No. 11-1497

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DEBRA GRIFFIN AND JOY GARDNER,
Plaintiffs-Appellants,

v.

FLAGSTAR BANCORP, INC.
REBECCA A. LUCCI, ERIN ENGLAND
AND JOHN DOE, 1-10
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Case No. 2:10-cv-10610

BRIEF OF *AMICI CURIAE* AMERICAN BENEFITS COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE DEFENDANTS-APPELLEES AND REQUESTING AFFIRMANCE OF DISMISSAL

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August 17, 2011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-1497 Case Name: Debra Griffin v. Flagstar Bancorp

Name of counsel: Kent A. Mason

Pursuant to 6th Cir. R. 26.1, American Benefits Council and U.S. Chamber of Commerce
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 17, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Kent A. Mason

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF INTEREST, IDENTITY AND AUTHORITY TO FILE

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's over 300 members[1] are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

[1] A full list of the Council's members is available on the Council's website, www.americanbenefitscouncil.org.

The Council and the Chamber (collectively "*amici*") limit their participation to cases that are of great significance for their member companies. This is such a case. As a means of facilitating employee stock ownership, Federal law encourages employers to include their stock as an investment option in employer-maintained retirement programs. However, the use of company stock in retirement plans is threatened by a recent wave of fiduciary lawsuits that are generally filed after a sharp decline in the price of the company's stock, typically alleging that the stock investment was imprudent. The costs associated with litigating these claims harms plans and participants directly.

It is critical that the courts clearly articulate a standard that appropriately weeds out these claims, which tend to be filed automatically whenever a company's stock goes down, and this Court has previously done so through a presumption of prudence. This case presents an opportunity for the Court to reaffirm that presumption and is therefore of great interest to the members of the Council and the Chamber.

The Council and the Chamber respectfully submit to the Court this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to the filing of this *amicus curiae* brief.

STATEMENT PURSUANT TO FRAP 29(c)(5)

This brief was authored by undersigned counsel. No party's counsel authored this brief either in whole or in part. Neither the parties, nor their counsel, contributed money intended to fund preparing or submitting this brief. No person other than *Amici Curiae,* their members, and their counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Federal law strongly favors employee stock ownership. Unfortunately, plan investments in company stock are threatened by lawsuits that tend to be filed automatically any time an employer's stock price declines or performs below expectations. These "stock drop" lawsuits lead to expensive discovery and practical pressures to pay for settlements. They are having a severely detrimental effect on the voluntary employment-based retirement system and are undermining the public policy favoring investments in company stock. The costs of defending or settling these suits ultimately reduce the retirement benefits that will be provided to employees. If companies continue to be effectively forced to pay tens of millions of dollars to defend or settle cases filed simply because of a sharp decline in stock price, it is possible that they will stop offering company stock as an investment option.

Amici urge the district court's ruling be affirmed but primarily focus their brief on one issue. Under this Court's precedent, fiduciaries of plans that invest in employer stock are entitled to a presumption that their decision to invest, or continue to invest, in employer stock is prudent unless plaintiffs can show the fiduciaries abused their discretion. This presumption of prudence is generally referred to as the "*Moench* presumption." The district court held that the *Moench* presumption applies to all "eligible individual account plans" ("EIAPs") that

provide for investment in employer stock, and not just the subset of EIAPs meeting the formal requirements of an "employee stock ownership plan" ("ESOP"). The district court's holding should be affirmed. There is no statutory basis for limiting this presumption to ESOPs because the provisions that support the presumption apply to all EIAPs. Further, applying the presumption to participant-directed EIAPs that offer employer stock as an investment option avoids placing the fiduciary in the untenable position of having to ignore the plan's requirement to follow a participant's investment direction.

ARGUMENT

I. Meritless ERISA Stock Drop Lawsuits Threaten the Continued Viability of Company Stock Investment Options.

Employer-sponsored retirement plans are a core element of our nation's retirement system. They successfully assist millions of American families in accumulating retirement savings. Congress has time and time again demonstrated the importance it places on the ability of workers to save for retirement through employer-sponsored plans by adopting rules that facilitate employer sponsorship of plans, encourage employee participation, promote prudent investing, allow operation of plans at reasonable cost, and safeguard plan assets and participant interests through strict fiduciary obligations and intensive regulatory oversight.

In addition, the ability to invest in company stock through a retirement plan has been encouraged by Congress and is prized by employees. Congress has

consistently facilitated plan investments in company stock. *See, e.g.*, 29 U.S.C. § 1104(a)(2) (excepting individual account plans from the diversification requirements to the extent the plan is invested in company stock); 29 U.S.C. § 1107(b)(1) (excepting individual account plans from percentage limitations on investments in company stock); 29 U.S.C. § 1108(b)(3) and 1108(e)(3) (exempting employee stock ownership plans from certain prohibited transaction rules). Congress has even provided preferential tax treatment for plans that include, and participants who invest in, company stock. *See* 26 U.S.C. § 72(t)(2)(A)(vi) (exempting certain dividends paid with respect to stock of a corporation from the 10% early distribution tax); 26 U.S.C. § 402(e)(4) (taxing employees at preferential rates on "net unrealized appreciation" in employer securities); 26 U.S.C. § 404(k) (providing a deduction for dividends paid by a corporation with respect to applicable employer securities and authorizing the payment of dividends directly to employees while they work). In addition to Congress' encouragement of investment in company stock as part of retirement plans, courts have also recognized that ESOPs and employer stock funds within EIAPs 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).

In short, Congress has made a judgment that employee ownership of company stock is a valuable goal. Consistent with this judgment, it is important

that courts establish minimum standards of pleading that discourage lawsuits filed automatically, without regard to the merits, whenever a company's stock goes down. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976) (stating Congress' concern that courts should refrain from erecting barriers that would interfere with the goal of employee ownership). Otherwise, fiduciaries might well feel pressure to divest plan investments in company stock during every market downturn – undermining Congress' stated intention to encourage benefit plans that offer employer equity. As this Court explained in *Grindstaff v. Green*, 133 F.3d 416, 421-22 (6th Cir. 1998), the "concept of employee ownership constituted a goal in and of itself. 'Congress has repeatedly expressed its intent to encourage' the formation of plans that invest in company stock and 'has warned against judicial administrative action that would thwart that goal.'" (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1466 (5th Cir. 1983)). *See also Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995).

Unfortunately, company stock investments are currently threatened by lawsuits filed without regard to the merits. Plan fiduciaries have increasingly found themselves the targets of class action lawsuits alleging that they have violated their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by imprudently investing in company stock, and there is no sign that the lawsuits will let up. *See, e.g.*, Robert P. Davis et al., *The Outlook for*

ERISA 'Stock-Drop' Litigation, N.Y.L.J., Feb. 17, 2009, http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202428198658 ("With the current economic downturn, there has been a . . . surge in filings of ERISA stock-drop class actions."); Frances Denmark, *ERISA Class-Action Suits Shape U.S. Retirement Future*, Institutional Investor, Feb. 16, 2011, http://www.iimagazine.com/Article.aspx?ArticleID=2766226 ("[I]n less than a decade, 800 of the largest U.S. corporations . . . have been sued by classes of employees"); Myron D. Rumeld & Russell L. Hirschhorn, *Employer Stock Drop Litigation . . . And the Beat Goes On*, Proskauer Rose LLP ERISA Litig. Newsl., Apr. 2010, http://www.proskauer.com/publications/newsletters/erisa-litigation-newsletter-april-2010 ("The global economic crisis has resulted in a substantial uptick in employer 'stock drop' litigation.").

Despite the merits of a stock drop case, companies feel intense pressure to settle these cases for tens of millions of dollars, because these cases can be extremely expensive to litigate, generally involve exorbitant claims for damages, and are very disruptive and intrusive to the company's business. *See* Samuel Estreicher & Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment* (NYU Sch. of Law Pub. Law & Legal Theory Working Paper No. 08-03, Law & Econ. Working Paper No. 08-06, 2009) (finding that the mean gross settlement in ERISA cases from 1993

through 2007 was more than $31.6 million); Fiduciary Counselors Inc., *ERISA Class Action Settlements & Attorney Fees*, Feb. 2, 2010, http://www.erisasettlements.com/press/ERISA-Chart.pdf (compiling data on settlements of stock drop class actions involving some 100 different plan sponsors; in 2009 alone, at least 17 stock drop cases were settled for amounts ranging from $300,000 to $75 million). ***Notably, while many of these stock drop class actions have been settled and many have been won by defendants (often on summary judgment and a few at trial), not a single one has been won by Plaintiffs on a motion or at trial.***

In our experience, these stock drop cases are having a severely detrimental effect on retirement plans. Many plans have decided to stop using or offering company stock as an investment simply because of large fiduciary liability exposure, which is clearly in contravention of Congressional intent. Others have struggled to find employees who are willing to serve as the plan fiduciaries where company stock is an investment because employees know that they will be named as defendants in a lawsuit, and fear they will be personally liable, if the stock price falls significantly. Plan fiduciaries have also faced a sharp increase in the cost of fiduciary liability insurance for plans that invest in company stock.

These increased costs are not without consequences to employees who face the prospects of reduced employer contributions and greater plan expenses. *See*

Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 642 (7th Cir. 2006) ("Litigation cannot compel an employer to make plans more attractive . . . It is possible, though, for litigation . . . to make everyone worse off."). If companies continue to be effectively forced to pay tens of millions of dollars, it is possible they will be forced to take dramatic action, including reducing or eliminating sponsorship of retirement plans.

The instant case involves a particularly benign and common method of facilitating employee stock ownership. Many plans, particularly those maintained by large publicly-traded employers, including Flagstar, offer company stock as one of many investment alternatives in a plan that provides for participant investment direction. There are no firm statistics on the number of participants who are covered by plans with company stock funds, but the Employee Benefit Research Institute's database suggests that, in 2009, almost half of all 401(k) participants were participants in plans that offered company stock as an investment option. *See* Jack VanDerhei et al., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2009*, Employee Benefit Research Inst. Issue Brief, no. 350, Nov. 2010 (noting that 46% of all participants in the Employee Benefit Research Institute's 2009 database, which represents approximately 42% of the universe of active 401(k) plan participants, are in a plan with a company stock investment option). Participants in these plans are typically not required to invest in company stock but

may choose to do so. Stock drop lawsuits have cast a pall over this benevolent method of facilitating employee stock ownership.

In the instant case, Plaintiffs have not alleged any facts that would support a conclusion that the offering of the Flagstar stock fund was imprudent or that the availability of the fund caused participants' losses. The only facts that have been alleged are that Flagstar was in serious financial trouble at the time the Flagstar stock fund was made available to participants. However, the stock was publicly traded, participants were free to choose to invest in company stock or in a wide range of non-company-stock investment options, and there is no allegation or suggestion of fraud or insider information indicating that the market was mispricing the company stock.[2] This is exactly the sort of case that is harming the employer-based retirement system and we ask the Court to affirm the district court's dismissal of Plaintiffs' claims. To permit the case to proceed would be contrary to good public policy and would place the employer-based retirement plan system at severe risk for harm.

II. The District Court Correctly Held that the *Moench* Presumption Applies to All Eligible Individual Account Plans, Not Just Employee Stock Ownership Plans.

Amici urge the Court to affirm the district court's ruling that the presumption of prudence first articulated in *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir.

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[2] Although Appellants made a misrepresentation claim, they have not appealed the district court's dismissal of that claim.

1995) and adopted by this Court in *Kuper*, 66 F.3d at 1459 (the "*Moench* presumption"), applies to all eligible individual account plans ("EIAPs") and not just those EIAPs that are employee stock ownership plans ("ESOPs"). This ruling is consistent with the statutory provisions governing EIAPs, furthers the public policy rationale underlying the *Moench* presumption, and is crucial to the efficient administration of plans that offer employer stock as an investment option. Every Circuit, and nearly every district court, to have considered the issue squarely has found the presumption applies to all EIAPs. *See Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008); *Edgar*, 503 F.3d at 346-47 (3d Cir. 2007); *Wright v. Or. Metallurigcal Corp.*, 360 F.3d 1090, 1098 n.3 (9th Cir. 2004); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 474 (S.D.N.Y. 2005); *In re Syncor ERISA Litig.,* 351 F. Supp. 2d 970, 979 n. 5 (C.D. Cal. 2004); *In re Honeywell Int'l ERISA Litig.*, 2004 WL 3245931 at *11 n. 5 (D.N.J. June 14, 2004). The two cases Appellants cite in support of their position are inapplicable. In *Peabody v. Davis*, 636 F.3d 368, 374 n. 6 (7th Cir. 2011), the Seventh Circuit simply stated in a footnote it was "unclear" whether the non-ESOP EIAPs are entitled to the presumption. Appellants also cite *In re Schering-Plough Corp. ERISA Litig.*, 420

F.3d 231, 238 (3d Cir. 2005), but the Third Circuit subsequently has clarified that the case did not decide that issue. *See Edgar*, 503 F.3d at 347 n.12.[3]

Generally, under ERISA, an "individual account plan" is a pension plan that maintains an individual account for each participant and the participant's benefits are equal to the contributions, earnings, and losses in the account. 29 U.S.C. § 1102(34). Today the most common individual account plan is a 401(k) plan – named for the section of the Internal Revenue Code ("IRC") that gives special tax benefits – that allows for pre-tax employee contributions and, often, employer matching or other contributions. These plans often allow participants to direct the investment of their account among a menu of investments selected by the plan's fiduciaries. *See* Deloitte Consulting, *Annual 401(k) Survey,* 15 (2010), http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_consulting_2010annual401kbenchmarkingsurvey_121510.pdf (showing that the median number of funds offered on menu is 16).

With respect to the holding of qualifying employer securities, an *eligible* individual account plan, or EIAP, is an "individual account plan" where the plan

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[3] We located one unpublished district court decision that held otherwise. *See In re Westar Energy Inc. ERISA Litig.*, 2005 WL 2403832 (D. Kan. 2005). In addition, *DeFelice v. U.S. Airways, Inc.*, 397 F. Supp. 2d 758 (E.D. Va. 2005), includes a footnote with no analysis and citing to *In re Schering-Plough* decision, which, as stated in the text, did not decide the issue. Defendants in the *DeFelice* decision ultimately prevailed. *See DeFelice v. U.S. Airways*, 497 F.3d 410 (4th Cir. 2007).

"explicitly provides for acquisition and holding of qualifying employer securities." 29 U.S.C. § 1107(d)(3). A 401(k) plan that offers employer stock as one of the investment options is an EIAP.

An ESOP is an individual account plan that (a) meets the definition of a tax-qualified "stock bonus" or "money purchase" plan under the Internal Revenue Code, (b) is designed to invest primarily in qualifying employer securities, and (c) meets any other requirements that the Secretary of the Treasury prescribes by regulation. 29 U.S.C. § 1107(d)(6); 26 C.F.R. § 54.4975-11. Often, ESOPs are described generically as a subset of EIAPs that are designed to invest "primarily" in employer securities, but there are other requirements related to the tax code for an EIAP to be an ESOP.

A. The Provisions of ERISA Supporting the *Moench* Presumption Apply to All EIAPs, Not Just ESOPs.

ERISA requires that those fiduciaries responsible for investing plan assets must discharge their duties "by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. § 1104(a)(1)(C). In addition, ERISA fiduciaries must discharge their 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) (generally referred to as

the "duty of prudence"). When an ERISA plan holds employer securities, which are by definition a single, undiversified investment, the fiduciaries could face a claim that these rules were violated every time volatility in the stock price results in a large loss. Thus, Congress exempted fiduciaries of EIAPs from the requirement to diversify so as to minimize the risk of large losses and from the requirement to act prudently insofar as it requires diversification of qualifying employer securities. 29 U.S.C. § 1104(a)(2).

In arguing that the *Moench* presumption should not apply to EIAPs, Appellants point out that EIAPs are not exempt from the duty to act prudently other than insofar as it requires diversification. *See* Appellants Br. 26-27, June 23, 2011, ECF No. 006110995444. Appellants conveniently fail to point out that this *does not distinguish* EIAPs that are not ESOPs from those that are because both are subject to the general duty of prudence.

In addition to exempting EIAPs from the requirement to diversify with respect to qualifying employer securities, Congress exempted them from a rule that applies to all other ERISA-governed plans preventing the plan from holding more than 10% of the plan's assets in employer securities. 29 U.S.C. § 1107(b)(1). This strict numerical test complements the general requirement to diversify plan assets.

Subject to an exception not applicable here,[4] EIAPs, whether ESOP or not, can hold more than 10% of the plan assets in employer securities so long as the employer securities is stock or other certain "qualifying" types of employer securities. *See* 29 U.S.C. § 1107(d)(4) (definition of qualifying employer security).

Lastly, ERISA contains strict *per se* prohibitions on a fiduciary causing a plan to enter into a transaction with the employer sponsoring the plan (considered a "party-in-interest"), dealing with the assets of the plan in the fiduciary's own interest or own account, or acting on behalf of a party whose interests are adverse to the interests of the plan. *See* 29 U.S.C. § 1106(a)-(b). These prohibited transaction and self-dealing rules would otherwise prohibit a fiduciary that is, or is affiliated with, the employer sponsoring the plan from causing the plan to buy, sell, and hold employer securities. Congress provided an exception that allows fiduciaries of EIAPs to acquire, hold, and sell employer securities. 29 U.S.C. § 1108(e)(3).

The foregoing statutory provisions that protect fiduciaries of EIAPs are exactly the statutory provisions this Court and others routinely cite to support the

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[4] The portion of an EIAP that *requires* an employee's pre-tax contributions to be invested in employer stock is not exempt from the 10% cap unless it is an ESOP. See 29 U.S.C. § 1107(b)(2). The plan in the instant case does not require employees to invest their own contributions in employer stock; those employees that do make that choice do so willingly.

Moench presumption. *See, e.g., Kuper*, 66 F.3d at 1458; *Quan*, 623 F.3d at 878; *Kirschbaum*, 526 F.3d at 248; *Moench*, 62 F.3d at 568.

B. The Provisions of ERISA that Apply Only to EIAPs that are ESOPs are Not Relevant to the Policy Behind the *Moench* Presumption.

One way to think about the *Moench* presumption is that it achieves the joint Congressional goals of encouraging employee ownership of their employer by facilitating plans investing in employer stock and ensuring fiduciaries act prudently in investing plan assets. The presumption recognizes that any single equity like employer stock will fluctuate in value, often significantly. There is no statutory basis for limiting this presumption to ESOPs. While EIAPs that qualify as ESOPs are entitled to some additional advantages under ERISA and the IRC, none of these is related to the basic fiduciary protections at issue in this case.

For example, ESOPs are allowed under ERISA and the IRC to borrow money from a party-in-interest to the plan, so long as any collateral given consists solely of employer securities. *See* 29 U.S.C. § 1108(b)(3) (ERISA); 26 U.S.C. § 4975(d)(3) (parallel provision in IRC). This allows the existence of “leveraged” ESOPs, in which a company finances borrowing on a tax-favored basis through the ESOP, incurring tax benefits that would not be available if the company borrowed directly from the lender. The IRC contains a number of provisions that, taken together, provide tax advantages for ESOPs. *See* 26 U.S.C. § 404(a)(9) (providing

additional deduction for payments to leveraged ESOP loan); 26 U.S.C. § 404(k) (providing deduction for dividends paid to ESOPs); 26 U.S.C. § 415(c)(6) (providing exception for ESOPs from limits on maximum contributions). In exchange for these tax advantages, ESOPs must not only invest primarily in employer securities, but must also meet technical requirements under Treasury regulations. *See* 26 C.F.R. §§ 54.4975-7, -11,-12.

These provisions, which implement Congress' intent to allow ESOPs to be a method of "corporate finance," *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 425 (6th Cir. 2002), *cert. denied*, 537 U.S. 1168 (2003) (internal quotations omitted) are irrelevant to ERISA's fiduciary goals.[5] Rather, they evidence that Congress sought to create a special category of EIAPs that are singled out for special tax advantages if they invest primarily in employer securities.

In summary, for purposes relevant to the *Moench* presumption, the law treats all EIAPs, whether ESOPs or not, the same. The *Moench* presumption should not distinguish them either.

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[5] Generally, the other places where ERISA mentions ESOPs specifically are unrelated to fiduciary duties. They implement technical requirements in what provisions can and cannot be in a plan document. *See* 29 U.S.C. § 1054(d) (allowing ESOPs to be amended to make nondiscriminatory changes in distribution options); 29 U.S.C. § 1055(b) (providing blanket exception from requirement that plan terms offer certain spousal annuities).

C. The *Moench* Presumption Should Apply to Participant-Directed EIAPs that Offer Employer Stock as an Investment Option.

Like many EIAPs, the Flagstar Bank 401(k) Plan is a participant-directed 401(k) plan that offers employer stock as an investment option. Generally in these kinds of plans, participants are entitled – but not required – to allocate a portion of their account to the employer stock fund. Because the terms of the plans give participants the right to direct investment of their account, the plan's trustee and other fiduciaries must follow participant instructions unless it would otherwise violate ERISA. *See* 29 U.S.C. § 1104(a)(1)(D) (requiring that fiduciaries act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]").

Most of these plans operate themselves to comply with ERISA section 404(c), 29 U.S.C. § 1104(c), which relieves plan fiduciaries of participant-directed plans of liability for losses resulting from a participant's excise of control. The Department of Labor regulations implementing this provision require the plan to offer at least three other investment options (other than employer stock), each of which must be diversified and which, taken together, allow a participant to allocate his or her account at any point along a reasonable risk/return spectrum. 29 C.F.R. § 2550.404c-1(b)(3). Most plans offer much more than three options in addition to the employer stock fund, and these tend to be diversified investments like

mutual funds. Thus, participants in these plans are able to allocate their account in an investment less volatile than employer stock.

The Secretary of Labor, in her brief as *amicus*, contends that ERISA section 404(c) does not relieve fiduciaries of the duty "to prudently select and monitor" investments available to participants. *See* Dep't of Labor Br. 16, June 30, 2011, ECF No. 006111002160. A number of courts disagree. *See, e.g., Langbecker v. Elec. Data Sys. Corp*., 476 F.3d 299 (5th Cir. 2007); *In re Unisys Savings Plan Litig.*, 74 F.3d 420 (3d Cir. 1996). But even if the Secretary is correct, this duty must be viewed in the context of the particular investment. Employer stock, being a single, non-diversified security, is much more likely to suffer the risk of "large losses," 29 U.S.C. § 1104(a)(1)(C), which is precisely the reason ERISA exempts fiduciaries of EIAPs from the duty to minimize the risk of large losses where employer stock is involved, 29 U.S.C. § 1104(a)(2). *See DeFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 425 (4th Cir. 2007) ("Congress considered the possible benefits to employees and employers from undiversified investments in employer stock and found them to out-weigh the risks inuring from such strategy."). When a participant allocates all or a portion of his or her account to the employer stock fund, and there is no allegation material information has been withheld, that choice

is made knowingly and willingly.[6] In fact, ERISA requires that participants in participant-directed individual account plans be given a statement *four times a year* that the "risk of holding more than 20 percent of a portfolio in the security of one entity (such as employer securities) may not be adequately diversified." 29 U.S.C. § 1025(a)(2)(B)(ii)(II).

When employer stock experiences a sudden decline in price – which happens from time to time to undiversified investments – the fiduciary of an EIAP in which employer stock is an option faces a dilemma not dissimilar from an ESOP designed to invest primarily in employer securities. In the latter, if the fiduciary decides to sells the plan's employer securities, the fiduciary will be overriding the decision of the plan's settlor. In the former, the fiduciary will be overriding the decision of the person the settlor designated to have investment control – the participant. Further, if the stock price is depressed, but later recovers, and the fiduciary refuses to implement a decision by the participant to hold or purchase shares, the fiduciary could find himself on the business end of a lawsuit alleging a breach for failure to implement the participant's direction. *See LaRue v. DeWolff, Boberg & Assocs.,* 552 U.S. 248 (2008) (holding plan fiduciaries of participant-directed plans may be liable for failure to implement a valid investment direction

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[6] As stated in footnote 2, this is not a case in which the fiduciary is alleged to have been in possession of and withheld material non-public information regarding the employer stock fund. Although Appellants made a misrepresentation claim, they have not appealed the district court's dismissal of that claim.

from a participant). Applying the *Moench* presumption avoids putting the fiduciary in this "Catch-22" and therefore furthers the efficient administration of employee benefit plans.

III. Conclusion

For the reasons discussed above, and those stated in the Appellee's brief, *amici* the Council and the Chamber respectfully urge the Court to affirm the district court's decision and clearly establish that the *Moench* presumption adopted by this Court in *Kuper* applies to all EIAPs and not just to the subset of EIAPs that qualify as ESOPs.

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I hereby certify that I caused the foregoing *Amici Curiae* Brief to be electronically filed with the Court via the CM/ECF electronic filing system on this 17th day of August, 2011. All parties may access this document via the CM/ECF system.

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