

No. 10-11948-DD

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**KENT SEWRIGHT and DEADRE D. DIGGS,**  
on behalf of themselves and all other similarly situated,  
Plaintiffs/Appellants,

v.

**ING GROEP, N.V., et al.,**  
Defendants/Appellees,

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

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**MOTION OF THE SECURITIES INDUSTRY AND FINANCIAL  
MARKETS ASSOCIATION AND CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS  
*AMICI CURIAE***

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March 17, 2011

**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.

The following persons have an interest in the outcome of this appeal:

Alston & Bird, LLP, counsel for appellees

Bottini, Francis A. Jr., counsel for appellants

Breukink, Henk, appellee

Burton, Byron Scott, appellee

Carroll, Kevin M., counsel for *amicus curiae* Securities Industry and Financial  
Markets Association

Chamber of Commerce of the United States of America, *amicus curiae*

Chang, Albert Y., counsel for appellants

Cleary Gottlieb Steen & Hamilton, LLP, counsel for appellees

Conrad, Robin S., counsel for *amicus curiae* Chamber of Commerce of the  
United States of America

Covington & Burling LLP, counsel for *amicus curiae* The ERISA Industry

Committee

Crowell & Moring LLP, counsel for *amici curiae* Securities Industry and  
Financial Markets Association and Chamber of Commerce of the  
United States of America

Cubbage, Thomas L. III, counsel for *amicus curiae* The ERISA Industry  
Committee

Delahanty, William, appellee

DiCarlo, Patrick C., counsel for appellees

Diggs, Deadre D., appellant

Egert, Mark A., counsel for *amici curiae* Securities Industry and Financial  
Markets Association and Chamber of Commerce of the United States  
of America

Elverding, Peter A.F.W., appellee

The ERISA Industry Committee, *amicus curiae*

Evangelista & Associates, LLC, counsel for appellants

Evangelista, James M., counsel for appellants

Eyre, Peter, counsel for *amici curiae* Securities Industry and  
Financial Markets Association and Chamber of Commerce of  
the United States of America

Gainey & McKenna, counsel for appellants

Gies, Thomas P., counsel for *amici curiae* Securities Industry and Financial  
Markets Association and Chamber of Commerce of the United States  
of America

de la Giroday, Eric Boyer, appellee

Hammerman, Ira D., counsel for *amicus curiae* Securities Industry and  
Financial Markets Association

Harris, Darryl, appellee

Harryvan, Dick, appellee

Hauser, Timothy D., counsel for *amicus curiae* Secretary of Labor Hilda L.  
Solis

Hele, John C.R., appellee

Hoffman, Claus Dieter, appellee

Hommen, Jan H.M., appellee

Hoogendoorn, Piet, appellee

Hopkins, Elizabeth, counsel for *amicus curiae* Secretary of Labor Hilda L.  
Solis

ING Groep, N.V., appellee

ING North America Insurance Corporation, appellee

ING Life Insurance and Annuity Company, appellee

ING U.S. Pension Committee, appellee

No. 10-11948-DD, Sewright v. ING Groep, N.V.

Johnson Bottini, LLP, counsel for appellants

Kawka, Shane B., counsel for *amicus curiae* Chamber of Commerce of the  
United States of America

Klaver, Piet C., appellee

Kok, Wim, appellee

Lowenthal, Mitchell A., counsel for appellees

McInerney, Tom, appellee

McKenna, Thomas J., counsel for appellants

Moore, Christopher P., counsel for appellees

van der Noordaa, Hans, appellee

Securities Industry and Financial Markets Association, *amicus curiae*

Sewright, Kent, appellant

Shattuck, Kimberly, appellee

Smith, Catherine H., appellee

Smith, M. Patricia, counsel for *amicus curiae* Secretary of Labor Hilda L.

Solis

Solis, Secretary of Labor Hilda L., *amicus curiae*

Tilmant, Michel J., appellee

Timmermans, Koos, appellee

Tso, Thomas, counsel for *amicus curiae* Secretary of Labor Hilda L. Solis

No. 10-11948-DD, Sewright v. ING Groep, N.V.

de Vacleroy, Jacques, appellee

Vine, John M., counsel for *amicus curiae* The ERISA Industry Committee

Vuursteen, Karel, appellee

Wheat, David A., appellee

Wood, Joel D., counsel for *amici curiae* Securities Industry and Financial

Markets Association and Chamber of Commerce of the United States

of America

Worley, David J., counsel for appellants

**MOTION OF SECURITIES INDUSTRY AND FINANCIAL MARKETS  
ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED  
STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

Pursuant to Federal Rule of Appellate Procedure 29(b), the Securities Industry and Financial Markets Association (“SIFMA”) and the Chamber of Commerce of the United States of America (“Chamber”) respectfully request leave to file the Brief lodged herewith as *amici curiae* in support of Appellees and in response to the *amicus* brief filed in this action by the Secretary of Labor (the “Secretary”). Grounds in support of this motion are set forth below.

Counsel for SIFMA and the Chamber requested the parties’ consent to the filing of the *amici* brief. Although the Appellees consented to the filing of this brief, the Appellants have withheld their consent, thus necessitating this motion.

**Identity of the *Amici Curiae***

SIFMA is a nonprofit association that brings together the shared interests of hundreds of securities firms, banks and asset 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 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, and all of these members may potentially be affected by the Court's decision.

SIFMA participates as *amicus curiae* in cases with the potential for far-reaching effects on the operations of securities firms, banks and asset managers. The Chamber participates as *amicus curiae* in cases with the potential for far-reaching effects on businesses and professional organizations as well as on the employees of such businesses and organizations.<sup>1</sup> This is such a case.

### **Reasons for Granting Leave to File an *Amici* Brief**

This appeal from the dismissal of claims concerning the duties owed by fiduciaries of ERISA-governed defined contribution plans that invest in the sponsoring employer's stock raises issues of importance to many businesses and professional organizations, including securities and financial institutions which

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<sup>1</sup> *E.g.*, *Barber Auto Sales, Inc. v. United Parcel Service, Inc.*, No. 10-10821 (11th Cir.); *Brown v. R.J. Reynolds Tobacco Co.*, No. 08-16158-CC (11th Cir.); *Cappuccitti, et al. v. DirecTV, Inc.*, No. 09-14107-BB (11th Cir.); *Cruz v. Cingular Wireless*, No. 08-16080-CC (11th Cir.); *In re: HealthSouth Corp. Sec. Litig.*, No. 07-10701 (11th Cir.); *Fisher v. JP Morgan Chase & Co.*, No. 10-1303-CV (2d Cir.); *Gearren v. McGraw-Hill Cos.*, No. 10-934-CV (2d Cir.).

offer their own company stock as an investment option in their in-house defined contribution plans. This case is but one of many ERISA “stock drop” lawsuits that have been filed in recent years, within this Circuit and nationwide.<sup>2</sup>

Typical of such cases, this appeal poses issues concerning whether ERISA’s duty of prudence bars a fiduciary from allowing plan participants to invest in employer stock in accordance with the requirements of a plan document and whether ERISA’s duty of loyalty requires a fiduciary to make disclosures about employer stock that participants may purchase under the plan.<sup>3</sup>

SIFMA and the Chamber believe that their brief “will assist the judges by presenting ideas, arguments, . . . [and] insights” that will not be found in the parties’ briefs. *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). The proffered brief provides important context by describing various means by which Congress has encouraged investments by ERISA plans in employer stock, as well as by describing the importance of employer stock in such plans, as reflected in studies of the workforce of employers who offer such an investment option. SIFMA and the Chamber’s brief also informs the Court of ways in which both the Plaintiff-Appellants and their supporting *amicus* the

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<sup>2</sup> *E.g.*, *Lanfear v. Home Depot, Inc.*, Case No. 10-13002-GG (11th Cir., docketed July 1, 2010), *on appeal from* Case No. 1:07- cv-00197-ODE (N.D. Ga.).

<sup>3</sup> The wide-ranging significance of the district court’s decision is reflected by the fact that the Secretary of Labor already has filed an *amicus* brief in this appeal.

Secretary of Labor have misconstrued relevant ERISA provisions, including particularly its duty of prudence and duty to follow plan documents. SIFMA and the Chamber believe that their brief offers a broader perspective than those offered by the parties or the Secretary.

The many SIFMA and Chamber members whose defined contribution plans allow investment in the employers' stocks are potential litigants are all potential targets of "stock drop" litigation of the same kind. Moreover, both SIFMA and Chamber members are likely to be affected in the design and administration of their defined contribution plans by the outcome of this and similar ERISA cases, potentially by the limitation or outright exclusion of employer stock as an investment option under such plans.

SIFMA and the Chamber submit that their participation in this case will aid the Court by articulating the concerns of many of the nation's largest employers, including securities firms and banks, which are directly affected by such class action cases prosecuting ERISA claims against the fiduciaries of employee benefit plans maintained by many types of employers, including financial institutions. SIFMA and the Chamber's brief explains why those concerns extend beyond the parties to this case, and indeed even to financial institutions and other employers who are not parties to any pending litigation. By doing so, the proffered *amici* brief provides context and perspective not supplied by the

parties or the Secretary of Labor.

### CONCLUSION

For the foregoing reasons, the Movant requests that its motion be granted and that the *amici* brief lodged with this motion be accepted and filed by the Court.

Respectfully submitted,



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\*Counsel of Record

Dated: March 17, 2011

## CERTIFICATE OF SERVICE

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

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I further certify that on this 17th day of March 2011, I filed the original and three copies of the above-referenced Motion with the Clerk of the Court by dispatching them via FedEx.

A handwritten signature in cursive script, appearing to read "Peter Eyre", written in black ink.

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Peter Eyre