d[id] not allege any facts sufficient to overcome th[is] presumption." *Id.* (citing *Moench v. Robertson*, 62 F.3d 553, 572 (3d Cir. 1995), for the notion that plaintiffs can overcome the presumption of prudence only where the sponsoring employer is on the "brink of collapse"). The District Court also dismissed plaintiffs' misrepresentation and disclosure claims, which were based on alleged misstatements or omissions contained in SEC filings. *Id.* at 2601-2602.

III. ARGUMENT

The District Court's decision should be affirmed. The arguments of Appellants and DOL contravene the clearly expressed intent of Congress as to the role of employee stock ownership in ERISA plans. An outcome that would subject plan sponsors to what amounts to a standard of retrospective infallibility, particularly in the face of an unprecedented market downturn (such as what occurred in 2008) unrelated to the specific activities of the plan sponsor, would inject rampant uncertainty into the administration of ERISA plans.

A.. The Importance of Employee Stock Ownership

Appellants and DOL would have employer stock funds treated identically to any other investment made by an ERISA retirement plan in a way that is contrary to settled law. Although ESOPs and other EIAPs that offer employer stock funds as an investment option are governed by ERISA, their distinct characteristics and purposes provide for sensible exceptions from some of the requirements imposed by ERISA on traditional retirement plans.[2] This is in keeping with the

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[2] ESOPs and employer stock funds within EIAPs both share the salutary purpose of promoting investment in company stock to encourage economic growth. *See Edgar v. Avaya,* 503 F.3d 340, 347 (3d Cir. 2007). Thus, as to the issues discussed herein, "nearly all the points made about ESOPs apply equally to EIAPs." *In re Citigroup ERISA Litig.,* No. 07 Civ. 9790, 2009 WL 2762708, at *11 (S.D.N.Y. Aug. 31, 2009).

original purpose of employer stock funds, to encourage employee ownership of employer stock, which "constituted a goal [of ERISA] in and of itself," for the purpose of "expanding the national capital base among employees—an effective merger of the roles of capitalist and worker." *Moench,* 62 F.3d at 568 (internal quotation marks omitted).

For example, EIAPs are exempt from ERISA's requirement that plan assets must be diversified. Specifically, "the diversification requirement and the prudence requirement (only to the extent that it requires diversification) is not violated by acquisition or holding of qualifying employer securities." *Moench*, 62 F.3d at 568, quoting 29 U.S.C. § 1104(a)(2) (internal quotation marks omitted). As the Third Circuit explained:

> [U]nder normal circumstances, ESOP fiduciaries cannot be taken to task for failing to diversify investments, regardless of how prudent diversification would be under the terms of an ordinary non-ESOP pension plan. ESOPs also are exempted from ERISA's strict prohibition against dealing with a party in interest, and against self-dealing, that is, dealing with the assets of the plan in his own interest or for his own account.

Moench, 62 F.3d at 568 (citing *Martin v. Feilen,* 965 F.2d 660, 665 (8th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993) (internal quotation marks omitted)). EIAPs are also afforded an exemption from ERISA's prohibited transaction rules in certain circumstances. *See* 29 U.S.C. § 1108(b)(3).

The special treatment afforded EIAPs is consistent with congressional recognition that employee stock ownership serves a "special purpose" by allowing for employee investment in the employer plan sponsor itself. *See* H.R. Rep. No. 93-1280 at 317 (Conference Committee report on the enactment of ERISA). As the Seventh Circuit has observed, ESOPs typically are not "intended to replace traditional pension arrangements . . . ," but rather, "to promote the ownership, partial or complete, of firms by their employees." *Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003); *see also Edgar v. Avaya, Inc.*, 503 F.3d 340, 347 (3d Cir. 2007).

Approximately one-third of the U.S. work force own stock in their employers through some type of employee benefit plan. *See* National Center for Employee Ownership, *A Brief Overview of Employee Ownership in the U.S.*, available at http://www.nceo.org/main/article.php/id/52 (last visited Feb. 7, 2011). Studies indicate that employees of corporations with ESOPs or employer stock funds in EIAPs, which allow such employees to participate in the ownership of their employers, are more motivated and productive. *See, e.g.*, Joseph Blasi & Douglas Kruse, *Largest Study Yet Shows ESOPs Improve Performance and Employee Benefits* ("Rutgers Study"), *available at* http://www.nceo.org/main/article.php/id/25 (last visited Dec. 9, 2010) (finding both that "ESOPs increase sales, employment, and sales per employee by about 2.3% to 2.4% per year over what would have been

expected absent an ESOP" and that ESOP companies are more likely to stay in business than comparable companies that do not offer ESOPs); Press Release, Employee Ownership Foundation, ESOP Companies Outperform Stock Market in 2008 (Aug. 17, 2009), *available at* http://www.esopassociation.org/media/media_stock_market_outperform.asp (last visited Dec. 9, 2010) (revealing that "88.5% of ESOP companies outperformed the stock market in 2008," despite the severe economic downturn).

Employee stock ownership plays an important and positive role in the continued growth of the American economy, with important benefits accruing both to companies offering employer stock funds and to employees who participate in such programs. As explained below, adoption of the arguments urged by Appellants and DOL would inject damaging uncertainty into the administration of retirement plans and would inevitably limit the availability of employer stock as an investment alternative in such plans.

B. The Duty of Prudence Claims Were Properly Dismissed

1. *Offering Employer Stock as an Investment Option Should Not Be a Fiduciary Decision*

DOL frames the issue as how the District Court's decision affects "fiduciary responsibility for all *decisions to invest* in company stock." DOL Br. at 7 (emphasis added). This misstates the governing legal analysis for two reasons: *First,* the conduct at issue in this case is the decision by the plan sponsor to offer

company stock as an investment *option*, a decision that does not trigger ERISA's fiduciary duties in the first place. *Second,* because the participants in the ING Plan managed and directed the investments of their own accounts, the "decision to invest" in company stock, in any case, was made by the participants, not ING.

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 also 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 is axiomatic that, where, as here, 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 offer an employer stock fund in the first instance implicates no fiduciary duties. A

plan sponsor is free to design a plan to include an employer stock fund, completely free from fiduciary liability, because designing a plan is a settlor function, 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 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 contrary rule, moreover, would radically alter the settled understanding of fiduciary status, 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?" This example, and countless others like it,

demonstrates the absurdity of a rule that would require fiduciary second-guessing of plan terms mandated by the sponsor.

Here, moreover, in arguing for an unwarranted expansion of ERISA's fiduciary duty rules, DOL mischaracterizes the way in which the plan actually operates. ING never exercised any discretion in deciding *actually to invest* in Company Stock. Rather, ING merely allowed (as directed by the plan) Company Stock as an investment option, and the actual decision to invest in Company Stock was made by the participants themselves. DOL's suggestion that ING violated ERISA's duty of prudence "by the simple expedient of mandating investment in a particular asset," DOL Br. at 10, is simply wrong. Company stock was one of several investment alternatives made available to plan participants; there was never any "mandate" actually to invest in employer stock.

DOL understandably cites no authority for the notion that a plan sponsor's fiduciary duties are triggered with respect to an investment decision made by a plan participant. And such a claim is foreclosed by the statute. See 29 U.S.C. § 1104(c).

2. *Appellants Misstate the Nature of the Duty of Prudence*

Appellants' principal claim is that Company Stock became an imprudent investment at some point in time and that Appellees violated their fiduciary duty

by allowing plan participants to continue to choose that investment option. The argument was properly rejected by the District Court.

As demonstrated above, an employer's decision to allow for investment in company stock is a settlor function not subject to ERISA's fiduciary duty rules. And, to the extent an employer's decision to allow continued investment in its stock is viewed as fiduciary conduct, Appellants mischaracterize the nature of the relevant inquiry. The proper analysis in determining whether a fiduciary satisfied his duty of prudence with respect to investment duties focuses on the process used to evaluate a particular investment rather than the nature of the investment.

ERISA section 404(a)(1)(B) requires that a fiduciary discharge its duties "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 . . . ." 29 U.S.C. § 1104(a)(1)(B). A fiduciary's actions are measured under standards prevailing at the time the conduct occurred, and not "from the vantage point of hindsight." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006). With respect to the selection of plan investment options, ERISA's fiduciary duty rules focus primarily on the way such decisions are made. *See, e.g.*, 29 C.F.R. § 2550.404a-1(a), (b) (standards for the discharge of a fiduciary's investment duties

require "appropriate consideration" of facts and circumstances, *inter alia*, of the role of a particular investment in "furthering the purposes of the plan").

The process used to select and maintain a particular investment option should be reviewed in proper context, recognizing the unique status of employee stock funds under current law. Proper context must also acknowledge the reality that employer-issued stock, like any security, is inherently volatile and subject to changes in price or valuation. One can safely assume that all company stock will, at some point in time (and perhaps at many points in time) decline in value. No court has held that the mere possibility of a decline in the shares of an employer's stock, without more, makes the shares an imprudent investment. The logical conclusion of the position urged by Appellants and DOL is that employer stock is, by definition, an unsuitable investment because of the possibility of a decline in the price of the shares. Such a rule should be rejected. Not only is it completely unsupported by either the statute or case law; it would make it impossible for employers to offer ESOPs and employee stock funds.

3. *DOL Misstates the Nature of the Duty imposed by 29 U.S.C. § 1104(a)(1)(D)*

DOL argues that, irrespective of the provisions of the plan, fiduciaries have a duty under ERISA to override plan terms that are inconsistent with a fiduciary's statutory obligation. DOL Br. at 14-16. However, there is no support in either ERISA or the case law for this sweeping new "duty to override." In order to create

this new "duty," DOL creatively reinterprets 29 U.S.C. § 1104(a)(1)(D), under which a plan fiduciary is *required* (not "permitted" as the DOL states, DOL Br. at 7) to discharge his duties with respect to the plan "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions" of Title I and IV of ERISA. 29 U.S.C. § 1104(a)(1)(D). Under DOL's formulation, this duty to follow plan terms becomes mere "perm[ission]" to follow plan terms, and the real duty of 29 U.S.C. § 1104(a)(1)(D), as revealed through the lens of ERISA's prudence and loyalty provisions (29 U.S.C. § 1104(a)(1)(A)-(B)), is a duty to pursue and eradicate any alleged inconsistency between the plan document and the statute (including interpretations of the statute that might be in dispute).

Such an interpretation would stand 29 U.S.C. § 1104(a)(1)(D) on its head. The primary statutory duty under this section is the duty to follow the terms of the plan, with an exception permitted *only* in the exceptional case of a clear conflict between the statute and plan language. Adopting DOL's position would cast aside this statutory duty in favor of a new "duty to override" invented solely for "stock drop" litigation.[3] In addition, because the decision to invest in employer stock

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[3] DOL relies principally on *Herman v. NationsBank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997). *NationsBank*, however, involved a situation very different from this case. There, this Court addressed a plan provision that governed solely

under the ING Plan is actually made by participants, applying DOL's new "duty" would likely also involve overriding decisions made by individual plan participants (and a decision that, under 29 U.S.C. § 1104(c), is statutorily granted to participants where a plan so provides). Attempting to stretch 29 U.S.C. § 1104(a)(1)(D) to impose such a "duty" on the employer is wrong as a matter of both law and policy, as it would encourage needless and unproductive second-guessing of routine actions taken in accordance with plan terms.

4. *The Presumption of Prudence Necessitates Affirmance*

The District Court applied an appropriate level of deference in the review of the defendants' actions by affording them the benefit of the presumption that maintenance of the employer stock fund was prudent. 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

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fiduciary conduct, i.e., casting proxy votes for shares of stock held by the plan but not yet allocated to any participant's account. 126 F.3d at 1357-58. By contrast, this case involves whether a directed trustee should override a decision by a settlor to include company stock in a qualified retirement plan in the first instance. To apply this Court's holding in *NationsBank* to the case at present would effectively render meaningless the well-established class of settlor functions. Moreover, doing so would be in direct conflict with twenty-plus years of established legal precedent, as well as the well-established congressional preference for employer stock plans.

in the manner it wishes. 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 is rendered essentially meaningless.

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.

This kind of litigation puts plan fiduciaries in an impossible position. They can be sued if they follow the terms of the plan and allow participants to continue investing in employer stock, and they can be sued if they override the terms of the plan by forbidding the purchase of additional employer stock or liquidating the plan's current holdings of employer stock. 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). Every appellate court that has considered this dilemma has rejected the principal argument advanced by Appellants and DOL here.[4]

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[4] The so-called *Moench* presumption has been expressly adopted by the Third, Fifth, Sixth, and Ninth Circuits, and adopted in principle by the Seventh Circuit. *See Quan v. Computer Sciences Corp.*, 49 Emp. Ben. Cas. [BNA] 2642, 2648-50 (9th Cir. 2010); *Pugh v. Tribune Co.*, 521 F.3d 686, 701 (7th Cir. 2008); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 256 (5th Cir. 2008); *Edgar v.*

The scope of the presumption is an issue of first impression in this circuit. *See, e.g.*, *Pedraza v. Coca-Cola Co.*, 456 F. Supp. 2d 1262, 1274 (N.D. Ga. 2006). Adoption of the presumption makes eminent sense. As the Ninth Circuit stated, "[f]iduciaries are not expected to predict the future of the company's stock performance . . . [; m]oreover, the long-term horizon of retirement investing requires protecting fiduciaries from pressure to divest when the company's stock drops." *Quan*, 49 Emp. Ben. Cas. [BNA] at 2649 (internal quotations and citations omitted).

Although ERISA's fiduciary duty rules are both many and strict, clairvoyance is not one of them. To the contrary, as courts routinely recognize, it is appropriate to insulate plan fiduciaries from Monday morning quarterbacks who would second-guess complex judgment calls about plan investments.

Courts have adopted a sensible and workable test for applying the presumption. It should be overcome only with a showing to the effect that "unforeseen circumstances would defeat or substantially impair the accomplishment of the trust's purposes." *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008). Although courts have described those

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Avaya, Inc., 503 F.3d 340 (3d Cir. 2007); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). Furthermore, "[n]o federal appellate court has rejected the *Moench* presumption on its merits." *Quan*, 49 Emp. Ben. Cas. [BNA] at 2648.

circumstances in various ways, this Court should endorse the concept that the presumption of prudence is only overcome, and action (if any is feasible) in contravention of plan terms is only required, where the employer is clearly and unmistakably in a death spiral (which does not include mere fluctuations in stock price). *See Dudenhoeffer v. Fifth Third Bancorp*, 50 Emp. Ben. Cas. [BNA] 1353, 1359 (S.D. Ohio 2010) ("the fact that the company remained viable despite a substantial drop in the stock price is a strong indicator that no breach of fiduciary duty occurred by remaining invested in employer securities"). The Ninth Circuit was surely correct in holding that "[m]ere stock fluctuations, even those that trend down significantly, are insufficient to establish the requisite imprudence to rebut the *Moench* presumption." *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004); *see also In re Bank of Am. Corp. Sec., Derivative, and ERISA Litig.*, 50 Emp. Ben. Cas. [BNA] 1366, 1380-81 (S.D.N.Y. 2010) (finding that a decline in stock price of approximately 83% during the class period was insufficient to state that the company was in imminent danger of collapse).

C. The Presumption Is Properly Considered at the Pleadings Stage

Dismissal of conclusory allegations that, even if true, would not overcome the presumption of prudence is appropriate. In both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court has been remarkably clear in instructing litigants that, when

complaint allegations do not give rise to a plausible claim of entitlement to relief, "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 557 (internal quotation marks and citations omitted); *see also Iqbal*, 129 S. Ct. at 1949 ("[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct allowed"). Requiring plaintiffs to allege plausible grounds for providing relief at the pleading stage "serves the practical purpose of preventing a plaintiff with a largely groundless claim from tak[ing] up the time of a number of people, with the right to do so representing an *in terrorem* increment of the settlement value." *Twombly*, 550 U.S. at 546 (internal quotation marks and citation omitted).

As the Third Circuit has written, there is "no reason to allow [an ERISA stock drop case] case to proceed to discovery when, even if the allegations are proved true, [plaintiff] cannot establish that defendants abused their discretion." *Edgar*, 503 F.3d at 349 (footnote omitted). The Ninth Circuit likewise affirmed a dismissal on the basis that alleged facts were not sufficient to establish entitlement to relief in light of the presumption of prudence. *See Wright*, 360 F.3d at 1098 ("Plaintiffs' alleged facts effectively preclude a claim under

Moench, eliminating the need for further discovery . . . ."); *see also Pugh*, 521 F.3d at 701.

Courts have repeatedly recognized that *Twombly* and *Iqbal* apply to all complaints without exception, even with respect to claims made under statutes enacted to protect employee rights. *See, e.g.*, *Lieberman v. United Healthcare Ins. Co.*, No. 09-81050-CIV, 2010 WL 903260, at *4 (S.D. Fla. Mar. 10, 2010) (ERISA); *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 955 n.9 (9th Cir. 2011) (Americans with Disabilities Act); *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 191 (4th Cir. 2010) (Title VII); *Carty v. D.C. Gov't*, No. 10-7081, 2010 WL 4340405, at *1 (D.C. Cir. Oct. 21, 2010) (Equal Pay Act); *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 921 (D. Ariz. 2010) (Fair Labor Standards Act); *Williams v. Family Serv. of Roanoke Valley*, No. 7:09cv00227, 2009 WL 3806333, at *5 (W.D. Va. Nov. 13, 2009) (Title VII and Age Discrimination in Employment Act). Appellants and the DOL provide no justification as to why actions brought under ERISA should be given special treatment.

D. Appellants and DOL's Theory of Disclosure Liability Would Undermine the Comprehensive Securities Regulatory Framework

Appellants' claim that Appellees violated ERISA's fiduciary duties by making material misrepresentations is premised entirely on alleged misstatements in SEC filings that were incorporated by reference into ING Plan documents. Appellants (and DOL) also argue that fiduciaries are liable for material omissions

in SEC filings, and that ERISA imposes a duty on fiduciaries to disclose non-public information to plan participants, and supplement or "correct" such SEC filings beyond what is required by the securities laws.

Courts have repeatedly concluded, however, that alleged misstatements and omissions in SEC filings are not actionable under ERISA because they are not made in an ERISA fiduciary capacity. *See, e.g.*, *In re Lehman Bros. Sec. & ERISA Litig.*, 683 F. Supp. 2d 294, 300 (S.D.N.Y. 2010). Just as a person does not act as a plan fiduciary when making SEC filings, a person does not act as a fiduciary when directing that an employer's SEC filings be incorporated by reference in the plan's Section 10(a) prospectus. *See also In re Worldcom, Inc.*, 263 F. Supp. 2d 745, 766 n.14 (S.D.N.Y. 2003) (explaining that securities laws require dissemination of Section 10(a) prospectus to plan participants). Because incorporating the employer's SEC filings into plan materials is required by the securities laws and therefore is not discretionary, the person who directs this action is, as the District Court concluded, not acting as a fiduciary when doing so. *See* Op. at 2601 ("incorporation [of SEC filings] by reference does not give rise to liability under ERISA, however, because no defendant has any discretion in an ERISA fiduciary capacity"); *see also Kirschbaum*, 526 F.3d at 257 (same result).

DOL admits that the SEC filings at issue here were incorporated in plan materials, *see, e.g.*, DOL Br. at 27, but fails to acknowledge that this was done in

order to comply with the securities laws. This is plainly not a fiduciary act under ERISA. DOL instead attempts to shoehorn fiduciary status into such conduct by stating that "when fiduciaries distribute plan documents to participants . . . they are acting as fiduciaries." DOL Br. at 28. However, DOL cites no authority for any generalized fiduciary disclosure obligation apart from ERISA's general disclosure obligations. Rather, DOL primarily relies on *Varity Corp. v. Howe*, which did not address such an affirmative disclosure duty, but rather was concerned about fiduciaries deliberately misleading participants. 516 U.S. 489 (2004). In fact, outside of misrepresentation or specialized circumstances not implicated here, courts have chosen not to impose upon fiduciaries any duties of disclosure beyond those specifically required by Part 1 of Title I of ERISA. *See Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein,* 107 F.3d 139, 146-47 (2d Cir. 1997) (finding that it would be "inappropriate to infer an unlimited disclosure obligation on the basis of [ERISA's] general provisions that say nothing about disclosure" (internal citations omitted)); *see also id.* at 146 (noting that "[i]n light of the precise language used by Congress . . . , we see no presumption favoring disclosure to participants beyond what is required" expressly by ERISA); *Ehlmann v. Kaiser Found. Health Plan of Tex.*, 198 F.3d 552 (5th Cir. 2000); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648 (4th Cir. 1996).

Compelling policy rationales underlie these decisions. First, SEC filings are already heavily regulated by a comprehensive body of securities laws and regulations. SEC filings are, by definition, documents that directors must execute to comply with a corporation's and/or directors' obligations under federal securities laws. *See, e.g.*, 15 U.S.C. § 77(f) (requiring filing of registration statement with the SEC for registration of securities); 15 U.S.C. § 78(m) (requiring filing of various periodical and other reports with the SEC). Any material misrepresentations or omissions in SEC filings are actionable under the securities laws and regulations promulgated by the SEC. *See Feins v. Am. Stock Exch., Inc.*, 81 F.3d 1215, 1221 (2d Cir. 1996) ("[t]he Exchange Act sets out a comprehensive regulatory scheme for the securities industry").

The Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") grant the SEC nearly plenary authority to regulate the purchase and sale of securities in the United States, including those made by employee benefit plans. 15 U.S.C. §77a, *et seq.* Subjecting SEC filings to duplicative and conflicting regulation under ERISA would "render much of securities law a dead letter." *Gearren,* 690 F. Supp. 2d at 273. Indeed, to permit these thinly disguised securities cases to proceed as ERISA claims would endorse an end run around every rule of pleading, proof, damages, and procedure that Congress and the courts have deemed important in private securities actions. *See*

Dudenhoeffer, 50 Emp. Ben. Cas. [BNA] at 1360 (finding that "Plaintiffs are generally attempting to challenge the wisdom of Fifth Third's business judgment and/or attempting to recover damages based on alleged mismanagement of the company, neither of which are actionable theories of recovery under ERISA"). Moroever, given ERISA's detailed financial reporting and disclosure requirements, its fiduciary duty provisions should not, and need not, be interpreted to require different or additional disclosure obligations. Doing so would also contradict the well-established rule that "[f]ederal common law is foreclosed where Congress has established a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

Moreover, Appellants' theories, if accepted, would seem to require that companies disclose to plan participants certain corporate information not disclosed to employees who are not plan participants or to the public generally. This type of unequal dissemination of information would encourage or facilitate conduct that would violate selective disclosure and insider-trading prohibitions. *See* SEC Release Nos. 33-7881 and 34-43154, at pt. III(A)(2) (Final Rule on Selective Disclosure and Insider Trading), 2000 SEC LEXIS 1672 (Aug. 15, 2000); 17 C.F.R. § 243.100 (SEC Regulation FD, prohibiting the selective disclosure of material, non-public information). Such an interpretation of what ERISA permits, or indeed requires, is implausible on its face. *See, e.g.*, *Varity*, 516 U.S. at 496 (in determining

whether general corporate communications constitute fiduciary communications, court should consider, among other things, whether the communications were made "by those who had plan-related authority to do so"); *Howell v. Motorola, Inc.*, ___ F.3d ____, 2011 WL 183966 (7th Cir. 2011) (noting both that "there is no support for the view that Plan fiduciaries [a]re required to provide all information about [the company's] business decisions in real time to Plan participants" and that "[w]e can think of at least one problem such a rule might create: insider trading"). DOL's ERISA regulations already recognize, in at least one context, that plan fiduciaries are not required to disclose information if such disclosure "would violate any provision of federal law." 29 C.F.R. § 2550.404c-1(c)(2)(ii). Furthermore, the securities laws require that "anyone in possession of material inside information must either disclose it to the investing public, or . . . abstain from trading in or recommending the securities concerned while such inside information remains undisclosed." *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (en banc); *see also* SEC Release Nos. 33-7881 and 34-43154; 17 C.F.R. § 243.100.

Plan fiduciaries who obtain detrimental information *cannot* protect the plan from loss by disclosing such information solely to participants or by liquidating the plan's employer stock investment without public disclosure. Selective disclosure is forbidden; trading decisions made by fiduciaries on the basis of non-public

material information could be deemed unlawful insider trading. 17 C.F.R. §§ 240.10b-5 (Rule 10b-5), 243.100-243.103 (Regulation FD). *See also Kirschbaum*, 526 F.3d at 256 ("Fiduciaries may not trade for the benefit of plan participants based on material information to which the general shareholding public has been denied access . . . ."). Furthermore, Appellants and DOL fail to address the fact that taking the actions they suggest may well depress stock prices even further. *See Brown v. Medtronic Inc.*, 628 F.3d 451 (8th Cir. 2010) ("it is fanciful to believe [the company] could have taken such an action without creating a much more severe impact on stock price than the alleged impact that [the company's] actual response caused").

The types of disclosures DOL advocates – selective disclosure of the impact of certain investments on the value of the Company Stock investment under the ING Plan – would violate Regulation FD or other securities laws or regulations. However, failure to make such a disclosure would, under DOL's theory, leave a financial institution open to fiduciary liability in its capacity as investment manager of an employer stock fund. There is absolutely no support in the case law for this outcome – and for good reason. As the Ninth Circuit recently stated, in adopting the *Moench* presumption, "[f]iduciaries are not expected to predict the future of the company's stock performance." *Quan*, 49 Emp. Ben. Cas. [BNA] at 2649.

DOL's alternative argument that plan fiduciaries be required to make a disclosure to "other shareholders and the public at large," rather than just plan participants (DOL Br. at 28), simply disregards the existing framework of securities laws and regulations concerning insider trading by seeking to take away the existing option to "abstain" from trading on inside information. Similarly, DOL's suggestion that plan fiduciaries could also fulfill purported ERISA disclosure obligations by alerting regulatory agencies, such as the SEC and DOL, to misstatements in SEC filings (DOL Br. at 28), is inherently inconsistent with the existing securities regulatory framework.

Appellants' arguments run counter to the consistently expressed congressional purpose of encouraging employee ownership of company stock. As the Supreme Court stated, courts must consider "competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit [and pension] plans in the first place." *Varity*, 516 U.S. at 497. Erecting the new federal common law duties urged by Appellants and DOL would both vastly complicate plan administration under ERISA and would reduce (if not eliminate) the incentives of offering employer stock as an investment option in an ERISA plan. Because such an

outcome is both unsupported by the law and bad public policy, the District Court's decision should be affirmed.

IV. CONCLUSION

For all of the foregoing reasons, we urge this Court to affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 2007 in Times New Roman size 14-point font.

Dated: March 17, 2011

Peter Eyre

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 2011, I served a copy of the Brief of *Amici Curiae* the Securities Industry and Financial Markets Association and Chamber of Commerce of the United States of America on the following counsel of record by dispatching with FedEx:

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