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 other similarly situated,
Plaintiffs/Appellants,

v.

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

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

BRIEF OF *AMICUS CURIAE* THE ERISA INDUSTRY COMMITTEE

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February 14, 2011

CERTIFICATE OF INTERESTED PERSONS and CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, *Amicus Curiae* The ERISA Industry Committee submits this supplemented Certificate of Interested Persons and Corporate Disclosure Statement. The following persons have an interest in the outcome of this appeal:

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether 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 invest in employer stock in accordance with the requirements of a plan document.
2. Whether the duty of loyalty under ERISA requires a fiduciary to make disclosures about employer stock that participants may purchase under the plan.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

The ERISA Industry Committee ("ERIC") is a nonprofit association representing America's largest private employers. ERIC's members sponsor employee benefit plans covering millions of active and retired workers and their families, including employee stock ownership plans and other programs that invest in

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[1] This brief was not authored in whole or in part by any party's counsel; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than the *amicus curiae,* its members, or its counsel contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

employer stock. ERIC participates as *amicus curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[2] This is such a case. Pursuant to its motion for leave, Fed. R. App. P. 29, ERIC respectfully submits this brief as *amicus curiae* in support of Appellees.

SUMMARY OF ARGUMENT

Although employers are not required to maintain benefit plans for their employees, numerous federal statutes strongly encourage employers to maintain employee benefit plans, including plans that allow employees to invest in employer stock. The objectives of these statutes must be considered in applying ERISA's fiduciary standards.

ERISA's fiduciary standards subject plan fiduciaries to a duty of prudence that takes into account the character of the plan and that focuses on fiduciaries' conduct, rather than on the investments that fiduciaries make. Accordingly, allegations that employer stock was an "imprudent investment" are misguided.

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[2] *E.g., LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 259, 128 S. Ct. 1020, 1027 (2008) (Roberts, C.J., concurring); *Hecker v. Deere & Co.*, 556 F.3d 575, 581 (7th Cir.), *reh'g denied*, 569 F.3d 708 (7th Cir. 2009).

A fiduciary who allows plan participants to invest in employer stock in accordance with the requirements of a plan document does not violate ERISA's duty of prudence. This is so because only discretionary conduct is subject to ERISA's fiduciary standards, and compliance with the requirements of a plan document does not constitute discretionary conduct. Further, even if such conduct were subject to ERISA's fiduciary standards, compliance with the plan document should be presumed to comply with ERISA's duty of prudence in all but the most extreme circumstances. Consequently, given the allegations in this case, the District Court properly dismissed Plaintiffs' claims of "imprudence."

ERISA's duty of loyalty does not require fiduciaries to make disclosures about plan investments such as employer stock. The federal securities laws comprehensively regulate disclosures in connection with securities offerings and protect investors (including plan participants) from being misled. There is no justification for creating common-law rules under ERISA to regulate such disclosures since such common-law rules would undermine important objectives of ERISA and the securities laws.

Since Congress addressed "strike suits" under the securities laws, abusive ERISA "stock drop" suits have become commonplace. ERISA "stock drop" suits weaken the employee benefit system and circumvent the laws governing securities litigation. ERISA should not be construed to encourage "stock drop" suits.

ARGUMENT

This is an ERISA "stock drop" suit. In recent years, such lawsuits have become commonplace. ERISA "stock drop" suits often accompany securities fraud lawsuits, as is the case here.[3] An emerging consensus of court decisions and sound legal reasoning—grounded in principles of statutory interpretation, congressional intent, and sound public policy—strongly support affirmance of the District Court's order dismissing this ERISA "stock drop" suit.

I. Congress Has Encouraged Employers To Maintain Plans That Allow Employees To Invest In Employer Stock.

ERISA is the principal federal law regulating employee benefit plans. Although ERISA does not require employers to maintain benefit plans for their employees, ERISA encourages employers to do so. *See Conkright v. Frommert*, 559 U.S. __, 130 S. Ct. 1640, 1643, 1648-49 (2010).

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[3] *See Freidus v. ING Groep N.V.,* 2010 U.S. Dist. LEXIS 95571, at *60 (S.D.N.Y. Sept. 14, 2010) (dismissing most securities law claims and leaving only one surviving claim, in what the court described as a "close call").

ERISA is a "comprehensive and reticulated statute." *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 146, 105 S. Ct. 3085, 3092 (1985). While ERISA's legislative history reflects Congress's expectation that the courts would develop a federal common law of rights and obligations under ERISA, the Supreme Court has instructed the courts to be mindful, as they develop federal common law, of the language, structure, and objectives of ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 497, 116 S. Ct. 1065, 1070 (1996). The Supreme Court recently observed that "ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans" and that in enacting ERISA, "Congress sought to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright*, 130 S. Ct. at 1648-49 (internal quotation marks and citation omitted).

Pension plans fall into two categories under ERISA: individual account plans and defined benefit plans. This case involves ERISA provisions that apply to individual account plans.

An individual account plan is a pension plan that provides benefits to a participant based solely on the balance in the bookkeeping account that the plan maintains for the participant. The participant's account reflects the participant's interest in contributions to the plan and the participant's share of the plan's investment experience and expenses (and forfeitures by other participants). The benefits under a defined benefit plan are typically determined by a formula and are not affected by the plan's investments. *See* ERISA § 3(34), (35), 29 U.S.C. §§ 1002(34), (35); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440, 119 S. Ct. 755, 761 (1999). Many major employers maintain both types of plans and allow eligible employees to participate in both.

Most private sector retirement plans are individual account plans with cash or deferred arrangements, commonly referred to as 401(k) plans after the relevant provision of the Internal

Revenue Code, 26 U.S.C. § 401(k). Many of these plans allow each participant to allocate the participant's account balance among several designated investment options.

Many individual account plans are Employee Stock Ownership Plans ("ESOPs") or offer an ESOP or other employer stock program as an investment option. A survey conducted by the Employee Benefits Research Institute and the Investment Company Institute found that, at the end of 2009, 46 percent of 401(k) plan participants participated in plans offering employer stock as an investment option. Jack VanDerhei, *et al.*, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2009*, at 24 (2010).[4] The widespread practice of offering employer stock as an investment option under individual account plans has enabled millions of employees to share in their employers' success.

The prevalence of employer stock investment options in individual account plans is not accidental. "Congress, believing employees' ownership of their employer's stock a worthy goal, has encouraged the creation of ESOPs both by giving tax breaks and

[4] *See* http://www.ebri.org/pdf/briefspdf/EBRI_IB_011-2010_No350_401k_Update-092.pdf (last viewed February 10, 2011).

by waiving the duty ordinarily imposed on trustees by modern trust law (including ERISA …) to diversify the assets of a pension plan." *Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003); *see also Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983).

ERISA encourages the offering of employer stock by exempting employer stock funds from requirements that would otherwise hamper their operation. ERISA exempts "eligible individual account plans" ("EIAPs") from the generally applicable requirement that fiduciaries "diversify[ ] the investments of the plan so as to minimize the risk of large losses," ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C); ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2). An EIAP is an individual account plan that "explicitly provides for acquisition and holding of qualifying employer securities …." ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3).[5] EIAPs also are exempt from the generally applicable 10% limit on the portion of plan assets that may be

[5] An ESOP is an EIAP. ERISA § 407(d)(3)(A), 29 U.S.C. § 1107(d)(3)(A).

invested in employer securities and employer real property. ERISA § 407(a), (b), 29 U.S.C. § 1107(a), (b).

Although ERISA prohibits most transactions between a plan and the sponsoring employer, ERISA §§ 3(14)(C), 406(a)(1), 29 U.S.C. §§ 1002(14)(C), 1106(a)(1), ERISA provides an exemption for purchases and sales of employer securities, ERISA § 408(e), 29 U.S.C. § 1108(e), and permits an ESOP to borrow from the employer in order to invest in employer stock, ERISA § 408(b)(3), 29 U.S.C. § 1108(b)(3).

The Internal Revenue Code offers tax incentives for employers to maintain plans that invest in employer stock. *See* 26 U.S.C. § 404(k) (deductible dividends on employer stock held by ESOP); *id.* § 402(e)(4) (preferential tax treatment for distributions of appreciated employer stock); *id.* § 1042 (deferring tax on gain from sale of employer stock to ESOP).[6]

[6] Congress has occasionally offered additional incentives, including tax credits for contributions to an ESOP, *e.g.*, Tax Reduction Act of 1975, Pub. L. 94-12, § 301, Tax Reform Act of 1976, Pub. L. 94-455, § 803, Revenue Act of 1978, Pub. L. 95-600, § 141, and an exclusion from a lender's taxable income of 50% of the interest received on a qualifying loan to finance an ESOP's acquisition of employer securities, *see* 26 U.S.C. § 133 (repealed).

Congress emphasized the importance of employee stock ownership by enacting legislation stating that "[t]he Congress is deeply concerned that the objectives sought by this series of laws [promoting employee stock ownership] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans …." Tax Reform Act of 1976, Pub. L. 94-455, § 803(h), 90 Stat. 1520; *see also Steinman*, 352 F.3d at 1103.

II. Plaintiffs' Duty Of Prudence Claims Were Properly Dismissed.

A. The Duty Of Prudence Governs How Fiduciaries Make Investment Decisions, Not The Investments Themselves.

Plaintiffs' duty of prudence arguments are based on the mistaken premise that the complaint could state a colorable claim by alleging that ING stock was an "imprudent investment." App't Br. at 1, 14, 22. ERISA's duty of prudence focuses, however, on how fiduciaries make investment decisions, not on the characteristics of the investments they make.[7] The duty of prudence requires a plan fiduciary to "discharge his duties with

[7] *See* John M. Vine, *Prudent Investing*, 38 COMP. PLANNING J. 1, 5-17 (Jan. 2010).

respect to a plan … 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." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). ERISA also requires fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [other applicable provisions of the statute]." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

ERISA establishes an objective test for evaluating the prudence of fiduciaries' conduct. *See Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984). That test evaluates a fiduciary's conduct as of the time it occurred—not "from the vantage point of hindsight." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006); *see also GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 732 (11th Cir. 1990).

ERISA's fiduciary standards were intended to accommodate a variety of investments and investment strategies. In enacting

ERISA, Congress chose not to impose rigid requirements such as the "legal list" rules that previously limited permissible trust investments under English law and the laws of some states.[8] Instead, ERISA codified the flexible "prudent man" standard under which a fiduciary's conduct is evaluated in light of the character and aims of the plan. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996).

Plaintiffs mistakenly challenge the "prudence" of ING stock, rather than the prudence of the fiduciaries' conduct. In their brief to this Court, Plaintiffs assert that Defendants breached their fiduciary duties by continuing to make and maintain investments in ING stock when they knew or should have known that ING stock was not a "prudent investment." App't Br. at 1. Plaintiffs' misguided emphasis on the character of the investment, rather than the conduct of the fiduciaries, recurs throughout their brief. *See, e.g., id.* at 6 ("ING stock was an imprudent investment."); *id.* at 8 (same); *id.* at 14 (same); *id.* at 22 (same). The same error also

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[8] *See* Howard R. Williams, *The Prudent Man Rule of the Pension Reform Act of 1974*, 31 BUS. LAWYER 99, 100 (1975) (discussing Congress's rejection of the "legal list" rule in favor of the prudent fiduciary standard).

appears throughout the brief of Plaintiffs' *amicus*, the Secretary of Labor (the "DOL"). DOL Br. at 5 ("imprudent investments"); *id.* at 7 (same); *id.* at 10 ("obligation to consider whether such investment is prudent"); *id.* at 16 ("imprudent investment").[9]

This is not a question of semantics. The difference between prudent *investors* and prudent *investments* is substantial. ERISA mandates prudent conduct, not prudent investments, and allegations about the quality of an investment fail to establish entitlement to relief. *Cf. Cunningham*, 716 F.2d at 1467; *Gochnauer v. A.G. Edwards & Sons, Inc.,* 810 F.2d 1042, 1050 (11th Cir. 1987).

B. The Decision To Allow Employees To Invest In Employer Stock Was A Settlor Decision, Not A Fiduciary Decision.

ERISA's fiduciary standards do not govern every decision affecting a benefit plan: the fiduciary standards do not apply to plan design decisions, and employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate"

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[9] Similar mistaken allegations have been made in other cases. *E.g.*, *Brown v. Medtronic, Inc.*, __ F.3d __, 2010 U.S. App. LEXIS 25369, at *23 (8th Cir. Dec. 13, 2010) ("Brown alleges generally that Medtronic stock became an imprudent investment ….").

employee benefit plans. *Hughes Aircraft*, 525 U.S. at 443, 119 S. Ct. at 763. The decision to establish an ESOP or other EIAP is a plan design decision. When employers make such decisions, "they do not act as fiduciaries, but are analogous to the settlors of a trust." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890, 116 S. Ct. 1783, 1789 (1996) (citation omitted).

C. Defendants Did Not Act In A Fiduciary Capacity When They Allowed Participants To Invest In The ING Stock Fund.

Because a person is an ERISA fiduciary "only 'to the extent' that he acts in such a capacity," a threshold question is whether a defendant "was performing a fiduciary function … when taking the action subject to the complaint." *Pegram v. Herdrich*, 530 U.S. 211, 225-26, 120 S. Ct. 2143, 2152-53 (2000). The District Court correctly held that none of Defendants acted in a fiduciary capacity when they allowed participants in the ING Plans to direct to have their accounts invested in the ING stock fund. Generally, ERISA classifies someone as a fiduciary only if the person possesses or exercises *discretionary* responsibility over the management or administration of a plan, and then only *to the* *extent* of such responsibility. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *Cotton v. Mass. Mut. Life Ins. Co.,* 402 F.3d 1267, 1277 (11th Cir. 2005); *Hamilton v. Allen Bradley Co.,* 244 F.3d 819, 826 (11th Cir. 2001); *In re SunTrust Banks, Inc. ERISA Litig.,* __ F. Supp. 2d __, 2010 U.S. Dist. LEXIS 114169, at *16-*29 (N.D. Ga. Oct. 25, 2010).

None of Defendants exercised discretion when allowing participants to invest in the ING stock fund: the ING Plans required an ING stock fund to be offered as an investment option and stipulated that the Plan Committee's authority to delete investment options did *not* apply to the ING stock fund, "which shall always be an investment option under the Plan, and the Committee shall have no discretion with respect to investments in or disposition of [ING] Stock." *See also In re Bear Stearns Cos., Inc. Securities, Derivative, & ERISA Litig.,* 2011 U.S. Dist. LEXIS 6026, at *368-*80 (S.D.N.Y. Jan. 19, 2011); *In re American Express Co. ERISA Litig.*, 2010 U.S. Dist. LEXIS 117013, at *25-*34 (S.D.N.Y. Nov. 2, 2010) (same); *Lanfear v. Home Depot, Inc.,* 718 F. Supp. 2d 1364, 1376-81 (N.D. Ga. 2010); *In re Citigroup*

ERISA Litig., 2009 U.S. Dist. LEXIS 78055, at *19-*61 (S.D.N.Y. Aug. 31, 2009); *In re Coca-Cola Enters. Inc., ERISA Litig.,* 2007 U.S. Dist. LEXIS 44991, at *24-*33 (N.D. Ga. June 20, 2007); *Mellot v. ChoicePoint, Inc.*, 561 F. Supp. 2d 1305, 1312-14 (N.D. Ga. 2007), *vacated pursuant to settlement* (May 28, 2007); *Pedraza v. Coca-Cola Co.,* 456 F. Supp. 2d 1262, 1273-74 (N.D. Ga. 2006); *Smith v. Delta Air Lines, Inc.*, 422 F. Supp. 2d 1310, 1326 (N.D. Ga. 2006).

D. The Presumption Of Prudence Also Justified Dismissal.

Even if Defendants acted as fiduciaries in permitting investments in the ING stock fund, the District Court's dismissal of the prudence claims was proper.

i. The Presumption Of Prudence Addresses The Dilemma Faced By Plan Fiduciaries.

If allowed to proceed, "stock drop" lawsuits, like this one, place fiduciaries on the horns of a dilemma. They can be sued if they follow the terms of the plan and allow the plan to continue investing in employer stock or they can be sued if they override the terms of the plan by halting the purchase of employer stock or by liquidating the plan's holdings of employer stock.

Although an employer's stock price might currently be depressed, there is a chance that the stock price will rebound. Here, after falling from $40.40 on April 28, 2008, to a low of $3.03 on March 5, 2009, ING's stock price rebounded to $10.89 on June 8, 2009 (the date Plaintiffs filed their complaint). *See also Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006); *Mellot*, 561 F. Supp. 2d at 1314-15.

The fiduciaries' predicament is illustrated by two cases involving the W.R. Grace 401(k) plan. The plaintiffs in one case alleged that the plan fiduciaries violated their duties by allowing the plan to invest in employer stock too long; the plaintiffs in the other case complained that the fiduciaries caused the plan to sell that stock too soon, before its price increased substantially. *See Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 2-3 (1st Cir. 2009).

Cases like these confirm the wisdom of precluding lawsuits attacking fiduciaries for following the plan's terms and also support the alternative basis for affirmance here: a presumption that fiduciaries fulfill the duty of prudence when they permit investments in employer stock in accordance with the terms of the plan. *See Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995).[10] When fiduciaries comply with a plan requirement that they permit investment in employer stock, they should be presumed to have acted with the "care, skill, prudence, and diligence" that a prudent man would use in conducting "an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Otherwise, fiduciaries become "virtual guarantors of the financial success of the … plan"—at risk if they permit continued investment in employer stock, and equally at risk if they do not. *Moench*, 62 F.3d at 570 (quoting *Martin v. Feilen*, 965

[10] In *Moench*, the Third Circuit observed that, under trust law, if the trust "requires" the trustee to invest in a particular stock, the trustee is "immune from judicial inquiry," but if the trust merely "permits" such investments, the trustee's investment decisions are subject to de novo review. The fiduciaries in *Moench* were not absolutely required to invest in employer stock, but were more than merely permitted to do so. In order to avoid eviscerating the statutory preference for ESOPs, the Third Circuit ruled that an ESOP fiduciary who is strongly encouraged, but not required, to invest in employer stock is entitled to a presumption that its decision to invest in employer stock was prudent and that a plaintiff can rebut the presumption only by showing that "owing to circumstances not known to the settlor and not anticipated by him [the making of such investment] would defeat or substantially impair the accomplishment of the purposes of the trust" (quoting the Restatement (Second) of Trusts § 227, Comment g).

F.2d 660, 666 (8th Cir. 1992)). *See also*, *e.g.*, *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 879-83 (9th Cir. 2010); *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 256 (5th Cir. 2008); *Pugh v. Tribune Co.*, 521 F.3d 686, 701 (7th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Bear Stearns*, 2011 U.S. Dist. LEXIS 6026, at *380-93; *Wright v. Medtronic, Inc.*, 2011 U.S. Dist. LEXIS 923, at *11-*12 (D. Minn. Jan. 5, 2011); *In re American Express Co. ERISA Litig.*, 2010 U.S. Dist. LEXIS at *34-*39; *Mellot*, 561 F. Supp. 2d at 1314-15.

The presumption that the fiduciary acted in accordance with the duty of prudence should be overcome only by showing such "unforeseen circumstances [as] would defeat or substantially impair the accomplishment of the trust's purposes." *Kirschbaum*, 526 F.3d at 256. Although those circumstances can be described in various ways, this Court should endorse the view that only where the employer is plainly in a death spiral, and where adherence to plan terms and to the congressional objective of employee capitalism is futile and the chances that the plan's investment will rebound are *de minimis*, may a court infer that the settlor would have preferred the recovery of a fraction of the plan's investment over its complete loss, and only then would the fiduciary not be at risk in selling (or not buying) employer stock. *See Bear Stearns,* 2011 U.S. Dist. LEXIS 6026 at *380-*84; *see also Quan,* 623 F.3d at 883; *Lanfear,* 718 F. Supp. 2d at 1380-81; *Pedraza*, 456 F. Supp. 2d at 1275-76.

ii. The Presumption Is Properly Considered At The Pleadings Stage.

In considering whether alleged facts in an ERISA "stock drop" case were sufficient to overcome the presumption that fiduciaries acted prudently, the Third Circuit said it saw "no reason to allow this case to proceed to discovery when, even if the allegations are proven true, [plaintiff] cannot establish that defendants abused their discretion." *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007) (footnote omitted). The Ninth Circuit also 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 v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1098 (9th Cir. 2004) *see also Pugh*, 521 F.3d at 701.

Dismissal of pleadings that, even if proved, would not overcome the presumption of prudence is especially appropriate in light of the concerns expressed by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). *Twombly* stated that when allegations in a complaint could 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 557-58, 127 S. Ct. at 1966 (internal quotation marks and citations omitted). Requiring plaintiffs to allege plausible grounds for 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 other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* (internal quotation marks and citation omitted).

Moench and its progeny establish the standard that must be met by a claim that fiduciaries violated their ERISA duties by allowing the plan to continue to invest in employer stock in accordance with the terms of the plan. Allegations that, if proved, would not meet this standard fail to state a "plausible" claim of entitlement to relief. *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965; *Bear Stearns*, 2011 U.S. Dist. LEXIS 6026, at *384-*93.[11]

iii. The Allegation That The Stock Was "Overpriced" Does Not Overcome The Presumption.

Amicus, the DOL, contends that "there is no rationale for applying a presumption of prudence where the plaintiff alleges that the fiduciaries knew or should have known that the stock's price was artificially inflated." DOL Br. at 22. The DOL maintains that even if the presumption is recognized, allegations "that the fiduciaries knew or should have known that the stock's price was artificially inflated," overcame the presumption. *Id.* These contentions are flawed.

First, the DOL would impermissibly credit allegations of imprudence that depend on hindsight. *Merino*, 452 F.3d at 182

[11] The First Circuit declined to consider a presumption of prudence at the pleadings stage. *Lalonde v. Textron, Inc.*, 369 F.3d 1, 7 (1st Cir. 2004), relying on *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957). *Twombly*, however, later repudiated the standard articulated in *Conley*. *See* 550 U.S. at 563, 127 S. Ct. at 1969.

(prudence cannot be judged with hindsight). The fact that a stock has been "overpriced" can be known only in retrospect after a change in circumstance (*e.g.*, publication of adverse news or a corrective disclosure) causes the stock price to drop. Until and unless that occurs, one cannot say that a plan paid "too much" for publicly-traded securities. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342-43, 125 S. Ct. 1627, 1631-32 (2005). The contention that fiduciaries should allow plan investment in employer stock only when that stock is not going to fall in value would not require fiduciaries to be merely prudent; it would require them to be clairvoyant. *See Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 705-06 (7th Cir. 2008) (questioning theories that fiduciaries should block plan investment when employer stock is overpriced); *Mellot*, 561 F. Supp. 2d at 1312.

Second, by focusing on whether the employer stock was "overpriced," the DOL erroneously examines the prudence of the *investment*. *See* DOL Br. at 16 ("[T]he stock was overpriced and therefore an imprudent investment."). The statute makes no mention of the prudence of an investment and instead requires a fiduciary to exercise the requisite degree of "care, skill, prudence, and diligence" in pursuing the plan's "character and … aims," ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B)—which include, in the case of ESOPs and other EIAPs, giving employees an opportunity to invest in employer stock. *See* Section II.A, *supra.*

Third, the DOL contends that fiduciaries must disregard the terms of plan documents and halt plan investment in employer stock whenever they know or should have known that the stock is "overpriced." DOL Br. at 11-16. That course of action is impracticable and self-defeating; far from protecting the plan from an investment loss, it would make an investment loss more likely. The market would certainly react negatively to the news that a plan's fiduciaries suddenly halted investment in the employer's stock. *Cf. Kirschbaum*, 526 F.3d at 256; *Edgar*, 503 F.3d at 350; *Summers*, 453 F.3d at 410.[12]

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[12] Fiduciaries cannot protect the plan by disclosing such information solely to participants or by liquidating the plan's holdings of employer stock without public disclosure. Selective disclosure is forbidden; trading decisions made on the basis of non-public material information could be deemed unlawful insider trading. 17 CFR § 243.100-243.103 (Regulation FD); *id.* § 240.10b-5 (Rule 10b-5); *Employee Benefit Plans*, SEC Release 33-

III. Plaintiffs' Duty Of Loyalty Claims Were Properly Dismissed.

A. The Duty Of Loyalty Does Not Create An Obligation To Make Disclosures About Employer Stock.

ERISA and its implementing regulations specify the disclosures that must be made to plan participants. Plaintiffs here do not allege that Defendants failed to make those disclosures. Instead, Plaintiffs contend that the fiduciary duty to "discharge [the fiduciary's] duties with respect to a plan solely in the interest of the participants and beneficiaries," ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires fiduciaries to fulfill an open-ended duty to disclose information about ING stock. App't Br. at 40-41.[13]

6188, 45 Fed. Reg. 8976 & n.168 (Feb. 11, 1980) (plan sales of employer stock are "subject to the … antifraud provisions of the 1993 Act," as well as Section 10(b) of the 1934 Act and Rule 10b-5); *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."); *accord Harzewski v. Guidant Corp.*, 489 F.3d 799, 807-08 (7th Cir. 2007); *Quan*, 623 F.3d at 881, 883 & n.8.

[13] Most of ERISA's disclosure requirements appear in Part 1 of Title I ("Reporting and Disclosure"), which imposes detailed disclosure obligations regarding the plan's terms, administration, and benefits and, for defined benefits plans, the plan's funded status. These provisions do not focus on plan investments.

ERISA's fiduciary duty provisions should not be interpreted to impose additional disclosure obligations in addition to those set forth in detail in ERISA's reporting and disclosure provisions.

As the Supreme Court has observed, "we do not think that Congress intended [ERISA's reporting and disclosure requirements] to be supplemented by a faraway provision in another part of the statute, least of all in a way that would lead to improbable results." *See Curtiss Wright Corp. v. Schoonejongen,* 514 U.S. 73, 84, 115 S. Ct. 1223, 1231 (1995); *see also Board of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 146-47 (2d Cir. 1997) ("inappropriate to infer an unlimited disclosure obligation on the basis of [ERISA's] general provisions that say nothing about disclosure") (citation omitted); *Mellot*, 561 F. Supp. 2d at 1318 (same); *Lanfear,* 718 F. Supp. 2d at 1381 (following the District Court's decision below). As one district court recently observed, "[i]t is difficult to believe that Congress intended that ERISA – a statute governing employee-benefit plans – *supplant* the comprehensive and delicately balanced system of laws and regulations that define the information that a corporation must disclose to the investing public." *Wright v. Medtronic, Inc.*, 2011 U.S. Dist. LEXIS 923, at *23.

While courts engage in a form of common-law rulemaking when interpreting ERISA's fiduciary duty provisions, *see Varity*, 516 U.S. at 497, 116 S. Ct. at 1070, such judicial rulemaking regarding disclosures about public corporations—a core area of securities law regulation—is unnecessary and inappropriate. *Cf. Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831-32, 123 S. Ct. 1965, 1970-71 (2003). Federal 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, 101 S. Ct. 1784, 1792 (1981); *see also In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981), *reh'g denied*, 673 F.2d 47 (2d Cir. 1982). The Securities Act of 1933 and the Securities Exchange Act of 1934, as modified by Congress and implemented by the SEC, create such a "comprehensive regulatory program" governing disclosures regarding issuers' securities. *See Baker v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004) (declining "to create a new fiduciary duty" of disclosure because of the risk of "disturbing the carefully delineated corporate disclosure laws").

Plaintiffs' assertion (App't Br. at 40-42) that the duty of loyalty includes a duty to disclose facts regarding plan investments is based on plaintiffs' misapplication of cases involving communications regarding plan benefits, not plan investments. *See Howell v. Motorola, Inc.*, __ F.3d __, 2011 U.S. App. LEXIS 1193, at *55-*56 (7th Cir. Jan. 21, 2011) (differentiating disclosures regarding the plan from disclosures regarding employer stock); *see also Bear Stearns,* 2011 U.S. Dist. LEXIS 6026, at *399*; Mellot*, 561 F. Supp. 2d at 1316-17.

B. Statements in SEC Filings Are Not Made By Persons Acting In A Fiduciary Capacity.

The "threshold question" in an ERISA fiduciary breach action is "whether [the defendant] was acting as a fiduciary (that is, performing a fiduciary function) when taking the action subject to complaint." *Pegram*, 530 U.S. at 226, 120 S. Ct. at 2152-53. In *Varity*, the Supreme Court held that, where an employer/plan administrator makes material misrepresentations regarding its corporate well-being *in a fiduciary capacity*, it may be liable for a breach of fiduciary duty under ERISA. *See* 516 U.S. at 503, 116 S. Ct. at 1073. In *Varity*, the district court found that misleading communications were made by the company in its capacity as plan administrator, as part of an effort to persuade employees to switch benefit plans. *See id.*[14]

In this case, by contrast, the District Court correctly held that the filing and dissemination of ING's SEC reporting documents did not constitute the making of statements in a fiduciary capacity. *See Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc.,* 828 F.2d 710, 713 (11th Cir. 1987); *Lanfear,* 718 F. Supp. 2d at 1381 (following the District Court's decision below); *Bear Stearns,* 2011 U.S. Dist. LEXIS 6026, at *401 ("[P]ersons who prepare SEC filings do not become ERISA fiduciaries through those acts …" (internal quotation marks and citation omitted) (citing cases)); *In re American Express*

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[14] The Supreme Court observed in *Varity* that an employer does not act as a fiduciary merely "because it ma[kes] statements about its expected financial condition or because an ordinary business decision turn[ed] out to have an adverse impact on the plan," 516 U.S. at 505, 116 S. Ct. at 1074 (internal quotation marks omitted).

Co. ERISA Litig., 2010 U.S. Dist. LEXIS at *43 (same); *Mellot*, 561 F. Supp. 2d at 1317 (same). 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 Securities Act prospectus. *See In re Worldcom, Inc.*, 263 F. Supp. 2d 745, 766 n.14 (S.D.N.Y. 2003) (securities law requirement to disseminate prospectus to participants in plan allowing investment in employer stock). Because incorporating the employer's SEC filings in the prospectus is required by the securities laws and therefore is nondiscretionary, the person who directs those filings to be incorporated is not acting as a fiduciary when doing so. *See Kirschbaum*, 526 F.3d at 257; *see also Lanfear,* 718 F. Supp. 2d at 1381; *Wright v. Medtronic,* 2011 U.S. Dist. LEXIS 923, at *23; *Mellot,* 561 F. Supp. 2d at 1318.

IV. ERISA "Stock Drop" Lawsuits Threaten To Undermine Congressional Goals.

A. ERISA's Fiduciary Standards Should Not Be Construed In A Way That Allows The Laws Governing Securities Litigation To Be Circumvented.

In recent years, securities fraud class actions have commonly been accompanied by ERISA "stock drop" actions. *See*, *e.g.*, *Pugh*, 521 F.3d at 692 (history of consolidated securities and ERISA class actions); *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 128 (5th Cir. 2005).

The prevalence of "strike suits" in securities litigation led Congress to enact the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, which included provisions to establish greater judicial control over such suits. PSLRA established heightened pleading standards for fraud or misrepresentation class actions under Rule 10b-5 and the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78u-4(b)(1)(B); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 127 S. Ct. 2499, 2504 (2007). PSLRA requires that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"—that is, with requisite knowledge of misleading statements or omissions. 15 U.S.C. § 78u-4(b)(2). PSLRA also provides that discovery in securities fraud cases shall be stayed "during the pendency of any motion to dismiss." *Id.* § 78u-4(b)(3)(B).

PSLRA also addresses the selection of a lead plaintiff and class counsel. Before PSLRA, securities fraud litigation often featured a "race to the courthouse" by shareholders and their respective lawyers seeking to become presumptive class representative and counsel. Often, the first plaintiff to file was neither the largest nor the most sophisticated investor.[15] Congress responded by requiring courts to appoint the "most adequate plaintiff" as "lead plaintiff," without regard to order of filing and preferring the person with the largest interest in the relief being sought by the class. *Id.* § 78u-4(a)(3)(B).

Congress reinforced these measures by enacting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, *codified at* 15 U.S.C. § 78bb(f). Responding

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[15] *See* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE. L.J. 2053, 2060-62 (1995).

to the migration of securities litigation to state courts, SLUSA mandated "that such class actions be governed exclusively by federal law." *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003) (internal quotation marks omitted).

SLUSA provides compelling evidence that Congress intended class actions alleging securities fraud to be brought under the federal securities laws and to be subject to the procedural requirements of PSLRA. The courts should not allow one category of investors (those investing through employee benefit plans) to evade PSLRA's requirements.

Insofar as Plaintiffs contend that ERISA's fiduciary duty provisions should be construed to alter or supersede disclosure obligations imposed on corporate insiders by securities laws, that contention should be rejected. ERISA itself provides that it does not "alter, amend ... or supersede" any other federal law. ERISA § 514(d), 29 U.S.C. § 1144(d). Plaintiffs' effort to establish a low pleading threshold for ERISA "stock drop" cases contravenes Congress's intention to impose heightened pleading requirements on suits alleging misrepresentations or omissions relating to publicly traded securities. *See*, *e.g.*, *Pugh*, 521 F.3d at 692 (PSLRA requirements not applicable to ERISA claim); *see also Wright v. Medtronic*, *Inc.,* 2011 U.S. Dist. LEXIS 923, at *22 ("[P]laintiffs' attorneys have taken what is essentially a securities-fraud action and pleaded it as an ERISA action in order to avoid the demanding pleading requirements of the [PSLRA]" (internal quotation marks and citations omitted).).

While PSLRA does not supersede ERISA, ERISA's general fiduciary standards should not be construed to subvert the congressional objective of encouraging employers to establish plans fostering employee ownership of employer stock. *See* Section I, *supra.*

Imposing ERISA liability on corporate insiders for alleged misrepresentations or omissions regarding company stock also could threaten potential defendants with incompatible duties under two bodies of law. For similar reasons, in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 127 S. Ct. 2383 (2007), the Supreme Court held that the federal securities laws impliedly precluded an antitrust suit alleging unlawful practices in connection with initial public offerings. The Supreme Court rejected the plaintiffs' argument that antitrust claims based on activities closely regulated by the securities laws should be allowed because both bodies of law had compatible goals. *Id.* at 285, 127 S. Ct. at 2397. The Court expressed concern that obligations and potential liabilities arising from antitrust law were unnecessary and could eventually generate inconsistent requirements. The Court observed, in a point apposite here, that—

> Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file [securities] suits. *To permit an antitrust lawsuit risks circumventing these requirements by permitting what is essentially a securities complaint in antitrust clothing.*

Id. at 284, 127 S. Ct. at 2396 (emphasis added).

B. "Stock Drop" Lawsuits Undermine Statutes Encouraging Employee Benefit Plans Generally And Investment In Employer Stock Particularly.

ERISA class action suits against fiduciaries who permit investment in employer stock threaten the employer-sponsored retirement plan system. Plan fiduciaries are at risk of being sued whenever the employer's stock price declines or performs below expectations. This risk causes plan sponsors to question the desirability of continuing to offer employer stock as a plan investment option and cannot be ignored.

Removing employer stock would greatly disappoint the many employees who prize having employer stock as an investment option. That outcome also would be inconsistent with Congress's judgment that employee ownership of employer stock is a worthy goal in and of itself. *Cunningham*, 716 F.2d at 1458.

ERISA class action suits also threaten voluntary employee benefit plans in general. As the Seventh Circuit has noted, "[i]t is possible … for litigation about pension plans to make everyone worse off." *Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006).

ERISA's goals will be undermined if ERISA is misapplied to "unduly discourage employers from offering [ERISA] plans," *Conkright,* 130 S. Ct. at 1649 (internal quotation marks and citation omitted), by making retirement plans that invest in employer stock more a source of litigation than a source of retiree income and employee ownership. *See also Wright v. Medtronic, Inc.*, 2011 U.S. Dist. LEXIS 923, at *23 (Imposing a duty of disclosure on corporate insiders who serve as ERISA fiduciaries "would either render much of securities law a dead letter, or (more likely) dissuade employers from offering company stock to employees in the first place, in direct contravention of Congress's objectives when it passed ERISA" (quoting *Gearren v. McGraw-Hill Cos.,* 690 F. Supp. 2d 254, 273 (S.D.N.Y. 2010)).

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d) because this brief contains 6,920 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in font size 14 and Century Schoolbook type style.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February 2011, I served a copy of the Brief of *Amicus Curiae* The ERISA Industry Committee on the following counsel of record by dispatching with Federal Express:

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