UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 09 3804-cv

Caption [use short title]: In re: Citigroup ERISA Litigation

Motion for: Leave to File Brief Amicus Curiae

Set forth below precise, complete statement of relief sought
Grant of leave to file Amicus Brief with Brief considered filed as of date leave is granted

MOVING PARTY: AARP as Amicus Curiae
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Defendant-Appellee Citigroup Inc

MOVING ATTORNEY: Jay E Sushelsky
[name of attorney, with firm, address, phone number and e-mail]
604 E St, NW
Washington, DC 20049
202-434-2060
jsushelsky@aarp org

OPPOSING ATTORNEY [Name]: Brad S Karp Esq
[name of attorney, with firm, address, phone number and e-mail]
Paul Weiss Rifkind, Wharton & Garrison1285 6th Ave
1285 6th Ave
New York, NY 10019
212-935-7400
rharwood@hfesq com

Court-Judge/Agency appealed from: Judge Sidney H Stein US District Court for the Southern District of New York

Please check appropriate boxes:

Has **consent** of opposing counsel
A been sought? ☑ Yes ☐ No
B been obtained? ☑ Yes ☐ No

Is **oral argument** requested? ☐ Yes ☑ No
(requests for oral argument will not necessarily be granted)

Has **argument** date of appeal been **set**? ☐ Yes ☑ No
If yes, enter date ______

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made **below**? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency

Signature of Moving Attorney: Jay E Sushelsky
Date: 12/22/2009

Has **service** been effected? ☑ Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: ______

By: ______

Form T-1080 (Revised 10/31/02).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-3804-cv

IN RE: CITIGROUP ERISA LITIGATION

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

NO. 07 Civ. 9790 (SHS)(DCF)
JUDGE SIDNEY H. STEIN

MOTION OF AARP TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS URGING REVERSAL

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, AARP respectfully moves for leave to file a brief *amicus curiae* in support of appellants. In support of this motion, AARP declares:

1. AARP is a nonpartisan, nonprofit membership organization of nearly 40 million persons age 50 or older, working or retired, that helps people over age 50 have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. Over 3.25 million AARP members live in those states within the Second Circuit's jurisdiction.

2. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for

all citizens. In its efforts to promote independence, AARP works to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity, and adequacy of public and private pension, health, and other employee benefits.

3. AARP advocates on behalf of individuals throughout the country to protect the rights of participants in private, employer-sponsored employee benefit plans covered by ERISA, 29 U.S.C. § 1001 *et seq.* For instance, AARP has filed numerous briefs *amicus curiae* on various types of ERISA cases, including those involving ERISA's fiduciary responsibility provisions and suitability of class certification. *See, e.g., LaRue v. DeWoff, Boberg, & Assocs., Inc.*, 551 U.S. 248 (2008); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *In re Schering Plough ERISA Litig.*, 2009 WL 4893649 (3d Cir. Dec. 21, 2009); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008); *Langbecker v. Electronic Data Systems*, 476 F.3d 299 (5th Cir. 2007); *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006); *Milofsky v. Am. Airlines,* 442 F.3d 311 (5th Cir. 2006); *In re Schering Plough ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003).

4. As of the end of the second quarter of 2009, employer-sponsored private pension plans had more than $5.6 trillion in assets, the single largest pool

of capital in the United States. Out of this, defined contribution plans held $3.6 trillion with almost seventy percent of that held in 401(k) plans. Investment Company Institute, *The U.S. Retirement Market, Second Quarter 2009,* 18 Research Fundamentals No. 5-Q2 at 1-2 (Oct. 2009), *available at* www.ici.org/pdf/09_q2_retmrkt_update.pdf. Such substantial assets lend themselves to potential misuse and mismanagement by those responsible for investing and managing the assets.

5. Like the plan at issue here, many individual account plans provide that employer stock is an investment option into which the employees may choose to direct the investment of their own contributions. Unlike defined benefit plans, defined contribution plans, such as 401(k) plans, are not subject to a specific limitation on investment in employer stock. *See* ERISA § 407(d), 29 U.S.C. § 1107(d). As a result, the security of 401(k) accounts is dependent on the faithful exercise by plan fiduciaries of their duties under ERISA's fiduciary responsibility provisions. These duties include, among others, the selection and monitoring of plan investment options from which employees may choose to place their retirement monies including whether to offer or continue to offer employer stock as an investment option.

6. The impact upon plan participants of fiduciaries' failure to comply with ERISA's fiduciary responsibility provisions is dramatic. In recent years, workers at Enron, WorldCom, Bear Stearns, Lehman Brothers and other companies involved in recent corporate scandals have lost substantial amounts of their retirement savings because of the investment of 401(k) assets in their employers' stock. As a consequence, numerous individuals over the age of 50 have postponed their retirements, returned to work, are looking for work after their retirements, or have made other adjustments in their lifestyles. *See generally 60 Minutes*: *Retirement Dreams Disappear with 401(k)s* (Apr. 19, 2009), *available at* http://www.cbsnews.com/stories/2009/04/17/60minutes/main4951968.shtml. When participants are older they have less time to make up their losses. *See generally Musmeci v. Schwegmann Giant Super Markets*, 159 F.Supp.2d 329 (E.D. La. 2001). Thus, it is important to AARP members to ensure that where plan fiduciaries have breached their duties to participants and beneficiaries to prudently offer, select, monitor, invest, or otherwise manage plan assets plan participants can remedy the fiduciaries' breach. ERISA §§ 2(b), 404(a)(1)(A) & 502(a), 29 U.S.C. §§ 1001(b), 1104(a)(1)(A) & 1132(a) (2000); *cf. Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985) (ERISA was passed to prevent the misuse and mismanagement of plan assets). If participants are without recourse to

remedy the losses to their retirement plans, their retirement security will be irreparably damaged.

7. The brief of *amicus* AARP will discuss the policy reasons the district court's decision concerning "hardwiring" of investment options should be reversed. In particular, the brief will focus on how Congress ensured that ERISA's fiduciary duties would protect participants' retirement security, including providing no exceptions to the duties of loyalty and prudence, and requiring that there always would be a plan fiduciary with responsibility for plan assets. *Amicus* AARP submits that its brief may assist the Court's resolution of the issues presented.

8. The resolution of the issues in this case will have a direct and vital bearing on the economic security of millions of workers. In light of the significance of the issues presented by this case, AARP respectfully submits this brief to facilitate a full consideration by the Court of these issues.

9. Counsel for appellants have consented in writing to the filing of a brief *amicus curiae* by AARP. *See* Exhibit 1. Counsel for appellees verbally agreed that his clients would not object to AARP's filing of its brief *amicus curiae*. *See* Exhibit 1.

10. Accordingly, AARP respectfully requests leave to file a brief *amicus curiae* in support of appellants. If the requested leave is granted, AARP requests that its brief *amicus curiae* be considered filed as of the date of this motion.

Respectfully submitted,

Jay E. Sushelsky

Jay E. Sushelsky
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP

CERTIFICATE OF FILING AND SERVICE

I, Jay E. Sushelsky, hereby certify under penalty of perjury that on December 22, 2009, I served two copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* by AARP in Support of Plaintiffs-Appellants by United States Mail and one copy via E-mail on the following parties:

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ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Gray v. Citigroup Inc.

DOCKET NUMBER: 09-3804

I, Michelle Ryan, certify that I have scanned for viruses the PDF version of the Motion for Leave to File Brief *Amicus Curiae* that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the name and the version of the anti-virus detector that you used:

Symantec End Point Protection

Michelle Ryan

Dated: December 22, 2009

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December 1, 2009

<u>Via Electronic Mail</u>

Ms. Mary Ellen Signorille
Senior Attorney
AARP Foundation Litigation
601 E. St., NW
A4-181
Washington, DC 20049

Re: <u>Gray v. Citigroup Inc. (No. 09-3804)</u>

Dear Ms. Signorille:

In response to your letter dated November 24, 2009, on behalf of plaintiffs Stephen Gray and James Bolla, we hereby consent to AARP filing an amicus curiae brief in the above matter.

Sincerely,

Andrew E. Lencyk

cc: Marian P. Rosner, Esq.
Robert I. Harwood, Esq.
Brad Karp, Esq.

Doc.

Ryan, Michelle L. - MLRyan

From: Signorille, Mary Ellen

Sent: Tuesday, December 22 2009 11 25 AM

To: Ryan, Michelle L - MLRyan

Subject: FW Citigroup ERISA Litigation

Mary Ellen Signorille
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Phone 202/434-2072
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From: Signorille, Mary Ellen
Sent: Wednesday, December 16, 2009 10:45 AM
To: 'lclayton@paulweiss.com'
Subject: Citigroup ERISA Litigation

Dear Mr Clayton

Thank you for your telephone call stating that your client would not object to AARP's filing of a motion for leave to file an amicus brief
in the Citigroup ERISA Litigation case

Sincerely,

Mary Ellen Signorille

Mary Ellen Signorille
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049
Phone 202/434-2072
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09-3804-cv

United States Court of Appeals
for the
Second Circuit

GRAY

Plaintiff-Appellant,

v.

CITIGROUP INC.

Defendant-Appellee.

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

BRIEF OF *AMICUS CURIAE* AARP
IN SUPPORT OF APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(b) of the Federal Rules of Appellate Procedure, *amicus curiae* AARP states the following:

AARP is a not-for-profit corporation with no parent company and issues no stock. Therefore, no publicly-held company has a 10% of or greater ownership interest in AARP. AARP provides information and resources, and advocates on legislative, consumer, and legal issues. Through a wholly-owned subsidiary, AARP Services, Inc., AARP makes available products and services from third party providers to its members, including long-term care insurance. Other legal entities related to *amicus curiae* AARP include AARP Foundation, Legal Counsel for the Elderly, AARP Financial, AARP Global Network and Focalyst.

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to the provisions of title 29, section 618, of the D.C. Code.

Jay E. Sushelsky

Jay E. Sushelsky

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MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*

With nearly 40 million members, AARP is the largest nonpartisan, nonprofit organization representing the interests of people age 50 and older. AARP helps people have independence, choice, and control in ways that are beneficial and affordable to them and society. Nearly half of the members are employed full or part-time, with many working for employers which provide benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. More than 3.25 million AARP members live in those states within the Second Circuit's jurisdiction.

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.[1]

[1] As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases, including those involving ERISA's fiduciary responsibility provisions. *See, e.g., LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

The policy implications of the district court's decision are enormous. If the underlying premise of that decision is correct, then by simply "hardwiring" investment choices into a governing pension plan instrument, whether or not these choices include company stock, those who adopt such plans can eliminate any fiduciary responsibility with regard to the investment of 401(k) plan assets. Astonishingly, this might leave $2.5 trillion of pension funds effectively unregulated and more than 75 million participants unprotected. Indeed, the district court's decision not only eviscerates the plain language of ERISA, but ignores the clear intent of Congress as set forth in the statute's Findings and Declaration of Policy and its legislative history. Quite simply, the district court's decision leaves plan participants with no one minding the plan. Congress did not intend this outcome when it enacted ERISA and its fiduciary protections.

The resolution of the issues in this case will have a direct and vital bearing on the economic security of millions of workers. In light of the significance of the issues presented by this case, AARP respectfully submits this brief to facilitate a full consideration by this Court of these issues.[2]

[2] AARP is limiting its brief to the issue of "hardwiring" of investment options into a plan because this was the threshold issue in the district court's decision.

ARGUMENT

I. 401(K) PLANS ARE THE DOMINANT EMPLOYER-SPONSORED RETIREMENT PLAN IN THE UNITED STATES.

As of the end of the second quarter of 2009, employer-sponsored private pension plans had almost $5.6 trillion in assets, one of the largest pools of capital in the United States.[3] Investment Company Institute, *The U.S. Retirement Market, Second Quarter 2009,* 18 Research Fundamentals No. 5-Q2 at 2 (Oct. 2009), *available at* www.ici.org/pdf/09_q2_retmrkt_update.pdf. Defined contribution plans held almost $3.6 trillion, with $2.5 trillion of that in 401(k) plans. *Id.* at 1-2. Such substantial assets lend themselves to potential misuse and mismanagement.

By every measure, defined contribution plans have become the nation's primary retirement vehicle in comparison to defined benefit plans. *See* U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, *Private Pension Plan Bulletin Historical Tables* (February 2008), *available at* www.dol.gov/ebsa /pdf/privatepensionplanbulletinhistoricaltables.pdf. There are more defined contribution plans; more employers sponsor them; they have more participants; they have more assets; they are more contributions made to them on an ongoing

[3] In addition, more than half of the $3.183 trillion in assets in individual retirement accounts are derived from employer-based plans (including rollovers). Investment Company Institute, *The U.S. Retirement Market, Second Quarter 2009,* 18 Research Fundamentals No. 5-Q2, Figures 7 & 8 (Oct. 2009), *available at* www.ici.org/pdf/09_q2_retmrkt_update.pdf.

basis; there is more money distributed from them. *Id.* at 1, 4, 7, 10, 13, 16. Recently, policy makers have questioned whether 401(k) plans can provide adequate retirement income as the risks – investment, interest and longevity – are now all borne by the participants. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *401 (K) Plans: Several Factors Can Diminish Retirement Savings, but Automatic Enrollment Shows Promise for Increasing Participation and Savings* (GAO-10-153T Oct. 28, 2009)(detailing problems including no access, low participation, low contributions, poor investment decisions). If 401(k) plans lack fiduciaries who have even the minimal obligation to ensure that the investment options from which participants choose to invest are all prudent, it unnecessarily increases the investment risk on participants, placing participants at risk of reaching an adequate level of retirement income.

When substantial losses due to a plan's failure to determine whether investment options are prudent occur at or near retirement, the long-term effect wreaks havoc, financially and emotionally, on individuals and their families since retirement typically occurs at an age where employees do not have time to make up their losses. *See generally Musmeci v. Schwegmann Giant Super Markets*, 159 F.Supp.2d 329 (E.D. La. 2001). With the recent financial turmoil and significant losses in retirement plans and personal investments, numerous individuals over the age of 45 have postponed their retirements, returned to work, stopped making contributions to their retirement plans, or have made other adjustments in their lifestyles. AARP, *Retirement Security or Insecurity? The Experience of Workers Aged 45 and Older* (Oct. 2008) at I-iii, *available at* http://www.aarp.org/research/surveys/money/econ/trends/articles/retirement_survey_08.html.

Thus, it is important to participants to ensure that 401(k) plans have fiduciaries who can be held accountable for the selection and retention of options from which participants choose to invest.[4] ERISA §§ 2(b), 404(a)(1)(A) & 502(a), 29 U.S.C. §§ 1001(b), 1104(a)(1)(A) & 1132(a); *cf. Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985) (ERISA was passed to prevent the misuse and mismanagement of plan assets). If participants are without recourse to remedy the losses to their retirement plans, their retirement security will be irreparably damaged.

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[4] An employer using company stock to finance its company may be jeopardizing its employees' retirement security. *See Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 409 (7th Cir. 2006). In many respects, this is merely the modern version of the Studebaker fiasco. *See* n. 5, *infra*.

II. CONGRESS ENACTED ERISA'S FIDUCIARY STANDARDS TO PROTECT PENSION PLAN ASSETS AND THUS PARTICIPANTS' RETIREMENT SECURITY.

A. In Order to Ensure Fiduciaries Would Be Held Liable for Their Actions, Congress Included Provisions Whose Purpose Was to Block Attempts to Thwart the Statute's Fiduciary Responsibility Provisions.

By "establishing standards of conduct, responsibility, and obligation for fiduciaries" and "by providing for appropriate remedies [and] sanctions" for violations of these fiduciary standards, ERISA § 2(b), 29 U.S.C. § 1001(b), Congress sought to protect "the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). Congress wanted to protect the financial integrity of plans by ensuring that plan assets were neither misused nor mismanaged. *See Russell*, 473 U.S. at 141-42 (1985). In this manner, employers would be held accountable for the benefits they promised to their employees, thereby fostering ERISA's primary goal of protecting employees' benefits.[5] *See Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 374-75 (1980) (purpose of ERISA was to prevent the "great personal tragedy" suffered by

[5] The closing of the Studebaker plant and the termination of its pension plan are often cited as the catalysts for the passage of ERISA. *See generally* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY at 8-10, 51, 80 (2004).

employees whose retirement benefits were not paid); *see generally* ERISA § 2(a), 29 U.S.C. § 1001(a).

One of the significant methods Congress provided participants for protecting the financial integrity of their plans, and thus their benefits, was through ERISA's fiduciary requirements. *Nachman,* at 361; *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 569-571 (1985); *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). "ERISA's fiduciary responsibility rules impose the twin duties of care and loyalty that are at the heart of trust law . . . ." S.J. Sacher, et al., EMPLOYEE BENEFITS LAW, at 623 (2d ed. 2005). Although employers are not required to establish employee benefit plans, if they do so, they must abide by ERISA's standards.

Although Congress relied on trust law as the foundation of ERISA, it realized that trust law was inadequate to completely protect participants. *See Varity Corp.*, 516 U.S. at 497. Thus, Congress enacted three significant provisions to provide additional protections to workers beyond those provided by trust law. The first was section 404(a)(1)(D), which forbids a fiduciary from acting in accordance with plan documents to the extent the plan documents are inconsistent with Titles I and IV of ERISA. 29 U.S.C. § 1104(a)(1)(D). The second was section 410, which forbids exculpatory clauses. 29 U.S.C. § 1110.

The third were the prohibited transaction rules set forth in section 406 which prohibits conflicts of interest surrounding certain plan transactions. 29 U.S.C. § 1106; *see generally* SACHER at 623. The purpose of these provisions was to block attempts to thwart the statute's fiduciary responsibility provisions and thus ensure fiduciaries would be held liable for their actions. *Id.*

B. Congress Did Not Provide Any Exceptions to ERISA's Duties of Loyalty and Prudence.

Congress provided very specific and limited exceptions to ERISA's fiduciary rules. Congress waived ERISA's diversification requirements for eligible individual account plans (EIAPs) in order to allow them to invest primarily in company stock. Section 404(a)(2), 29 U.S.C. § 1104(a)(2). In order to facilitate this investment, Congress provided an exception for EIAPs from ERISA's prohibited transaction rules, section 408(e), 29 U.S.C. § 1108(e), and the 10% cap on the amount a plan may hold in employer securities. Section 407(b)(1), 29 U.S.C. § 1107(b)(1). *See generally Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003).

However, the plain language of ERISA did not exempt plan fiduciaries from acting in good faith where company stock was concerned.

> The duty of an ERISA trustee to behave prudently in managing the trust's assets, which in this case consisted of the assets of the ESOP,

> is fundamental. . . . [B]ut the absence of any general such duty [to diversify] from the ESOP setting does not eliminate the trustee's duty of prudence. If anything, it demands an even more watchful eye, diversification not being in the picture to buffer the risk to the beneficiaries should the company encounter adversity.

Armstrong v. LaSalle Bank Nat'l Ass'n, 446 F.3d 728, 732 (7th Cir. 2006); *see generally* Craig C. Martin, Matthew J. Renaud & Omar R. Akbar, *What's Up On Stock-Drops? Moench Revisited*, 39 J. MARSHALL L. REV. 605, 634 (2006) ("To be sure, there is nothing logically inconsistent about imposing ERISA's rigorous fiduciary duties on EIAP fiduciaries while exempting them from the duty to diversify investments").

Indeed, a review of the legislative history explaining the rules concerning fiduciary responsibility supports the view that all fiduciaries are subject to the same standards, regardless of the type of plan,[6] unless Congress explicitly provided exceptions. *E.g.*, H.R. CONF. REP. NO. 93-1280, at 305 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5086 ("plan fiduciaries generally must diversify plan investments (with certain exceptions for profit-sharing plans, etc., that invest in

[6] In defined contribution plans, unlike defined benefit plans, fiduciary misconduct concerning investments does not necessarily threaten the solvency of the entire plan, but instead reduces benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned Congress when it enacted ERISA. *See LaRue,* 552 U.S. at 253, 128 S.Ct. at 1025.

employer securities")). Nowhere in the statutory language or legislative history did Congress indicate an exception to the prudence rules. *E.g., id.* ("all plan fiduciaries must act, with respect to the plan, in accordance with a 'prudent man' rule."); *Eaves v. Penn,* 587 F.2d 453, 460 (10th Cir. 1978)("the legislative history combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments."). If anything, Congress showed particular concern for plans which used employer securities by indicating that it barred the use of section 404(c) as a defense to fiduciary breaches.[7] H.R. CONF. REP. NO. 93-1280, at 305 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5086.

Courts must assume that "a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Consequently, a court should not disregard the plain language of a statute unless a literal application of the statutory language "would lead to absurd results . . . or would thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 643 (1978) (internal quotation marks and

[7] Moreover, § 404(c), exempting fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts, would be superfluous if a plan sponsor could simply relieve fiduciaries from any liability for losses in an individual account. *Id.*; *see also* 29 C.F.R. § 2550.404c-1 (2007).

citation omitted); *see Puello v. Bureau of Citizenship and Immigration Serv.s*, 511 F.3d 324, 327 (2d Cir. 2007). Here, literal application of ERISA's language clearly furthers ERISA's purpose of protecting participants and beneficiaries and the financial integrity and stability of retirement plans. ERISA § 2, 29 U.S.C. § 1001. Indeed, to hold otherwise would create a perverse incentive for plan sponsors to disregard ERISA fiduciary responsibilities as to avoid ERISA's pervasive reach and thwart its requirements. These principles and ERISA's plain language, applied to the facts as alleged in the Complaint, make unmistakably clear that nothing in the statute exempts fiduciaries of plans investing in company stock or any other investment for that matter from ERISA § 404(a)'s requirements of loyalty and prudence. *See generally Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) ("ESOP fiduciaries remain subject to the general requirements of Section 404"). Especially where there are underlying issues concerning potential or actual fraud, misrepresentation or lies, the necessity of this approach becomes crystal clear.

Finally, it is important to note what this case does not allege. It does not allege a violation of ERISA's diversification rules. It does not allege a violation of any maximum amount of company stock in the plan. It does not allege any violation of ERISA's prohibited transaction rules. It does not allege that company stock is *per se* an imprudent investment. Instead, the case alleges that in offering and retaining company stock as an investment, the plan fiduciaries had an obligation to ensure that it was an appropriate and prudent investment for the plan. Nothing more and nothing less.

C. Plan Fiduciaries Must Override Plan Documents Where it Is Imprudent to Offer or Retain an Investment Option.

The district court's conclusion that defendants were not fiduciaries with regard to the alleged failure to offer or eliminate the plan's investment in company stock is predicated on an underlying assumption that plan fiduciaries have no responsibility to determine whether investment alternatives are prudent if the plan investment choices are written into governing plan documents by a plan's settlor. This assumption is demonstrably incorrect. Moreover, it severely undercuts ERISA's core fiduciary standards, directly disregarding Congress' reasons for enacting these provisions.

Even if a plan document requires an investment, in company stock or otherwise, the fiduciaries of a plan must override it if making or retaining the investment would be imprudent.[8] *See Laborer's Nat'l Pension Fund v. N. Trust Quantitative Advisories, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999) (investment

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[8] Obtaining the opinion of an independent fiduciary can be one method of making this determination. *See generally DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007); *Donovan v. Bierwith*, 680 F.2d 263, 271-73 (2d Cir. 1982).

manager must disregard plan if investing plan assets as required by plan documents would violate its duty of prudence); *Kuper v. Iovenko,* 66 F.3d 1447, 1457 (6th Cir.1995) (ERISA plan "may not be interpreted to include a per se prohibition against diversifying an ESOP"); *see generally Martin v. Feilen,* 965 F.2d 660, 665 (8th Cir. 1992) ("do[ ] not relieve a fiduciary . . . from the general fiduciary responsibility provisions of [§ 1104] which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interests of plan participants and beneficiaries and in a prudent fashion . . . nor does it affect the requirement ... that a plan must be operated for the exclusive benefit of employees and their beneficiaries"); *Eaves*, 587 F.2d at 459 (10th Cir. 1978); *see also* U.S. DEP'T OF LABOR OPINION LETTER NO. 90-05A, 1990 WL 172964, at *3 (Mar. 29, 1990) (despite plan provisions to the contrary, it is the responsibility of fiduciaries to determine, based on all the relevant facts and circumstances, the prudence of investing a large percentage of plan assets in qualifying employer securities); *see generally* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 659-60 (1995) (comparing trust law which permits the creator of an ordinary trust to include a provision in the trust instrument excusing the trustee from complying with the prudent-man rule with ERISA which expressly imposes the duty of prudence on directed trustees and forbids them to comply with directions of the fiduciary named in the plan that are not "proper."). These authorities are firmly grounded in § 404(a)(1)(D) of ERISA, which requires plan fiduciaries to follow the provisions of governing plan documents only "insofar as such documents and instruments are consistent with the provisions of [title I] and [title IV] of [ERISA]." 29 U.S.C. § 1104(a)(1)(D).

Indeed, ERISA's legislative history compels the conclusion reached by the authorities cited above. The legislative history explicitly indicates that Congress wanted to ensure that a plan document would not be a vehicle to circumvent the fiduciary rules:

> [I]f the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, . . . Even though the typical employee benefit plan is quite different from the testamentary trust both in purpose and in nature.

See S. REP. NO. 93-127, at 29 (1973), 1 LEG. HIST. 615 (describing Senate version of what is now Section 404(a)(1)(D)); H.R. REP. NO. 93-533, at 12, 2 LEG. HIST. 2359 (describing House version); CONG. REC. HOUSE (Feb. 25, 1974), 2 LEG. HIST. 3308 (describing House version).

A hypothetical clearly demonstrates the reasons this Court should reject defendants' attempt to eliminate the duty of prudence from the selection and retention of investment alternatives when the investment alternatives are set forth in the plan documents. Assume, for example, that the plan's settlor decides to offer participants five different mutual fund options which satisfy the broad range of investment alternatives of federal regulations. *See* 29 C.F.R. § 2550.404c-1(c)(3) (requiring a broad range of investment options to meet the 404(c) requirements). Assume further that ratings from a recognized service such as Morningstar show that each mutual fund option is the lowest rated fund of its type. As a result, the plan participants would have no choice but to direct their investments of plan assets into one or more of the poorly performing mutual funds; *i.e.* they would have no prudent option, unless the plan fiduciaries have a duty to override the plan documents. If the district court and defendants are correct, however, participants will be left with no recourse when the investments, predictably, perform poorly. Whether the investment alternative in the plan document is company stock, a real estate investment, or a mutual fund, there is simply no logical way to excuse fiduciaries from the responsibility to exercise prudence where one of the investment alternatives is challenged. ERISA cannot be read to leave participants so unprotected.

In *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919-20 (8th Cir. 1994), defendant trustees argued that they could not be held liable for their imprudent actions. Rejecting that argument, the Eighth Circuit stated:

> Finding a fiduciary liable for failing to provide adequate security . . . no more makes him a guarantor than does finding a fiduciary liable for improperly investing a pension fund's assets in the garden-variety breach of duty case. The basis of personal liability in each case is the breach of duty, which is not a guarantee but a standard of conduct that Congress has imposed and that the fiduciary can satisfy by acting reasonably.

The Eighth Circuit's reaction is consistent with this Court's expression of "skepticism of a line of reasoning that would draw from 'a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans' the elimination of protective standards of professional conduct." *Gerosa v. Savasta & Co., Inc.*, 329 F.3d 317 n.7 (2d Cir. 2003).

Here, the participants' claims are based on the alleged failure of one or more of the defendants to satisfy this standard of conduct. Like the plan and participants here, the security of 401(k) plans and protection for 401(k) participants are dependent on the faithful exercise by plan fiduciaries of their duties under ERISA's fiduciary responsibility provisions, including the selection of investment options such as company stock.[9]

[9] Like some other individual account plans, the Citigroup plans used company stock in two ways: first, company stock was an investment option into which the employees could choose to direct the investment of their own contributions; and second, employees' contributions were matched with the sponsoring employer's

III. IN ORDER TO PROTECT PLAN ASSETS AND PARTICIPANTS' RETIREMENT SECURITY, ERISA REQUIRES THAT THERE BE A PLAN FIDUCIARY WITH RESPONSIBILITY FOR PLAN ASSETS AND INVESTMENTS.

Based on its assumption that the governing plan documents removed discretion from all of the defendants with regard to the selection and monitoring of the plan's investment in Citigroup stock, the district court concluded that neither Citigroup nor the Administration and Investment Committees were plan fiduciaries. The logical consequence of this conclusion is that no entity at any time will ever be responsible under ERISA for determining whether it is prudent to retain any investment option in a plan with such provisions in its governing instrument. Not only does this undercut the purposes of ERISA, but it is contrary to the plain language of the statute.

Under ERISA, fiduciary status may be conferred in one of two ways. The first is that an individual or entity may be named a fiduciary directly in the governing plan documents or pursuant to a procedure specified in those documents. The second is by meeting the statute's functional definition of a fiduciary. *See generally* Kimberly Lynn Weiss, *Directors' Liability for Corporate Mismanagement of 401(k) Plans: Achieving the Goals of ERISA In Effectuating*

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stock. *See* Complaint paragraphs 85 and 100.

Retirement Security, 38 IND. L. REV. 817, 827 (2005).

Congress decided to require a plan to identify a named fiduciary in the plan instrument so that responsibility to control and manage the operation and administration of the plan and liability for its mismanagement would be established with a degree of certainty. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). *See* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075-78, 5081 n.3 ("[A] written plan is required so the employee may know who is responsible for operating the plan. Therefore, the plan document is to provide for the "named fiduciaries" who have authority to control and manage the plan operations and administration."). *See also* 29 C.F.R. § 2509.75-5, FR-1.

Along with ensuring that there is at least one fiduciary who is always responsible for administration of the plan, Congress also established statutory requirements in order to guarantee that some entity is responsible for the management of plan assets. Under ERISA § 403(a), 29 U.S.C. § 1103(a), plan assets must be held in trust by one or more trustees. Those trustees must either be named in a plan document or trust instrument, or appointed by a named fiduciary of the plan. *Id.* These trustees will always be fiduciaries, *see* 29 C.F.R. § 2509.75-8, D-3, and, unless one of two exceptions is met, they will have exclusive authority and discretion to manage and control all plan assets. The first exception is where the written plan document instructs that the trustee is subject to the direction of a named fiduciary who is not a trustee. ERISA § 403(a)(1), 29 U.S.C. § 1103(a)(1). The second exception is where there has been a proper delegation to an investment manager. ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2).

If the employer is identified in the plan document as a named fiduciary with the responsibility for directing the trustee, then the employer clearly is a fiduciary with regard to plan assets, including plan assets invested in the employer's stock. If so, then the employer may have the duty to direct the plan trustee to cease investment in the employer's stock, regardless of the plan provisions. The employer would have a duty to override the plan documents, if it was prudent to do so.

Alternatively, even though ERISA specifies that there must be a trustee and a named fiduciary to ensure that some entity has responsibility for the plan and its assets, the statute provides another method for determining fiduciary status. ERISA provides a functional definition of fiduciary, which depends on the facts of a particular situation. *Varity Corp.*, 516 U.S. at 527 (1996) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (Congress "define[d] 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan.")). ERISA provides that "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *see also* 29 C.F.R. § 2509.75-8, at D-3. The term fiduciary must be broadly construed in order to fulfill the remedial purposes of ERISA. *Bannistor v. Ullman*, 287 F.3d 394, 401 (5th Cir. 2002); *accord, Musmeci*, 332 F.3d 339, 351 (5th Cir. 2003).

Accordingly, an employer may become a fiduciary with regard to plan investments by actually exercising discretion over them. For example, if an employer is not named in the plan document, but gives directions to the trustee or effectively controls the trustee's decisions with regard to investment of plan assets, the employer becomes a fiduciary pursuant to ERISA's functional fiduciary definition. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). The employer therefore is subject to the strict standards of ERISA governing the conduct of fiduciaries under ERISA § 404(a), 29 U.S.C. § 1104(a). *See Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996); *Licensed Div. Dist. No. 1 Meba/NMU, AFL-CIO v. Defries*, 943 F.2d 474 (4th Cir. 1991); *see also Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984) (" a fiduciary should be defined . . . by considering the authority which a particular person has or exercises over an employee benefit plan.").[10] Thus, if Citigroup effectively controlled the investment of the plan assets here, then it had the duty to override the plan document with regard to investment in Citigroup stock.

The district court incorrectly held that the plan provisions removed all discretion from the Investment Committee and thus there was no duty of care or prudence by any entity to determine whether the company stock should be kept as an investment alternative. The Court should reverse the district court and remand the case to the district court for further proceedings.

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[10] Furthermore, an employer may be responsible as a fiduciary if it actively and knowingly participated in another fiduciary's breach. *See Bannistor*, 287 F.3d at 408. Some courts have recognized a veil piercing theory to find fiduciary liability of employers. S*ee Musmeci*, 332 F.3d at 350-351.

CONCLUSION

For the reasons stated above, AARP respectfully requests that this Court reverse the district court's decision and remand the case to the district court.

Respectfully submitted,

Dated: December 22, 2009

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CERTIFICATE OF FILING AND SERVICE

I, Jay E. Sushelsky, hereby certify under penalty of perjury that on December 22, 2009, I served two copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* by AARP in Support of Plaintiffs-Appellants by United States Mail and one copy via E-mail on the following parties:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,871 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: December 22, 2009

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