UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP ERISA LITIGATION THIS DOCUMENT RELATES TO ALL ACTIONS	MASTER FILE: 07 Civ. 9790 (SHS) (DCF) ELECTRONICALLY FILED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. PRELIMINARY STATEMENT 1

II. STATEMENT OF FACTS 6

A. The Events During the Class Period 6

1. Citigroup's Undisclosed High-Risk Bets on the Subprime Market and SIVs Cause its Decline 6

2. The Risks and Consequences Devastate the Company and the Plans 8

3. The Fiduciaries Knew or Should Have Known That Citigroup Stock Was an Imprudent Investment But Did Nothing to Protect the Plans' Assets 10

B. The Defendants 11

C. The Counts in the Consolidated Complaint 12

III. ARGUMENT 13

A. Standard of Review on a Motion to Dismiss 13

B. Count I Properly Pleads Claims for Failing to Invest the Plans' Assets Prudently and Loyally 16

1. Defendants Cannot Override ERISA's Duties of Prudence and Loyalty Under the Guise of Settlor Intent 16

a. The Plan Documents Did Not Mandate Investment in Citigroup Stock, But Authorized and Required Reduction of Company Stock Ownership in Circumstances Such as Those Present Here 16

b. Under ERISA, Plan Fiduciaries Remain Responsible for the Prudent and Loyal Investment of Plan Assets Notwithstanding Plan Language Purporting to Mandate a Particular Investment 18

2. The Complaint Adequately Alleges That the Prudence Defendants Were Fiduciaries for Count I 20

a. ERISA Uses a Functional Definition of Fiduciary That Is Inappropriate for Resolution on a Motion to Dismiss 20

b. The Complaint Adequately Alleges that Defendants Citigroup and Citibank Were Fiduciaries for Count I 21

c. The Complaint Adequately Alleges that the Investment Committee Defendants Were Fiduciaries for Count I 25

d. The Complaint Adequately Alleges that the Administration Committee Defendants Were Fiduciaries for Count I 26

3. Defendants Erroneously Rely on the Presumption of Prudence 27

a. Prudence Is Not Presumed At Motion To Dismiss Stage 27

b. The Standard for Overcoming the *Moench* Presumption 30

c. The Complaint Alleges Sufficient Facts to Support Plaintiffs' Breach of Fiduciary Duty Claims 32

d. The Cases Cited by Defendants Are of No Help to Them 32

4. The Complaint Adequately Alleges Defendants Failed To Investigate The Prudence Of Continued Investment In Citigroup Stock 34

a. The Complaint Adequately Alleges that Defendants Knew or Should Have Known that Citigroup Stock Was an Imprudent Investment 34

b. Defendants' Effort to Dispute the Factual Allegations Regarding "Red Flag" Events Is Misguided 35

C. Count II States a Claim Against Citigroup, the Administration Committee, and Prince for Breaching Their Fiduciary Duty to Provide Complete and Accurate Information to Plan Participants 37

1. ERISA Fiduciaries Have a Duty to Disclose Material Information Plan Participants Need to Know to Protect Their Investments 37

2. The Complaint Alleges Facts Sufficient to Establish That Citigroup, the Administration Committee, and Defendant Prince Acted in a Fiduciary Capacity When Communicating With Plan Participants 41

3. Truthful Disclosure Would Have Prevented Plan Losses 45

D. Count III Properly Pleads Claims Against Citigroup and the Director Defendants for Failure to Monitor 47

1. ERISA Requires Appointing Fiduciaries to Monitor Their Appointees 47

2. Defendants' "Monitoring" Arguments Are All Flawed 48

E. Count IV Properly Pleads Claims Against Citigroup and the Director Defendants for Breach of Fiduciary Duty To Disclose Necessary Information to Co-Fiduciaries 52

F. Count V Properly States a Claim for Breach of Duty to Avoid Conflicts of Interest . . . 53

G. Count V Properly Alleges Co-Fiduciary Liability Against All Defendants 55

H. ERISA §404(c) Does Not Require Dismissal of Any Aspect of the Complaint 57

IV. CONCLUSION 59

TABLE OF AUTHORITIES

Page

CASES

In re AEP ERISA Litig.,
327 F. Supp. 2d 812 (S.D. Ohio 2004) 28, 43, 58

Agway Inc., Employees' 401(k) Thrift Investment Plan v. Magnuson,
2006 U.S. Dist. LEXIS 74670 (N.D.N.Y Jul. 13, 2006) 19, 28, 43

Allen v. WestPoint-Pepperell, Inc.,
945 F.2d 40 (2d Cir. 1991) 3

Alvidres v. Countrywide Fin'l Corp.,
2008 U.S. Dist. LEXIS 27431 (C.D. Cal. Mar. 18, 2008) 28

Alvidres v. Countrywide Fin'l Corp.,
2008 WL 803132 (C.D. Cal. Mar. 17, 2008) 37

In re AOL Time Warner, Inc., Sec. & ERISA Litig.,
2005 U.S. Dist. LEXIS 3715 (S.D.N.Y. Mar. 10, 2005) . . . . passim

Baker v. Kingsley,
387 F. 3d 649 (7th Cir. 2004) 41

Bannister v. Ullman,
287 F.3d 394 (5th Cir. 2002) 23

In re Bausch & Lomb Inc. ERISA Litig.,
2008 U.S. Dist. LEXIS 106269 (W.D.N.Y. Dec. 12, 2008) 32

Beauchem v. Rockford Prods. Corp.,
2003 U.S. Dist. LEXIS 5546 (N.D. Ill. Mar. 24, 2003) 52

Bell Atl. Corp. v. Twombly,
550 U.S. 544, 127 S. Ct. 1955 (2007) 13, 14, 29

Bixler v. Cent. Pa. Teamsters Health & Welfare Fund,
12 F.3d 1292 (3d Cir. 1993) 38, 39

Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein,
107 F.3d 139 (2d Cir. 1997) 40

In re Boston Sci. Corp. ERISA Litig.,
506 F. Supp. 2d 73 (D. Mass. 2007) 14

Bowerman v. Wal-Mart Stores, Inc.,
226 F.3d 574 (7th Cir. 2000) 38

In re Calpine Corp. ERISA Litig.,
2005 WL 1431506 (N.D. Cal. Mar. 31, 2005) 49, 55

In re Calpine Corp. ERISA Litig.,
2005 WL 3288469 (N.D. Cal. Dec. 5, 2005) 14, 34, 44

In re Cardinal Health ERISA Litig.,
424 F. Supp. 2d 1002 (S.D. Ohio 2006) 43

Childers v. Northwest Airlines, Inc.,
688 F. Supp. 1357 (D. Minn. 1988) 41

In re CMS Energy ERISA Litig.,
312 F. Supp. 2d 898 (E.D. Mich. 2004) . . . . . passim

In re Coca-Cola Enters. Inc., ERISA Litig.,
2007 WL 1810211 (N.D. Ga. June 20, 2007) 14, 34, 48

Concha v. London,
62 F.3d 1493 (9th Cir. 1995) 15

In re Countrywide Fin. Corp. Sec. Litig.,
2008 U.S. Dist. LEXIS 102000 (C.D. Cal. Dec. 1, 2008) 4

Coyne & Delany Co. v. Selman,
98 F.3d 1457 (4th Cir. 1996) 49

Cress v. Wilson,
2007 U.S. Dist. LEXIS 42632 (S.D.N.Y. June 6, 2007) 14, 38

Crowley v. Corning, Inc.,
234 F. Supp. 2d 222 (W.D.N.Y. 2002) 44, 50

Crowley v. Corning Inc.,
2004 WL 763873 (W.D.N.Y. Jan. 14, 2004) 24, 25

DC Comics, Inc. v. Powers,
482 F. Supp. 494 (S.D.N.Y. 1979) 24

DiFelice v. U.S. Airways, Inc.,
497 F.3d 410 (4th Cir. 2007) 58

Dobson v. Hartford Fin. Servs. Group,
389 F.3d 386 (2d Cir. 2004) 39

Donovan v. Bierwirth,
680 F.2d 263 (2d Cir. 1982) 1, 53, 54

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983) 56-7

In re Duke Energy ERISA Litig.,
281 F. Supp. 2d 786 (W.D.N.C. 2003) 34

In re Dynegy, Inc. ERISA Litig.,
309 F. Supp. 2d 861 (S.D. Tex. 2004) 42

Eaves v. Penn,
587 F.2d 453 (10th Cir. 1978) 28

Eddy v. Colonial Life Ins. Co.,
919 F.2d 747 (D.C. Cir. 1990) 39

Edgar v. Avaya,
503 F.3d 340 (3d Cir. 2007) . . . . passim

Ehlmann v. Kaiser Found. Health Plan,
198 F.3d 552 (5th Cir. 2000) 41

In re EDS ERISA Litig.,
305 F. Supp. 2d 658 (E.D. Tex. 2004) 15, 49

In re Enron Corp. Sec., Deriv. & ERISA Litig.,
284 F. Supp. 2d 511 (S.D. Tex. 2003) . . . . passim

Erickson v. Pardus,
551 U.S. 89, 127 S. Ct. 2197 (2007) 14

Estate of Becker v. Eastman Kodak Co.,
120 F.3d 5 (2d Cir. 1997) 39

Faircloth v. Lundy Packing Co.,
91 F.3d 648 (4th Cir. 1996) 40

In re Ferro Corp. ERISA Litig.,
422 F. Supp. 2d 850 (N.D. Ohio 2006) 17, 28, 44, 54

Fink v. National Savings & Trust Company,
772 F.2d 951 (D.C. Cir. 1985) 28

In re First Am. Corp. ERISA Litig.,
2008 U.S. Dist. LEXIS 83832 (C.D. Cal. July 14, 2008) 17, 54

Foman v. Davis,
371 U.S. 178 (1962) 59

In re Ford Motor Co. ERISA Litig.,
2008 WL 5377955 (E.D. Mich. Dec. 22, 2008) 19, 32, 45

Frommert v. Conkright,
433 F.3d 254 (2d Cir. 2006) 21

In re Fremont Gen. Corp. Litig.,
564 F. Supp. 2d 1156 (C.D. Cal. 2008) 28

Glaziers & Glassworks Union Local No. 252 Annuity Fund v. Newbridge Sec. Inc.,
93 F.3d 1171 (3d Cir. 1996) 38, 52, 53

In re GM ERISA Litig.,
2006 U.S. Dist. LEXIS 16782 (E.D. Mich. Apr. 6, 2006) 54

In re GM ERISA Litig.,
2007 U.S. Dist. LEXIS 63209 (E.D. Mich. Aug. 28, 2007) 15, 44

Graden v. Conexant Sys., Inc.,
574 F. Supp. 2d 456 (D.N.J. 2008) 29, 45

Griggs v. E.I. Dupont Nemours & Co.,
237 F.3d 371 (4th Cir. 2001) 39, 41

Haber v. Brown,
774 F. Supp. 877 (S.D.N.Y. 1991) 56

Halaris v. Viacom, Inc.,
2008 WL 3855044 (N.D. Tex. Aug. 19, 2008) 29

Hamilton v. Carell,
243 F.3d 992 (6th Cir. 2001) 23

Harris Trust & Sav. Bank v. John Hancock Mutl Life Ins. Co.,
1997 WL 278116 (S.D.N.Y. May 23, 1997) 19

Harte v. Bethlehem Steel Corp.,
214 F.3d 446 (3d Cir. 2000) 40

Harzewski v. Guidant Corp.,
489 F.3d 799 (7th Cir. 2007) 46

Hecker v. Deere & Co.,
496 F. Supp. 2d 967 (W.D. Wis. 2007) 58

Herrington v. Household Int'l., Inc.,
2004 U.S. Dist. LEXIS 5461 (N.D. Ill. Mar. 31, 2004) 55

Hill v. BellSouth Corp.,
313 F. Supp. 2d 1361 (N.D. Ga. 2004) 51

In re Honeywell Int'l ERISA Litig.,
2004 U.S. Dist. LEXIS 21585 (D.N.J. Sept. 14, 2004) 44

Howard v. Shay,
100 F.3d 1484 (9th Cir. 1996) 54

Howell v. Motorola, Inc.,
337 F. Supp. 2d 1079 (N.D. Ill. 2004) 48, 52

Hull v. Policy Mgmt. Sys. Corp.,
2001 WL 1836286 (D.S.C. Feb. 9, 2001) 44, 45. 52

Iqbal v. Hasty,
490 F.3d 143 (2d. Cir. 2007) 13

JDS Uniphase Corp. ERISA Litig.,
2005 WL 1662131 (N.D. Cal. July 14, 2005) 46, 48

John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan,
26 F.3d 360 (2d Cir. 1994) 54

Jordan v. Fed. Express Corp.,
116 F.3d 1005 (3d Cir. 1997) 40

Kirschbaum v. Reliant Energy, Inc.,
526 F.3d 243 (5th Cir. 2008) . . . . passim

Kling v. Fidelity Mgmt. Trust, Co.,
323 F. Supp. 2d 132 (D. Mass 2004) 45, 56

Kramer v. Time-Warner, Inc.,
937 F.2d 767 (2d Cir. 1991) 3

Krohn v. Huron Mem'l Hosp.,
173 F.3d 542 (6th Cir 1999) 38

Kuper v. Iovenko,
66 F.3d 1447 (6th Cir. 1995) 27, 29, 34

Lalonde v. Textron, Inc.,
369 F.3d 1 (1st Cir. 2004) 28, 30

Langbecker v. Elec. Data Sys. Corp.,
476 F.3d 299 (5th Cir. 2007) 58

LaRue v. DeWolff, Boberg & Assocs., Inc.,
128 S. Ct. 1020 (2008) 30

Lee v. Burkhart,
991 F.2d 1004 (2d Cir. 1993) 56

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984) 48, 52

Liss v. Smith,
991 F. Supp. 278 (S.D.N.Y. 1998) 42, 52

Lively v. Dynegy, Inc.,
420 F. Supp. 2d 949 (N.D. Ill. 2006) 22

LoPresti v. Terwilliger,
126 F.3d 34 (2d Cir. 1997) 21, 23

Lowen v. Tower Asset Mgt.,
829 F.2d 1209 (2d Cir. 1987) 19

Marks v. Newcourt Credit Group Inc.,
342 F.3d 444 (6th Cir. 2003) 44

In re Marsh ERISA Litig.,
2006 U.S. Dist. LEXIS 90631 (S.D.N.Y. Dec. 14, 2006) 21, 22, 38

Mass. Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 40

In re McKesson HBOC, Inc. ERISA Litig.,
2002 WL 31431588 (N.D. Cal. Sept. 30, 2002) 45

In re McKesson HBOC, Inc. ERISA Litig,
391 F. Supp. 2d 812 (N.D. Cal. 2005) 33, 34

Mehling v. N.Y. Life Ins. Co.,
163 F. Supp. 2d 502 (E.D. Pa. 2001) 48

Mellot v. Choicepoint, Inc.,
561 F. Supp. 2d 1305 (N.D. Ga. 2007) 41

Menhorn v. Firestone Tire & Rubber Co.,
738 F.2d 1496 (9th Cir. 1984) 40

Mertens v. Hewitt Assocs.,
508 U.S. 248, 262 (1993) 20, 22, 23

Moench v. Robertson,
62 F.3d 553 (3d Cir. 1995) . . . . passim

Morse v. Stanley,
732 F.2d 1139 (2d Cir. 1984) 54

Nat'l Football Scouting Inc. v. Cont'l Assurance Co.,
931 F.2d 646 (10th Cir. 1991) 23

Olson v. Chem-Trend Inc.,
1995 U.S. Dist. LEXIS 11016 (E.D. Mich. May 30, 1995) 41

Pegram v. Herdrich,
530 U.S. 211 (2000) 15

Pietrangelo v. NUI Corp.,
2005 U.S. Dist. LEXIS 40832 (D.N.J. July 18, 2005) 42, 44, 46

Pineiro v. Pension Benefit Guar. Corp.,
318 F. Supp. 2d 67 (S.D.N.Y. 2003) 39

In re Polaroid ERISA Litig.,
362 F. Supp. 2d 461 (S.D.N.Y. 2005) . . . . passim

Pugh v. Tribune Co.,
521 F.3d 686 (7th Cir. 2008) 29, 48

In re Radioshack Corp. ERISA Litig.,
547 F. Supp. 2d 606 (N.D. Tex. 2008) 29

Rankin v. Rots,
278 F. Supp. 2d 853 (E.D. Mich. 2003) . . . . passim

Ream v. Frey,
107 F.3d 147 (3d Cir. 1997) 53

Rombach v. Chang,
355 F.3d 164 (2d Cir. 2004) 14

In re Sears, Roebuck & Co. ERISA Litig.,
2004 U.S. Dist. LEXIS 3241 (N.D. Ill. Mar. 3, 2004) 44, 55

Shirk v. Fifth Third Bancorp,
2007 U.S. Dist. LEXIS 26534 (S.D. Ohio Apr. 9, 2007) 54, 57

Smith v. Local 819 I.B.T. Pension Plan,
291 F.3d 236 (2d Cir. 2002) 14, 15, 16

Smith v. Delta Air Lines, Inc.,
422 F. Supp. 2d 1310 (N.D. Ga. 2006) 25, 48

Sprague v. GMC,
133 F.3d 388 (6th Cir. 1998) 41

In re Sprint Corp. ERISA Litig.,
388 F. Supp. 2d 1207 (D. Kan. 2004) . . . . passim

Stein v. Smith,
270 F. Supp. 2d 157 (D. Mass. 2003) 57

Stuart Park Associates Ltd. Partnership v. Ameritech Pension Trust,
846 F. Supp. 701 (N.D. Ill. 1994) 23

Summers v. State Street Bank & Trust Co.,
453 F.3d 404 (7th Cir. 2006) 32

Sweeney v. Kroger Co.,
773 F. Supp. 1266 (E.D. Mo. 1991) 41

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 13, 14

In re Syncor ERISA Litig.,
351 F. Supp. 2d 970 (C.D. Cal. 2004) 15

In re Syncor ERISA Litig.,
516 F.3d 1095 (9th Cir. 2008) 19, 27, 30, 34

Tatum v. R.J. Reynolds Tobacco Co.,
2007 U.S. Dist. LEXIS 39801 (M.D.N.C. May 31, 2007) 23

Taylor v. United Techs. Corp.,
2007 WL 2302284 (D. Conn. Aug. 9, 2007) 15

Thompson v. Air Power,
248 Va. 364 (1994) 24

Thompson v. Avondale Indus. Inc.,
2003 WL 359932 (E.D. La. Feb. 14, 2003) 53

Toussaint v. J.J. Weiser & Co.,
2005 WL 35634 (S.D.N.Y. Feb. 13, 2005) 14

Trs. of Teamsters Local Union No. 443 Health Servs. & Ins. Plan v. Papero,
485 F. Supp. 2d 67 (D. Conn. 2007) 21

Urban v. Comcast Corp.,
2008 WL 4739519 (E.D. Pa. Oct. 28, 2008) 25

Varity Corp. v. Howe,
516 U.S. 489 (1996) 22, 39, 43, 44

Weiss v. Cigna Healthcare, Inc.,
972 F. Supp. 748 (S.D.N.Y. 1997) 41

West v. Prudential Secs., Inc.,
282 F.3d 935 (7th Cir. Ill. 2002) 45

In re Westar Energy, Inc. ERISA Litig.,
2005 U.S. Dist. LEXIS 28585 (D. Kan. Sept. 29, 2005) 28, 29, 45, 46

Woods v. Southern Co.,
396 F. Supp. 2d 1351 (N.D. Ga. 2005) 51, 57

In re WorldCom Inc. ERISA Litig.,
263 F. Supp. 2d 745 (S.D.N.Y. 2003) . . . . passim

In re WorldCom, Inc. ERISA Litig.,
354 F. Supp. 2d 423 (S.D.N.Y. 2005) 56

Wright v. Or. Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004) 27, 33, 46, 48

In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig.,
312 F. Supp. 2d 1165 (D. Minn. 2004) 28

In re Xerox Corp. ERISA Litig.,
483 F. Supp. 2d 206 (D. Conn. 2007) 14, 22

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Amended Brief Of The Secretary Of Labor As Amicus Curiae Opposing The Motions To Dismiss, *Tittle v. Enron Corp, et al.*, No. H-01-3913 (S.D. Tex. Aug. 30, 2001), at http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02.pdf 41

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Brief of the Secretary of Labor as Amicus Curiae in Opposition to Motion to Dismiss, *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y. Jan. 15, 2004) ("*DOL WorldCom Amicus*"), at http://www.dol.gov/sol/media/briefs/WorldCom-1-16-04.pdf 47, 49

Elaine L. Chao, United States Secretary of Labor, Get it Right: Responsibilities of an ERISA Fiduciary (May 28, 2004), at http://www.dol.gov/_sec/media/speeches/20040528_Yale.html . 51

Department of Labor Field Assistance Bulletin No. 2004-03 at http://www.dol.gov/ebsa/regs/fab_2004-3.html 53

Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Proposed Rule, 73 Fed. Reg. 43,018 (proposed July 23, 2008) (to be codified at 29 C.F.R. pt. 2550) 59

Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans, 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992) (29 C.F.R. pt. 2550) 58

Remarks of John C. Dugan Comptroller of the Currency Before the Global Association of Risk Professionals, New York, NY (Feb. 27, 2008) 3, 37

STATUTES AND RULES

Employee Retirement Income Security Act of 1974 ("ERISA") . . . . passim

Fed. R. Civ. P. 8(a) 13, 14, 15

Fed. R. Civ. P. 9(b) 13, 14, 15

29 U.S.C. §1104 . . . . 12, 57

I. PRELIMINARY STATEMENT

Plaintiffs bring this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), enacted to protect "the interests of participants in employee benefit plans ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. §1001(b). The fiduciary standards in 29 U.S.C. §§1104(a)(1)(A) and (B), emanating from trust law, impose upon fiduciaries the duties of loyalty and care, described as the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).[1]

The Consolidated Class Action Complaint for Violations of the Employee Retirement Income Security Act ("Complaint" or "Compl.") alleges that Defendants, fiduciaries of the Citigroup 401(k) Plan and the Citibuilder 401(k) Plan for Puerto Rico (collectively, the "Plans"), breached their fiduciary duties by maintaining the Plans' massive investment in Citigroup, Inc. ("Citigroup") common stock while they knew or should have known that Citigroup stock was an imprudent retirement investment, due to the enormous undisclosed risks the Company's management had recklessly added to its balance sheet.

Indeed, Citigroup has become the poster child for the corporate recklessness that precipitated the financial crisis of 2008, and the Company's imminent collapse over the weekend of November 22-23, 2008 marked a new low point in that crisis. Defendants' high-risk conduct brought a once respected and seemingly diversified franchise to its knees, within hours of failure, saved only by a massive government bailout. Even months earlier, Citigroup had survived only by going hat-in-hand to foreign investors for multi-billion dollar capital infusions.

Contrary to Defendants' dubious factual disputations in their motion, blaming external forces for the Company's collapse, the painful reality is that Citigroup's troubles were wrought

[1] The ERISA duty of loyalty requires a fiduciary to act with "complete loyalty" to the trust's beneficiaries, with an "eye single to the interests of the participants and beneficiaries." *Donovan*, 680 F.2d at 271. The duty of care requires a fiduciary to act 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 employ. 29 U.S.C. §1104(a)(1)(B).

wholly by its own leaders. Of all companies at the forefront of the financial crisis, Citigroup has taken the largest write-downs (after reassurances of adequate reserves), as a consequence of its own reckless conduct. Indeed, prior to and during the Class Period, Citigroup was one of the leading participants in the asset-backed securitization and collateralized debt obligation ("CDO") markets, one of the heaviest investors in the subprime mortgage market, and a pioneer in the market for off-balance sheet Structured Investment Vehicles ("SIVs").

As widely reported, Citigroup's senior-most management, facing increased competition from investment banks, pushed the Company to assume risks and highly leveraged products undreamed of for large money-center banks only a few years earlier. The magnitude of these risks is illustrated by the fact that Citigroup came within hours of certain bankruptcy, *despite* the fact that it was, as Defendants state, "the world's largest bank by revenue" and employed a "diversified" model.[2]

Both Plans held huge concentrations of Citigroup stock at the beginning of the Class Period, and Plan fiduciaries continued to purchase or permit the purchase of Company stock for the Plans, even as Citigroup's worsening financial condition became acutely apparent. Notwithstanding that the Citigroup Plan held an astounding $4.13 billion (representing some 75 million shares), or 32% of its total investments, in Citigroup stock at the beginning of the Class Period, and the Citibuilder Plan held 34% of its investments in Citigroup stock at that time (¶ 8), Plan fiduciaries never considered whether Citigroup stock was an appropriate investment for the Plans. Defendants Citigroup, Citibank, N.A. ("Citibank") and the Director Defendants knew that Citigroup was in financial peril due to its exposure to CDOs, subprime securities, and SIVs (*e.g.*, ¶¶ 6-7, 130-36, 155, 189, 194, 200), but did nothing to warn other Plan fiduciaries of the potentially disastrous impact such exposure would have on the Plans and on the retirement

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[2] Memorandum of Law in Support of Defendants' Motion to Dismiss the Consolidated Class Action Complaint ("Brief" or "Def. Br.") at 4. References to paragraphs of the Complaint are in the form "¶ _."

security of Citigroup workers (tens of thousands of whom were later terminated). Instead, in correspondence and meetings with employees, Citigroup and Defendant Prince painted a glowing picture of Citigroup's financial health to allay any employee fears about Citigroup's exposure to its toxic assets (¶¶ 136-75, 197-99), knowing employees were making investment choices for their individual accounts based in part on that information. ¶¶ 191, 200, 233-39. This is the very type of conduct ERISA prohibits, as the lynchpin of the statute is for fiduciaries to monitor the employee benefit plan investments and inform participants of adverse facts affecting their interests in the plans.

Defendants selectively seek to introduce articles[3] outside the Complaint to argue for a different explanation for Citigroup's collapse.[4] However, the "facts" they proffer do not add up, and are not the ones alleged. The Complaint alleges that Citigroup's downfall was due not to a *force majeure*, but to the acts of Citigroup itself. Defendants ignore in their brief that it was *they*

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[3] Defendants improperly inject factual arguments based on numerous appended exhibits. While a court may take judicial notice of the existence of certain documents under Fed. R. Evid. 201, it cannot, as Defendants suggest, draw inferences on this motion that the self-serving statements in the articles are true. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir.1991) ("under Rule 12(b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken."); *see also Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991) ("If a district court wishes to consider additional material, Rule 12(b) requires it to treat the motion as one for summary judgment under Rule 56, giving the party opposing the motion notice and an opportunity to conduct necessary discovery and to submit pertinent material."). Accordingly, the Court should not consider any such statement offered for its truth.

[4] Defendants even misrepresent the articles they cite in their brief. For example, when Defendants quote Mr. Dugan's statement that "nearly all market participants made [the] mistake" of "grossly underestimat[ing] the risk of super-senior tranches of ABS CDOs" (Def. Br. 11), they ignore Dugan's statement, *in the very same speech*, that, "In many cases, assets in the [underlying] pool [of interests in subprime mortgage-backed securities] were not in the triple A-rated senior tranches of these securities, but instead in the lower-rated junior, or 'mezzanine,' tranches," and concluded that: "There is really no excuse for institutions that specialize in credit risk assessment – like large commercial banks – to rely solely on credit ratings in assessing credit risk." *Remarks of John C. Dugan Comptroller of the Currency Before the Global Association of Risk Professionals, New York, NY* (Feb. 27, 2008), Pravda Decl. Ex. 17, at p.11 (emphasis added). Dugan emphasized that "[b]ecause of the difference in the composition of risk," triple A-rated super-senior ABS CDO securities have characteristics "that may have lead them to perform quite differently than other types of triple A-rated securities, such as individual corporate securities," noting that "the CDO pool remains very exposed to systematic risk: if an event occurs that leads to subprime losses generally, then losses on the super-senior tranche are likely to be extreme." *Id*. at 10. Dugan also noted that the largest problems arose if a bank, like Citigroup, retained dangerously big positions in certain securities, like CDOs, rather than selling them off to other investors: "What most differentiated the companies sustaining the biggest losses from the rest was their willingness to hold exceptionally large positions on their balance sheets which, in turn, led to exceptionally large losses." *Id.*

who, at the behest of Defendants Prince and Rubin, pioneered and pushed their way deeper into the CDO, asset securitization and subprime markets (¶¶ 28-29, 130-31, 134, 174); pioneered the financial legerdemain of SIVs (not even mentioned in their brief) to offload liabilities from their balance sheet, misrepresented that the Company had no liabilities associated with assets contained in these SIVs when in fact it did (¶¶ 178-79); dramatically raised Citigroup's tolerance for risk (*e.g.*, ¶¶ 130-31); and failed to have in place effective risk management policies and procedures. ¶¶ 7, 130-36, 189. Citigroup competitors like JP Morgan Chase and Wells Fargo demonstrate that Citigroup's total implosion was not unavoidable and depended on the Company and its own actions, in particular, its attitude toward risk.[5] Moreover, courts have soundly rejected attempts, like those by Defendants here, to deflect blame for company-specific allegations on external economic forces. *See, e.g., In re Countrywide Fin. Corp. Sec. Litig.*, 2008 U.S. Dist. LEXIS 102000, at *102-04 & n.53 (C.D. Cal. Dec. 1, 2008) (where defendants contended decline of company stock was caused by "an 'unprecedented' external 'liquidity' crisis," court cautioned it "will not be distracted by liquidity versus solvency and other macroeconomic arguments" and sustained plaintiffs' claims, noting "[i]t will be the fact-finder's job to determine which losses were proximately caused by Countrywide's misrepresentations and which are due to extrinsic or insufficiently linked forces.") (citations omitted).

Relying on virtually no authority within this Circuit, Defendants move to dismiss the Complaint arguing it alleges no set of facts making them liable for any portion of the approximately $3 billion in losses suffered by the Plans. Essentially, Defendants argue that ERISA, a comprehensive statute designed to protect employee retirement benefits, prevented

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[5] That Citigroup's collapse was tied to its own actions, and not derivative of the general market, is also indicated by the fact that the declines in Citigroup stock occurred in response to events unique to Citigroup, not to general market events (although some of the general market decline occurred upon the successive revelations of further blunders at Citigroup). *E.g.*, ¶¶ 156, 160-66, 171-75. Moreover, within a year, the Company forced out its Chairman and CEO, changed its CFO, and saw its COO retire shortly after announcing unprecedented writedowns. ¶¶ 139, 164, 167, 183. It is not credible that this would have occurred if the Company believed Citigroup was purely a victim of fate.

their acting with respect to the Plans' single largest asset. Remarkably, Defendants argue that, even if they had any fiduciary responsibility with respect to the Citigroup stock in the Plans, they were required to do nothing unless the Company was on brink of bankruptcy. Putting aside that the "brink of bankruptcy" argument has been repeatedly rejected by the courts, it is ironic for Defendants to highlight this as one of their main arguments in a brief submitted on the Friday before the weekend during which Citigroup *was* on the brink of bankruptcy.

The Complaint alleges that each Defendant was a fiduciary, and thus required to exercise Plan responsibilities consistent with ERISA's exacting duties of prudence and loyalty. ¶¶ 52, 56, 61, 68, 70; §III.B., *infra*. Contrary to Defendants' argument, the Plans did not require them to continue purchasing and holding employer stock, but only permitted it as an option; even if so required, ERISA's overarching prudence requirement prohibits them from doing so. *See* §III.B.1.b. Defendants are not entitled to a presumption that they acted in compliance with ERISA, and were not entitled to wait until Citigroup was on the verge of bankruptcy before considering whether its stock continued to be an appropriate Plan investment. *See* §III.B.3. As the Complaint clearly alleges, had Defendants prudently investigated long before Citigroup's stock price plummeted, they would have discovered it was no longer prudent to continue purchasing and holding Citigroup stock and could, and should, have taken action to preserve the Plan participants' retirement savings. *See* §III.B.4.

The Complaint also alleges certain Defendants had first-hand knowledge of the danger the Plans faced due to Citigroup's exposure to CDOs, subprime securities, and SIVs, but did nothing to warn those they had appointed as fiduciaries, in violation of their duty to monitor their appointees. *See* §III.D. Nor did they warn their co-fiduciaries of the risk posed by investment in Citigroup stock, despite their duty to do so. *See* §III.E. Moreover, while ERISA requires fiduciaries to speak truthfully in communications to participants, certain Defendants misled Plan

participants by telling them that continued investment in Citigroup stock was safe, and denied and concealed Citigroup's enormous exposure to risk. *See* §III.C. Finally, neither Fed. R. Civ. P. 9(b) nor ERISA §404(c) are applicable or require dismissal of the claims here. *See* §§III.A.& III.H. Accordingly, the Complaint alleges facts establishing Defendants' liability under ERISA.

II. STATEMENT OF FACTS

Contrary to Defendants' effort to portray Citigroup as a victim, it was a primary catalyst and originator of the subprime debacle which caused the financial crisis of 2008.

A. The Events During the Class Period

1. Citigroup's Undisclosed High-Risk Bets on the Subprime Market and SIVs Cause its Decline

As alleged in the Complaint, well before its stock declined, Citigroup chose to expose virtually the entire equity value of the Company to risky and illiquid subprime and CDO securities, and off-balance sheet SIVs, in an unnecessary and reckless bet of enormous stakes, without disclosing this fact to other Plan fiduciaries, the Plan participants, or the market. ¶¶ 7, 108-110, 130-89. As reported, Citigroup "made some of the biggest bets in the subprime lending debacle – and absorbed some of the biggest losses." ¶ 174 (quoting September 2008 issue of *Bloomberg Markets* magazine).

The Complaint alleges that, in early 2005, after falling behind in competition to rivals including investment banks, Citigroup senior management, including Defendants Prince and Rubin, caused Citigroup to embark on a reckless strategy of increasing the Company's already substantial exposure to the subprime loan market by significantly expanding its securitization and CDO activity, and making a conscious decision to raise Citigroup's risk tolerance. ¶¶ 28-29, 130-31, 174, 178. Despite a litany of urgent and credible warnings that this unique segment of the market was fraught with risk (*e.g.*, ¶¶ 189(a)-(y)), and despite warnings by industry watchdogs in late 2004 and early 2005 that relaxed lending practices were increasing risks in an

overheated housing market (*e.g.*, ¶¶ 116-29, 136), Citigroup increased its exposure to the treacherous subprime market, even as that market was collapsing. ¶¶ 130-34. Neither Plan participants nor the market were aware of the scale of Citigroup's increased bets and risk-taking at the time. ¶¶ 131-33, 136, 143, 150, 191, 199-200, 212, 237.

Compounding its bet, Citigroup generated additional CDO and securitization business by enticing investors to purchase mortgage-backed securities by granting them billions of dollars of "liquidity puts," which allowed mortgage-backed securities buyers to sell them back to Citigroup. The mortgage-backed securities sold pursuant to liquidity puts were backed by subprime loans. ¶ 131. Thus, at a time when they were becoming riskier, Citigroup increased its exposure to subprime loans. None of this was disclosed to the public or Plan participants.

Citigroup's highly aggressive business strategies did not end there. Prior to and during the Class Period, Citigroup ventured heavily into the formation and management of SIVs without disclosing Citigroup's extraordinary liabilities or risks related thereto. ¶¶ 7, 176-82. Citigroup became one of the largest participants in the SIV market, structuring or managing at least seven funds holding assets of over $80 billion during the Class Period, financed generally by debt instruments, such as commercial paper, issued to the SIVs' investors. ¶¶ 176-78. While Citigroup touted to money market fund managers and other investors that the SIVs invested strictly in high quality debt securities (¶ 179), in fact, Citigroup's SIVs were exposed to risky subprime loans (¶ 180), containing a "large percentage" of such subprime assets (¶ 181). Investors began to complain that the SIVs were not as risk-free as represented, and some stopped investing in the SIVs, forcing the SIVs to sell assets at fire-sale prices to pay off debts, pushing the SIVs to the brink of collapse, and subjecting Citigroup to billions of dollars of liability from lawsuits charging that SIVs had issued debt based on false and misleading statements. ¶ 180.

Further, while Citigroup structured its SIVs to keep them off its balance sheet, ostensibly because it assumed no liability on the SIVs, in reality, Citigroup had provided informal SIV guarantees and staked its reputational capital to reassure investors to invest in the SIVs. ¶ 182. Because Citigroup was in fact liable for the SIVs' losses, it was required to recognize these toxic assets on its balance sheet. Indeed, Citigroup ultimately acknowledged that its highly aggressive stance regarding SIV liability, which put it at great risk, was improper. Thus, contrary to Citigroup's previous statement that it "had no contractual obligation to provide liquidity facilities or guarantees to any of the Citi-advised SIVs" and "will not take actions that will require the company to consolidate the SIVs," on December 13, 2007, the Company announced its commitment to provide a support facility to its SIVs, whose assets had declined from $87 billion at August 2007, to $49 billion, and that Citigroup "would consolidate the SIVs' assets and liabilities onto its balance sheet under applicable accounting rules." ¶ 182.

Notwithstanding its massive and ever-more dangerous exposure to the subprime market, Citigroup masked and/or denied its subprime loan exposure and losses during the Class Period, instead leading Plan participants and the market to believe the Company was growing, had minimal subprime exposure, and record financial results. *See, e.g.*, ¶¶ 138, 143, 147, 150. Defendants Citigroup, Prince and the Administration Committee regularly communicated with Plan participants about Citigroup stock through newsletters, memos, letters, emails, Plan documents, and other Plan-related materials, and held regular town hall meetings in Citigroup's headquarters, via which they encouraged employees to invest in Citigroup stock through the Plans, and issued therein false and misleading statements and concealed material information about the risks to Citigroup stock. *See, e.g.*, ¶¶ 197-200, 283.

2. The Risks and Consequences Devastate the Company and the Plans

In a July 20, 2007 conference call with analysts, Citigroup acknowledged it had been

focused on managing down its subprime exposure "for some time" and had reduced its exposure "over the last six months." ¶ 155. The Company also announced a 15% drop in profits from consumer banking, increased credit costs and higher delinquencies in second mortgages, and that it expected to see continued deterioration in consumer-credit quality through the second half of the year and would probably make "meaningful additions" to its loss reserves. *Id.* Citigroup stock declined 8.2% after this acknowledgment, from a close of $51.19 on July 19, 2007 to close at $46.97 on July 27, 2007, but Defendants still took no action with respect to the Plans.

On October 1, 2007, Citigroup announced an expected decline from the prior year comparable quarter of approximately 60% in net income for the 2007 third quarter, due to problems in the mortgage-backed securities and credit markets, with stated losses including a $1.4 billion write-off in Citigroup's $57 billion portfolio of highly leveraged loans, a loss of about $1.3 billion on the value of securities backed by subprime loans, a loss of $600 million in fixed-income trading, and increased consumer credit costs of $2.6 billion, mostly due to increased loan-loss reserves. ¶ 158. As described in the Complaint, over the next seven weeks, there occurred a string of adverse announcements from, or about, Citigroup relating to its CDO, subprime and SIV exposures (¶¶ 159-71). On January 15, 2008, Citigroup reported a net loss for the 2007 fourth quarter of $9.83 billion, including $18.1 billion in subprime-related losses. ¶171.

Over the following months, Citigroup continued to suffer the fallout from its CDO, subprime and SIV exposures, incurring some $54.6 billion in writedowns and credit costs (¶ 174), culminating in Citigroup stock hitting a low of $3.05 per share on November 21, 2008.[6] The next day, Citigroup came within hours of bankruptcy, forestalled only by an unprecedented

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[6] This trading low came two days after Citigroup announced on November 19, 2008 its commitment to purchase the remaining assets of the SIVs at their current fair value, now estimated at $17.4 billion, to pay down the debt obligations associated with Citigroup's SIVs (*see* Ex. A to Declaration of Andrew E. Lencyk submitted herewith ("Lencyk Decl.") (Citigroup November 19, 2008 press release), which caused Citigroup stock to plunge from a closing price of $8.36 on November 18, 2008, to a low of $4.39 on November 20, 2008 (*see* Ex. B to Lencyk Decl.).

government bailout at a cost of tens of billions of dollars to the U.S. taxpayer.[7] That rescue was required to save Citigroup from the very securities, assets and exposures that are the subject of the Complaint. From the first trading day of the Class Period until November 21, 2008, Citigroup stock lost almost 95% of its value. Losses to Plan participants have been devastating.[8]

With detailed factual support, the Complaint alleges that Defendants, ERISA fiduciaries charged with the "highest duty known to law," knew or should have known that their conduct put participants' retirement savings at tremendous undisclosed risk, and caused or allowed the Plans to continue to both hold and purchase Citigroup stock, incurring billions of dollars of losses, taking no steps to protect the Plans from the enormous undisclosed risks to which Citigroup's management had exposed them, leaving Citigroup's stock overpriced and unduly risky.

3. The Fiduciaries Knew or Should Have Known That Citigroup Stock Was an Imprudent Investment But Did Nothing to Protect the Plans' Assets

The Complaint alleges that Citigroup, the sponsor of the Citigroup Plan, was a fiduciary that exercised *de facto* control over the Plans' investments. *E.g.*, ¶¶ 43-52, 217, 232. Defendant Citibank, the sponsor of the Citibuilder Plan, was the trustee appointed to "manage, invest, and reinvest" the assets of the Citigroup Plan during the Class Period (¶¶ 53, 55; Trust Agreement, Art. II, §2.2). Acting as Plan fiduciaries, with the power to protect Plan participants, Citigroup and Citibank, however, did nothing to protect them: they did not use their *de facto* control of the Plans to halt purchases of Citigroup shares; they did not cause the Plans to divest themselves of,

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[7] Over the weekend of November 22-23, 2008, the U.S. government agreed to inject an additional $20 billion of capital into Citigroup, on top of a previous $25 billion, and guaranteed $306 billion of troubled assets, making Citigroup one of the largest recipients of U.S. bailout funds. *See* Ex. C to Lencyk Decl. This massive rescue effort does not include Citigroup's going hat-in-hand to the Abu Dhabi Investment Authority for a $7.5 billion cash infusion to stay afloat less than a year before in November 2007. ¶ 170.

[8] On January 9, 2009, the *Associated Press* reported that Defendant Rubin will be leaving Citigroup, and that the Company is in discussions to merge its Smith Barney wealth management business with Morgan Stanley, with Morgan Stanley having the "majority stake in the new entity." *See* Ex. D to Lencyk Decl. The article quotes Christopher Whalen, managing director of Institutional Risk Analytics, as saying that Rubin "had embraced a riskier strategy for a bank that was ... already a high-risk bank," and that if Morgan Stanley ends up buying Smith Barney, it "sounds like the beginning of a liquidation." *Id.*

or reduce in any way, their holdings of Citigroup shares; and they did not disclose the risks to either their fellow fiduciaries, or Plan participants. ¶¶ 219, 227, 237.

The Plans' Investment Committee, a named Plan fiduciary authorized to manage and control the appointment and removal of Plan investment managers, as well as the establishment or removal of the Plans' investment funds (¶ 69), and the Administration Committee, also a named Plan fiduciary, charged with managing the operation and administration of the Plans (¶¶ 62-63), both similarly had the power to protect the Plans' participants, and similarly did nothing. ¶¶ 227, 237, 284. Contrary to Defendants' contention that these Plan fiduciaries were blindsided by the credit crisis and had no reason to investigate the riskiness of Citigroup stock as a Plan option, the Complaint catalogues numerous public warnings (*e.g.*, ¶¶ 116-28, 189) that would have caused any reasonable fiduciary to investigate the riskiness of Citigroup stock. Thus, the Complaint sufficiently alleges that Plan fiduciaries knew or should have known of Citigroup's growing subprime risk at least as early as the end of 2006. ¶ 133. Still, the Investment Committee and the Administration Committee failed even to investigate the appropriateness of Citigroup stock as a Plan investment, a necessary predicate to taking other actions within their power and duty to protect participants. ¶¶ 221, 225, 265.

In short, all fiduciaries failed the Plan participants. Citigroup knew the truth and did nothing. Defendants Prince and Rubin drove Citigroup to pursue these high-risk strategies, and lulled Plan participants with false assurances that Citigroup was sound and had "strong expense and credit management" (¶ 141), and that management was "delivering on our plan" (¶ 148), among other misrepresentations by senior management. The responsible Committees failed even to inquire whether continued investment in Citigroup posed a threat to the Plans.

B. The Defendants

The Complaint divides the fiduciaries into fiduciary categories (¶¶ 22-35) and explains

the basis of each category's fiduciary status (¶¶ 36-77). The categories are: Citigroup and Citibank; Citigroup Director Defendants;[9] Citigroup Administration Committee Defendants;[10] and Citigroup Investment Committee Defendants.[11]

C. The Counts in the Consolidated Complaint

Count I of the Complaint alleges that Citigroup, Citibank, the Investment Committee and Administration Committee Defendants (the "Prudence Defendants") breached their duties of prudence and loyalty under 29 U.S.C. §1104(a), by, *inter alia*, continuing to offer Citigroup stock as a Plan investment option, failing to reduce the amount of Citigroup stock in the Plans, or discontinue purchasing additional Citigroup stock, when they knew or should have known such investments were imprudent and harmful to the Plans. ¶¶ 215-29. Count II alleges that Defendants Citigroup, the Administration Committee, and Prince (the "Communications Defendants") violated 29 U.S.C. §1104(a) by failing to provide participants with complete and accurate information sufficient to advise them of the risks of investing Plan assets in Citigroup stock. ¶¶ 230-42. Count III alleges that Citigroup and the Director Defendants (the "Monitoring Defendants") breached 29 U.S.C. §1104(a) by failing properly to monitor their fiduciary appointees. ¶¶ 243-52. Count IV alleges that Citigroup and the Director Defendants violated 29 U.S.C. §1104(a)(1)(A)-(B), by failing to disclose material information to co-fiduciaries. ¶¶ 253-59. Count V alleges that each Defendant breached his or her duty to avoid and promptly resolve conflicts of interest by failing to take the necessary steps to ensure that participants' interests were loyally and prudently served, due to Defendants' own conflicting financial interests, and to

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[9] Defendants Prince and Rubin.

[10] Defendants Jorge Bermudez, Michael Burke, Steve Calabro, Larry Jones, Faith Massingale, Thomas Santangelo, Alisa Seminara, and Richard Tazik ("Tazik").

[11] Defendant James Costabile, Robert Grogan, Robin Leopold, Glenn Regan, Christine Simpson, Timothy Tucker, Leo Viola, Donald Young, Marcia Young, and Tazik. Named as John Doe Defendants 1-20 are all other individuals who are or were Plan fiduciaries under ERISA §3(21)(A) during the Class Period.

prevent drawing attention to the Company's inappropriate practices. ¶¶ 260-67. Count VI alleges that Citigroup, Citibank, and the Director Defendants (the "Co-Fiduciary Defendants") are liable as co-fiduciaries for knowingly participating in, and knowing about, but failing to undertake any effort to remedy, their co-fiduciaries' breaches. ¶¶ 268-80.

III. ARGUMENT

A. Standard of Review on a Motion to Dismiss

On a motion to dismiss, plaintiffs are required to allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007). While a complaint "must contain either direct or inferential allegations respecting all material elements necessary to sustain recovery under some viable legal theory," those allegations are to be inferred in Plaintiffs' favor, not Defendants'. *Id.* at 1969. In *Twombly*, the Court held that it did "not require heightened fact pleading of specifics." *Id.* at 1974. The issue in resolving such a motion is "not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quotations omitted). This Circuit has interpreted *Twombly* to require a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007). Plaintiffs easily meet that standard.

Courts have overwhelmingly held, except in unusual circumstances not present here, that Fed. R. Civ. P. 8(a) is the applicable standard for pleading breaches of fiduciary duty, not Rule 9(b). This is so regardless of whether some of the underlying wrongdoing may also give rise to fraud claims, or whether the fiduciaries are also charged with breaching their disclosure duties.[12]

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[12] *See, e.g.*, *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 469-70 (S.D.N.Y. 2005) ("Despite the incendiary tone of many of Plaintiffs' allegations and the insinuation that Defendants engaged in fraudulent accounting tactics that artificially inflated the price of Polaroid stock, Plaintiffs' claims in this action are for breach of fiduciary duty

Here, Plaintiffs assert only breach of fiduciary duty with regard to the Plans' high-risk investment in Citigroup stock; they do not assert any fraud claims, nor do their allegations rely on, or require, any premise of fraudulent conduct.[13]

Twombly reaffirms that Rule 8 "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" 127 S. Ct. at 1964 (citation omitted); *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (same, noting that "[s]pecific facts are not necessary" for a pleading to satisfy Rule 8(a)(2)). Numerous courts in other ERISA

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simpliciter. Accordingly, Rule 9(b) is inapplicable.") (citations omitted); *Cress v. Wilson*, 2007 U.S. Dist. LEXIS 42632, at *19-20 (S.D.N.Y. June 6, 2007) (applying "Rule 8 pleading standard, which applies to ERISA breach of fiduciary duty actions"); *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 759-60 (S.D.N.Y. 2003) (citing *Swierkiewicz*, 534 U.S. at 513); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2005 U.S. Dist. LEXIS 3715, at *11 (S.D.N.Y. Mar. 9, 2005); *Smith v. Local 819 I.B.T. Pension Plan,* 291 F.3d 236, 241 (2d Cir. 2002); *In re Boston Sci. Corp. ERISA Litig.*, 506 F. Supp. 2d 73,76-77 (D. Mass. 2007); *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206, 216-17 (D. Conn. 2007) (allegations that plan fiduciary breached its duty to inform are based on the "breach of that fiduciary duty, not a common law or statutory fraud theory" (citation omitted)); *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003) (action including criminal fraud allegations).

[13] Defendants invoke Rule 9(b)'s pleading standard citing inapplicable case law. Defendants' primary authority, *Rombach v. Chang*, 355 F.3d 164 (2d Cir. 2004), is a typical securities fraud case, with no ERISA breach of duty allegations. In *Rombach*, plaintiffs asserted fraud claims under §10(b) of the Securities Exchange Act and SEC Rule 10b-5, and claims under §§11 and 12(a)(2) of the Securities Act. Because the allegations under §§11 and 12(a)(2) of the Securities Act were essentially identical to those under §10(b) and Rule 10b-5, which are clearly subject to heightened pleading standards of Rule 9(b) and the Private Securities Litigation Reform Act, the court held that the §§11 and 12(a)(2) claims were indeed fraud claims, and had to satisfy Rule 9(b). *Id.* at 178. None of this has any relevance here. That Citigroup may have also violated anti-fraud statutes is immaterial. Defendants' remaining cases indicate that Rule 9(b) has been applied only in the rare case where an ERISA claim was plainly and *entirely* premised on an underlying fraud. *See Toussaint v. J.J. Weiser & Co.*, 2005 WL 35634, at **9-10 (S.D.N.Y. Feb. 13, 2005) ("because plaintiff's first claim of breach of fiduciary duty under ERISA does not sound in fraud but instead implicates defendants' duties of care, loyalty, and disclosure, Rule 9(b)'s particularly requirements do not apply;" only in the second count, where plaintiff accused defendants of an "intent to defraud" through plainly fraudulent conduct such as "accepting gifts and benefits," "using plan assets to further political careers of certain Local 100 union officers," and use of "false invoices" did the Court find that Rule 9(b) was implicated). Defendants rely on two other cases outside this Circuit, *In re Coca-Cola Enters. Inc., ERISA Litig.*, 2007 WL 1810211 (N.D. Ga. June 20, 2007), and *In re Calpine Corp. ERISA Litig.*, 2005 WL 3288469 (N.D. Cal. Dec. 5, 2005). The specific ERISA claims in both cases were entirely premised on an underlying fraud, thereby warranting 9(b) compliance. Even *Coca-Cola* recognizes that courts in other districts, including this one, hold that "a fiduciary claim brought under ERISA need only provide notice pleading, regardless of whether the claims are based on an underlying fraud." *Coca-Cola*, 2007 WL 1810211, at *5 (citing *Polaroid, supra*). Neither case requires Rule 9(b) compliance merely because business conduct relevant to the fiduciary breaches may also be subject to the securities laws.

class actions have recognized that *Twombly* has not heightened Rule 8(a)'s requirements.[14]

As explained more fully below, the precise issues Defendants seek to resolve with their motion, including the scope of their fiduciary duties, the allocation of responsibilities among fiduciaries and the prudence of investment decisions, are fact-bound determinations that cannot be resolved on the pleadings before conducting necessary discovery. *See In re EDS Corp. ERISA Litig.*, 305 F. Supp. 2d 658, 665 (E.D. Tex. 2004). As one court noted, such arguments "are a veiled attempt to obtain summary judgment at the pleading stage." *Rankin v. Rots ("Kmart")*, 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003) (denying motion to dismiss in company stock ERISA litigation). When evaluated under the proper Rule 8(a) standard, the Complaint clearly overcomes Defendants' Rule 12(b)(6) challenge.[15]

To bring a claim for breach of fiduciary duty under ERISA, a plaintiff need only allege that (1) a defendant was a plan fiduciary who (2) when acting within fiduciary capacity (3) engaged in conduct constituting a breach of fiduciary duty. *AOL*, 2005 U.S. Dist. LEXIS 3715, at *11 (citing ERISA §409, 29 U.S.C. §1109); *Polaroid*, 362 F. Supp. 2d at 470-71 (citing *Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000)). As to the first element – that the defendant was a fiduciary of the plan – plaintiff need only allege that the defendant meets the statutory definition of a fiduciary. *Polaroid*, 362 F. Supp. 2d at 470; *WorldCom*, 263 F. Supp. 2d at 759 (citing *Smith*, 291 F.3d at 241)). Similarly, as to the second and third elements, the pleader need only comply with the requirements of Rule 8: a short and plain statement that the defendant

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[14] *In re GM ERISA Litig.*, 2007 U.S. Dist. LEXIS 63209, *8-9 (E.D. Mich. Aug. 28, 2007); *Taylor v. United Techs. Corp.*, 2007 WL 2302284, at *3 (D. Conn. Aug. 9, 2007).

[15] Assuming *arguendo* that Rule 9(b) applied here, Plaintiffs have pled their claims with sufficient particularity. "The purpose of Rule 9(b) is to ensure that the defendants accused of the conduct specified have adequate notice of the allegations so that they might defend against them." *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 978 (C.D. Cal. 2004); *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) ("Even in cases where fraud is alleged, we relax pleading requirements where the relevant facts are known only to the defendant."). Defendants have adequate notice of the misconduct with which they are charged, including Plaintiffs' disclosure claims. ¶¶ 197-200. It would be neither necessary nor efficient to require more under Rule 8 and ERISA case law.

acted in its fiduciary capacity and breached its duty. *Smith*, 291 F.3d at 241-42.

B. Count I Properly Pleads Claims for Failing to Invest the Plans' Assets Prudently and Loyally

1. Defendants Cannot Override ERISA's Duties of Prudence and Loyalty Under the Guise of Settlor Intent

a. The Plan Documents Did Not Mandate Investment in Citigroup Stock, But Authorized and Required Reduction of Company Stock Ownership in Circumstances Such as Those Present Here

Defendants seek to evade all fiduciary obligations by arguing that, because the Plans require the Citigroup Common Stock Fund be *offered* as an investment option, there can be no fiduciary liability, because Defendants purportedly had no "discretionary authority to divest the Plans of Citigroup stock or restrict investment in Citigroup stock." Def. Br. at 15-16. Defendants' argument is wrong on the facts and the law.

First, on their face, the Plan documents do not require, but merely *permit*, the Plans to be invested in employer stock. Even if the Plan documents require *offering* employer stock as an investment option, this does not mandate *investment* in that option, or dictate the amount thereof.[16] In particular, the Plan language did not require continued purchasing and/or holding of Citigroup stock when the Company's future was tied to extremely risky mortgage securities and SIVs that Defendants knew or should have known would inevitably cause Citigroup's inflated stock price to plunge, and threaten the Company's very existence. *See, e.g.*, ¶¶ 90-94; 130-35. Under such circumstances, Defendants were authorized by Plan language (and required, consistent with their fiduciary obligations) to end further contribution of, and reduce the amount of, Company stock in the Plans.

Under the Plan documents, the Investment Committee has the discretion to 1) invest all

[16] Moreover, even to the extent employee matching contributions were required to be invested in the Citigroup Common Stock Fund, there was no Plan provision during the Class Period requiring they remain invested in that Fund. *See* Compl. Ex. E at 32; 2007 Form 11-K at 14.

of the assets of the Citigroup Common Stock Fund in cash or short-term fixed investments; 2) eliminate the requirement that certain contributions must remain in the Common Stock Fund; or even 3) eliminate the Citigroup Common Stock Fund altogether, if under the circumstances there is a duty to do so (consistent with ERISA's express mandate that adherence to ERISA's fiduciary obligations overrides any Plan document provisions, *see infra*).[17]

In addition, the language governing the Plans' ESOP component provides that "[t]he component designated as an ESOP under the Plan is designed to invest *primarily* in Citigroup Common Stock...." Compl. Ex. E, §15.02, at 67 (emphasis added). The descriptive "***primarily***" (*i.e.*, not *exclusively*) debunks any notion of Plan-mandated investment in Company stock. When considering plan documents providing similar or significantly less discretion than that provided here, courts have consistently held such discretion defeats the argument that the plans mandated investment exclusively in company stock. *See Enron*, 284 F. Supp. 2d at 670 (sustaining claim where plan documents used the word "primarily" and hence provided plan fiduciaries with "considerable discretion"); *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1220 (D. Kan. 2004) (same); *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 860 (N.D. Ohio 2006) (same); *In re First Am. Corp. ERISA Litig.*, 2008 U.S. Dist. LEXIS 83832, at

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[17] Specifically, Article 7.09 provides:

> The duties of the Investment Committee shall extend to the promulgation of any guidelines with respect to the amount of cash or any short-term investments that may be held by the Citigroup Common Stock Fund. In addition, notwithstanding the fact that provisions in the Plan mandate the creation and continuation of the Citigroup Common Stock Fund and provide that certain contributions to the Citigroup Stock Fund must remain invested in the Common Stock Fund for certain periods of time, *if it is determined that there exists a duty on the part of any person* (appointed under this Plan or otherwise) *to determine whether such provisions be modified, such duty shall be that of the Investment Committee.*

Compl. Ex. E, 7.09(e), at 44 (emphasis added); Ex. D, 7.09(e), at 32. Any such action would be an exercise of discretionary authority, and not a settlor function. In any event, the Investment Committee could not possibly be deemed to be acting in a settlor capacity because any amendment of the Plan was the exclusive province of Citigroup alone. *See* Compl. Ex. E, §12.01, at 61.

*7-8 (C.D. Cal. Jul. 14, 2008) (same).[18]

The Investment and Administration Committees also had the discretionary authority to establish rules and regulations with respect to the basis by which Plan participants could allocate retirement savings among investment options, including the Citigroup Common Stock Fund. *See* Compl. Ex. E §§7.01-7.04, 7.09(e), at 41-44; Ex. D, §§7.01-7.04, 7.09(e), at 29-32.

Accordingly, the Investment and Administration Committees, separately and together, had the authority to limit additional Plan investments, require Plan participants to transfer their investments from the Citigroup Common Stock Fund to another investment option, or in the case of the Investment Committee, had the authority and responsibility to reduce or liquidate those investments once it became imprudent to remain invested in Citigroup stock, and even to eliminate the Company Stock Fund. ¶¶ 92, 93, 106. With the authority to take action came the responsibility to do so. There was no prohibition against either the Administration or Investment Committees from acting to preserve the Plans' assets and divesting the Plans of Citigroup stock. Quite the opposite, these provisions specifically authorized and indeed required Defendants under the circumstances of this case to take corrective action and prevent further erosion of Plan assets. Instead, Defendants ignored their knowledge of the risks of Citigroup's massive exposure to the burgeoning subprime market meltdown, and massive liabilities associated with SIVs, and refused to act. *See, e.g., ¶* 155 (Company's disclosure that it had been focusing on its exposure to subprime meltdown for "over the last six months").

b. Under ERISA, Plan Fiduciaries Remain Responsible for the Prudent and Loyal Investment of Plan Assets Notwithstanding Plan Language Purporting to Mandate a Particular Investment

Even if Defendants' factual arguments regarding the Plan documents were correct -- which they are not -- under black-letter ERISA law, Defendants have a duty under ERISA to

[18] Further, the Plans expressly provide that the Citigroup Common Stock Fund may hold, with no stated limitation as to the percentage or amount, cash and short-term investments under the Plan. Compl. Ex. E, at 5; Ex. D, at 3.

override the terms of the Plans' documents to the extent those terms required them to act imprudently in violation of their fiduciary duties. *See* 29 U.S.C. §1104(a)(1)(D); *see also Agway, Inc. Employees' 401(k) Thrift Inv. Plan v. Magnuson*, 2006 U.S. Dist. LEXIS 74670, at *57-58 (N.D.N.Y. Jul. 13, 2006) ("Nothing in ERISA ... requires blind compliance with plan terms which would require a fiduciary to engage in imprudent conduct.... Indeed, ERISA casts upon fiduciaries an affirmative, overriding obligation to reject plan terms where those terms would require such imprudent actions in contravention of the fiduciary duties imposed under ERISA."); *Polaroid*, 362 F. Supp. 2d at 473-74 ("ERISA commands fiduciaries to obey Plan documents only to the extent they are consistent with other fiduciary duties.... [T]he fact that the Plan required investments in [Company] stock does 'not *ipso facto* relieve defendants of their fiduciary obligations.'") (citations omitted); *Harris Trust & Sav. Bank v. John Hancock Mutl. Life Ins. Co.*, 1997 WL 278116, at *2 (S.D.N.Y. May 23, 1997) (ERISA fiduciary "cannot 'hide' behind the terms of a contract to insulate itself from liability for breaching its fiduciary duty.") (citations omitted); *see* Compl. ¶¶ 91-92.[19]

This conclusion is reinforced by ERISA's structure, which was carefully crafted to ensure that decisions involving management or disposition of Plan assets were assigned to an identifiable fiduciary. *See* 29 U.S.C. §1103(a); *see also Lowen v. Tower Asset Mgt.*, 829 F.2d 1209, 1218-19 (2d Cir. 1987). While control of plan assets may in certain circumstances be given to participants (*see* §III.H. *infra*), nothing in ERISA permits a fiduciary to be relieved of responsibility for the management of plan assets by any plan document provision. To the contrary, ERISA provides that, with certain exceptions regarding the allocation of fiduciary

[19] *See also In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008) (ERISA "does not exempt fiduciaries from the first prong of the prudent man standard, which requires a fiduciary to act with care, skill, prudence, and diligence in any investment the fiduciary chooses.") (citation omitted); *In re Ford Motor Co. ERISA Litig.*, _ F. Supp. 2d _, 2008 WL 5377955, at *4-5 (E.D. Mich. Dec. 22, 2008) (holding that plan fiduciaries have a duty to ignore plan language if acting pursuant to that language would be imprudent).

responsibility among fiduciaries, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. §1110. Thus, governing plan documents can, within limits, specify which fiduciaries were responsible for deciding whether to purchase, sell or hold employer stock, or whether to offer employer stock as an investment option, but they cannot divest from all plan fiduciaries their responsibility or liability for deciding whether the plan will invest in, or offer for investment, employer stock. To hold otherwise would eviscerate ERISA's protections for plan participants, and permit a settlor to draft plan language requiring that plan assets be invested in particular assets at particular prices, regardless of the prudence thereof, defeating ERISA's careful scheme designed to assure that someone is responsible for all plan investment decisions.

2. The Complaint Adequately Alleges That the Prudence Defendants Were Fiduciaries for Count I

a. ERISA Uses a Functional Definition of Fiduciary That Is Inappropriate for Resolution on a Motion to Dismiss

An individual or entity becomes an ERISA fiduciary by being named as such in the plan documents, 29 U.S.C. §1102(a), and/or meeting the statutory definition of a fiduciary:

> 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 a plan.

29 U.S.C. §1002(21)(A); ¶ 37. Fiduciary is defined "not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties – and to damages – under §409(a)." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (emphasis in original, citation omitted). Thus, fiduciary status does not

require that such authority be granted by the plan documents, it may simply be conferred by conduct. *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997).

This Circuit has held that the statutory definition of a fiduciary is to be construed broadly. *See LoPresti*, 126 F.3d at 40. Indeed, to allege fiduciary status, Plaintiffs need only allege that Defendants meet the statutory definition. *See Polaroid*, 362 F. Supp. 2d at 470.[20] Because of the fact-intensive inquiry involved in resolving fiduciary status, such resolution has been held to be inappropriate at the pleading stage.[21] For purposes of the present motion, Plaintiffs have more than adequately alleged that all Defendants are fiduciaries.

b. The Complaint Adequately Alleges that Defendants Citigroup and Citibank Were Fiduciaries for Count I

Defendants next argue that Defendants Citigroup and Citibank had no discretion over Citigroup stock in the Plans. Def. Br. at 16-20. Defendants are wrong again. As alleged in the Complaint, Citigroup and Citibank were functional fiduciaries as a result of their exercise of authority regarding Plan assets, including Citigroup stock. ¶¶ 52, 56. The Complaint also alleges that Citigroup exercised *de facto* authority and control with respect to the *de jure* responsibilities of Citibank, the Administration Committee, and the Investment Committee, making itself fully responsible for the prudent and loyal fulfillment of the *de jure* responsibilities assigned by the governing Plan documents to those Defendants, without relieving them of any such responsibility. *Id.* ¶¶ 49, 256. *See LoPresti*, 126 F.3d at 40.

[20] *See also WorldCom*, 263 F. Supp. 2d at 759; *AOL*, 2005 U.S. Dist. LEXIS 3715, at *12 ("So long as the Complaint's allegations regarding the defendants could arguably justify conferring fiduciary status, then the allegations are sufficient."); *In re Marsh ERISA Litig.*, 2006 U.S. Dist. LEXIS 90631, at *15-16 (S.D.N.Y. Dec. 14, 2006).

[21] *See, e.g.*, *Frommert v. Conkright*, 433 F.3d 254, 271 (2d Cir. 2006) (reversing summary judgment and instructing that district court "should permit a trier of fact to assess [] whether the defendants acted in a fiduciary capacity"); *Trs. of Teamsters Local Union No. 443 Health Servs. & Ins. Plan v. Papero*, 485 F. Supp. 2d 67, 71 (D. Conn. 2007) ("The Second Circuit has recognized that whether an individual is a fiduciary in a specific situation is a mixed question of law and fact. It may not be determined on a motion to dismiss.") (citing *Frommert*); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 911-12 (E.D. Mich. 2004) (noting that fiduciary status is fact-intensive inquiry making its resolution inappropriate on a motion to dismiss).

Contrary to Defendants' attempt to re-write the Complaint, Plaintiffs do not allege that Citigroup was a fiduciary for Count I simply under corporate law tenets, or because it communicated with employees, or had the power to appoint the trustee and the Administration and Investment Committee members. Nor do Plaintiffs allege that Citigroup or Citibank are fiduciaries for Count I because they were Plan settlors.[22] Rather, the Complaint alleges that Citigroup and Citibank became *de facto* Plan fiduciaries by exercising authority and control over the Plans' assets. ¶¶ 49, 56. Courts in this District have held similar allegations sufficient. *See Polaroid*, 362 F. Supp. 2d at 473 (holding that defendant alleged to be a functional fiduciary could still be liable for breaching the duty of prudence even though the plan afforded him no discretionary authority over plan investments; court held that allegation that the defendant "exercised final decision-making authority regarding the Plan" was sufficient to allow discovery to proceed) (citing *WorldCom*, 263 F. Supp. 2d at 759); *Marsh*, 2006 U.S. Dist. LEXIS 90631, at *15-16 (same). Moreover, Plaintiffs allege that under the doctrine of *respondeat superior*, the

[22] Nowhere does the Complaint allege misconduct with respect to Defendants' activities as they relate to design, adoption, amendment or termination of the Plans. Rather, Plaintiffs' allegations relate to Defendants' failure to comply with their duties to manage and administer the Plans in their functional capacity, *i.e*,, whether Defendants functionally exercised control or authority over the disposition of Plans' assets. *See Mertens*, 508 U.S. at 262. Accordingly, Defendants' authorities regarding whether "settlor" activities confer fiduciary status (Def. Br. at 16-17) are inapplicable. *See Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996) (finding company alleged to be an ERISA fiduciary "was *both* an employer *and* the benefit plan's administrator, as ERISA permits," and as such, was wearing its 'fiduciary,' as well as its 'employer,' hat" and thus was "exercising 'discretionary authority' respecting the plan's 'management' or 'administration' when it made [] misrepresentations" concerning employee benefits) (emphasis in original). *See also In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206, 213 (D. Conn. 2007) (where defendants argued that presence of company stock fund in plans was part of plans' design "built into them by Xerox acting in its *settlor*, non-fiduciary capacity," court noted "Congress intended ERISA's definition of fiduciary to be broadly construed," holding, "plaintiffs have alleged that each defendant was a functional fiduciary, in addition to being, in some cases, a named fiduciary. The question of whether one is a functional fiduciary is fact-intensive and the court must accept well-pled allegations as true when ruling on a motion to dismiss.") (citations omitted; emphasis added); *Lively v. Dynegy, Inc.*, 420 F. Supp. 2d 949, 954 (N.D. Ill. 2006) (sustaining prudence claim; "[w]hile the Plan required employer contributions to be made in Dynegy Inc. stock and the establishment of that requirement was a *settlor* function, the Plan's fiduciaries enjoyed *discretion* to discontinue such investments if Dynegy Inc. stock was an imprudent investment.") (emphasis added); *Sprint*, 388 F. Supp. 2d at 1218, 1220 (where defendants contended that company "was acting in its capacity as plan *settlor*, not as fiduciary, when it made the Company Stock Fund a mandatory investment option under the plans," court held plaintiffs "state[d] a claim that defendants were acting in their *fiduciary* capacities by allowing the Company Stock Fund to invest so heavily in Sprint stock.") (emphasis added).

actions of the Administration and Investment Committees are imputed to Citigroup. ¶ 50.[23]

Plaintiffs also allege that Citibank was the trustee appointed to "manage, invest, and reinvest" the assets of the Citigroup Plan during the Class Period. Compl. Ex. C, §2.2, at 5; ¶ 53. Defendants contend that Citibank did not function as a fiduciary with respect to Citigroup stock because it was required to maintain the "Citigroup Common Stock Fund" in the trust. However, as noted above, the assets of the Citigroup Common Stock Fund were not required to be invested in Citigroup stock.[24] The Trust Agreement also provided that in the "sole judgment of the

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[23] Defendants' argument (Def. Br. at 20) that application of *respondeat superior* is "inconsistent with ERISA's functional concept of fiduciary responsibility" is flawed. Under this doctrine, employers are subject to liability for the torts of employees committed while acting within the scope of their employment. *See Stuart Park Assocs. Ltd. P'ship v. Ameritech Pension Trust*, 846 F. Supp. 701, 708 (N.D. Ill. 1994) ("It is well-established that an employee's actions within the scope of employment are imputed to the employer, even in the context of ERISA litigation") (citations omitted). In support of their argument, Defendants cite a sole case from this District where the court did not extend liability to the corporate defendant at issue for alleged breaches of fiduciary duties. Def. Br. at 20 *citing AOL*, 2005 U.S. Dist. LEXIS 3715, at *12 n.5. The *AOL* decision does not withstand the weight of authority, according to which it is proper to apply the doctrine of *respondeat superior* in the context of fiduciary liability under ERISA. *See, e.g., Bannister v. Ullman*, 287 F.3d 394, 408 (5th Cir. 2002) (under ERISA, "[i]n the context of *respondeat superior* liability, the issue is whether the principal, by virtue of its *de facto* control over the agent, had control over the disposition of plan assets"); *Nat'l Football Scouting Inc. v. Cont'l Assurance Co.*, 931 F.2d 646, 649-50 (10th Cir. 1991) (applying *respondeat superior* and finding question of fact concerning agency relationship precluded summary judgment on ERISA claim); *Hamilton v. Carell*, 243 F.3d 992, 1002 (6th Cir. 2001) (agreeing with Seventh Circuit that common law doctrine of *respondeat superior* under ERISA does not require a principal's active and knowing participation in the breach). In fact, a subsequent decision addressing the issue of whether a company can be imputed with the acts of its directors, officers and employees, explained, referencing *AOL*, that:

> [Plaintiff] does not allege that the Company Defendants are vicariously liable for the acts of their fiduciary employees. Rather, he alleges that the Company Defendants acted, as all business organizations must, through their "officers, employees, and/or agents" as de facto or functional fiduciaries. *See Mertens*, 508 U.S. at 262, 113 S.Ct. at 2071; *see also In re AOL Time Warner*, 2005 WL 563166, at *4 n.5 ("ERISA imposes liability only upon named fiduciaries and de facto fiduciaries....") (emphasis added). As outlined above, [plaintiff] pled specific facts demonstrating that the Company Defendants performed discretionary functions with respect to the Tobacco Plan's management, administration, and disposition of assets. As such, Defendants' Motion to Dismiss the ERISA breach of fiduciary claim against the Company Defendants based on insufficient pleading of fiduciary status is DENIED.

Tatum v. R.J. Reynolds Tobacco Co., 2007 U.S. Dist. LEXIS 39801, at *28-29 (M.D.N.C. May 31, 2007). Further, *AOL* does not comport with the Second Circuit's broad reading of ERISA liability, and thus should not be followed by this Court. *See LoPresti*, 126 F.3d at 40 ("Congress intended ERISA's definition of a fiduciary 'to be broadly construed'.")

[24] Defendants' citation to *Kirschbaum v. Reliant Energy, Inc.,*526 F.3d 243, 250 (5th Cir. 2008), is misplaced. In *Kirschbaum* the court not only held on summary judgment that the trust agreement required the Plan to contain the company stock fund (with no apparent exceptions) among other investment funds, but also found that all of the assets of the company stock fund were required to be invested in company stock with the exception of "only a minimal cash component to maintain liquidity for transactions in the stock," *i.e.*, ".25 percent to 1.25 percent of the

Trustee," the Plan's assets were required to be diversified to minimize the risk of large loss (with no exception for the assets contained in the Citigroup Stock Fund). Compl. Ex. C, §4.1, at 8. Thus, Citibank had the discretion and the duty to divest the Citigroup Common Stock Fund of Company stock, or at least diversify the fund, in order to preserve the Plan's assets.

These allegations against Citigroup and Citibank, which must be accepted as true, are more than adequate at the pleading stage to state a claim that Citigroup and Citibank exercised authority and control regarding the management and disposition of the Plans' assets, including Citigroup stock, and breached that duty. *See* ¶ 227 (listing breaches). At this stage, it is impossible without discovery to ascertain the full scope of control Citigroup and Citibank exercised regarding Plan investments. *AOL*, 2005 U.S. Dist. LEXIS 3715, at *18-19. Because

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Fund's total value may be held in cash." *Id.* There are no such dire restrictions here (*see supra* note 17 and accompanying text), where the ESOP component is designed to invest *primarily* in Citigroup Common Stock..." and the Plan documents provide that the Citigroup Common Stock Fund may hold cash and short-term investments, and expressly give the Investment Committee the authority and responsibility to reduce or liquidate such investments if they became imprudent. ¶ 106. *See also Crowley v. Corning Inc.,* 2004 WL 763873, at *6 (W.D.N.Y. Jan. 14, 2004) (court found no discretion to remove company stock as an investment option). Here, as set forth above, the fiduciaries did have discretion to remove Company stock from the Plans.

Defendants again run afoul of ERISA's statutory framework in citing directed-trustee cases. ERISA fiduciaries may not blindly follow plan provisions when doing so would conflict with ERISA's intent: "ERISA's expansive definition of fiduciary [and] its ... policy of heightened protection of plan assets and plan participants ... support the Court's conclusion that [the directed trustee provision] should be read to maintain *some*, rather than *virtually eliminate*, fiduciary obligations of a directed trustee to question and investigate where he has some reason to know the directions he has been given may conflict with the plan and/or the statute." *Enron*, 284 F. Supp. 2d at 587. Defendants thus improperly construe the role of a directed trustee to be one without fiduciary obligation whatsoever. In addition, the directed trustee cases cited by Defendants are distinguishable in that the companies used independent third party trustees to manage the plans, whereas here, Citigroup caused its wholly-owned subsidiary, Citibank, to manage the assets of the Citigroup Plan. Under basic tenets of corporate law, Citibank "is imputed with Citigroup's knowledge regarding the alleged misconduct, as Citigroup "ultimately controlled the operations business of Citibank through key decision-making" and "regularly engage[d] in inter-company transactions with Citibank." *See* ¶ 55 (a majority of Citigroup's U.S. consumer mortgage lending activity was consolidated within Citibank during 2006, and during 2007, it received $25.3 billion in contributions from Citigroup). *See Thompson v. Air Power*, 248 Va. 364, 371 (Va. 1994) (holding that knowledge of parent will be imputed to its subsidiary where a sufficient "nexus between them is shown" which "is generally established by showing control, interaction, or other similar involvement" between the parent and subsidiary). Citigroup's knowledge is also imputed to Citibank based on the fact that Citigroup and Defendants Prince and Rubin also had a duty to inform Citibank of the misconduct alleged herein (*see infra* §III.D.2.). *DC Comics, Inc. v. Powers*, 482 F. Supp. 494, 496-97 (S.D.N.Y. 1979) (holding that a parent company's knowledge will be imputed to its subsidiary where it is "shown that the parent's employees … were under a duty to report that information to the subsidiary").

Plaintiffs allege facts sufficient to put Citigroup and Citibank on notice of the claim against them, dismissal is inappropriate. *Id*.

c. The Complaint Adequately Alleges that the Investment Committee Defendants Were Fiduciaries for Count I

Defendants argue that the Investment Committee had no duty regarding the Plans' investment in Citigroup stock because purportedly the Plan documents require that the Citigroup Common Stock Fund be permanently maintained as an investment option. Defendants are mistaken. As described above, the Investment Committee had the discretion to eliminate the Citigroup Common Stock Fund altogether. Further, as indicated, even if the Plan documents required the maintenance of the Citigroup Common Stock Fund, the Investment Committee had the discretion to invest all assets of the Citigroup Common Stock Fund in cash or short-term fixed investments, or eliminate the requirement that certain contributions remain in the Common Stock Fund, or establish rules and regulations regarding the basis by which Plan participants could allocate retirement savings among investment options, including the Citigroup Common Stock Fund.[25] The Investment Committee had the power to determine the proportions of each participant's accounts that could be invested in the Citigroup Common Stock Fund, including the timing and frequency of the investments (based on recommendations from the Administration Committee). Compl., Ex. E, §7.01, at 41. Under the Trust Agreement with Citibank, the Investment Committee also had the duty to diversify the Citigroup Plan's assets held in trust to

[25] Defendants' cases are inapposite. Def. Br. at 25-26. Contrary to language quoted by Defendants from *Urban v. Comcast Corp.*, 2008 WL 4739519 (E.D. Pa. Oct. 28, 2008) (Def. Br. at 25, 26), in the context of analyzing the so-called *Moench* presumption (*see infra*), the Plans here do not "mandate investment in employer securities," but at most permit them as one option. Indeed, the Court in *Urban sustained* claims that defendants there were acting as fiduciaries, and determined they were not entitled to a presumption of prudence. *Id.* Defendants' citations from *Kirschbaum* and *Avaya*, both decided on summary judgment, were also in the context of discussing the *Moench* presumption (*see supra* and *infra*, distinguishing these cases). Contrary to *Crowley v. Corning, Inc.,* 2004 WL 763873, and *Smith v. Delta Air Lines, Inc.*, 422 F. Supp. 2d 1310 (N.D. Ga. 2006), the Investment Committee here had express discretion under the Plan to take actions necessary to ensure compliance with all fiduciary obligations, including the elimination of the Citigroup Common Stock Fund. *See supra*, §III.B.1.a. Further, none of those cases involved the type of calamitous disregard and non-disclosure of risk alleged here.

minimize the risk of large losses with no exception to the assets held in the Citigroup Common Stock Fund. *Compl.* Ex. C, §4.1 at 8, 11.

Accepted as true, the allegations against the Investment Committee Defendants are more than adequate at the pleading stage to state a claim that the Investment Committee Defendants exercised authority, control, and discretion regarding the management and disposition of the Plans' assets, including Citigroup stock, and breached that duty. ¶¶ 69, 70, 227.

d. The Complaint Adequately Alleges that the Administration Committee Defendants Were Fiduciaries for Count I

Defendants also argue that the Administration Committee had no discretion with respect to investment decisions and did not function as a fiduciary with respect to the investment in the Plan's assets. Again, Defendants are wrong. The Administration Committee was the Plan administrator, responsible for determining how participants' accounts are directed among the investment funds established and managed by the Investment Committee Defendants.[26] Specifically, the Plans state that "Each Participant's Accounts shall be invested in such Investment Funds in the proportions directed by the Participant in accordance with the rules and procedures established by the [Administration] Committee, including but not limited to any timing or frequency limitations approved by the Investment Committee." Compl., Ex. E, §7.01,

[26] The language cited by Defendants contending that the Administration Committee shall not have responsibility or control over the investment or management of the "Plan assets" (Def. Br. 21) applies to the selection or elimination of the Plans' investment funds, and the assets therein (the responsibility of the Investment Committee). Compl., Ex. D, §7.01, at 29; Ex. E, §7.01, at 41. Moreover, Defendants' citation to Plan language stating that the Administration Committee, the trustee and the Investment Committee shall have no "authority, discretion, responsibility, or liability with respect to the Participant's selection of an Investment Fund" simply seeks to absolve Defendants from liability with respect to losses that may result after a participant makes an investment decision, similar to the Section 404 (c) defense. (However, Defendants cannot contract around their ERISA duties, 29 U.S.C. §1110, and as explained *infra*, §III.H, the §404(c) defense is not available here.) Accordingly, this provision applies to the choices that Plan participants make, not the choices made available to Plan participants. This interpretation is highlighted by the title of the section containing the provision – "Investment Direction Responsibility Resides in Participants." If the provision was interpreted as argued by Defendants, it would be in direct conflict with the provision allowing the Administration Committee to establish rules by which participants may allocate their accounts amongst investment funds, including the rules regarding the frequency and timing of investments or the power of the Investment Committee to "eliminate" or add new investment funds without consent by any participant at any time. Compl., Ex. D, §7.01, at 29; Ex. E, §7.01, at 41.

at 41. Thus, the Administration Committee certainly could have required that Plan participants transfer their investments from the Citigroup Common Stock Fund to another investment option, or initiated temporary restrictions on investment in the Citigroup Common Stock Fund. Indeed, nothing would have prevented it from reducing the proportion permitted to be invested in the Citigroup Common Stock Fund (or the proportion of Citigroup stock in said Fund) all the way down to zero. Thus, the Administration Committee Defendants exercised authority, control, and discretion regarding the management and disposition of the Plans' assets, including Citigroup stock, and breached that duty. ¶¶ 68, 91, 227. Such allegations must be accepted as true herein.

3. Defendants Erroneously Rely on the Presumption of Prudence

Defendants argue that, even if their decision to invest in Citigroup stock is subject to the duty of prudence under ERISA, which it clearly is, the Complaint fails to overcome the purported "presumption of prudence" standard articulated in *Moench v. Robertson*, 62 F.3d 553, 569 (3d Cir. 1995), which has been rejected, limited and questioned by numerous courts, and has never been adopted by this Circuit. Defendants' argument is misguided in several respects.[27]

a. Prudence Is Not Presumed At Motion To Dismiss Stage

In *Moench*, the Third Circuit held that a fiduciary's decision to continue holding employer stock in an ESOP is entitled to a presumption that the fiduciary acted consistent with ERISA, and that the presumption could only be overcome by showing that the plan fiduciary abused its discretion by investing in employer securities. *Moench*, 62 F.3d at 571. While certain other circuit courts have adopted the so-called *Moench* presumption (albeit generally not at the

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[27] Defendants' claim that the Third, Fifth, Sixth, Seventh and Ninth Circuits have adopted the presumption of prudence (Def. Br. at 29) is misleading. First, the Ninth Circuit has never adopted the presumption. *See Syncor*, 516 F.3d at 1102 (noting "this Circuit has not yet adopted the *Moench* presumption, *see Wright*, 360 F.3d at 1098 n.3, and *we decline to do so now*.") (emphasis added). In fact, in *Syncor*, the Ninth Circuit went so far as to question whether *Moench* was correctly decided. *See id. Moench* and *Kirschbaum* were both decided on summary judgment *after* developing factual records. *Kuper* was decided after trial. Thus, these three cases do not support the proposition that it is proper to adopt the presumption at the pleading stage. As discussed *infra*, *Pugh* and *Avaya* were subject to pleading deficiencies that are not at issue in this case.

pleading stage), the Second Circuit has not adopted it, and this Court should not do so here.[28]

The *Moench* presumption is an evidentiary standard that controls a plaintiff's ultimate burden of proof at trial. Accordingly, most courts, including those analyzing the issue post-*Twombly*, have declined to apply the presumption at the pleading stage.[29] Without the Second Circuit's adoption, however, Plaintiffs need not overcome any presumption that Defendants acted prudently with respect to investment of Company stock in the Plans. Indeed, district courts in this Circuit and elsewhere have viewed as inappropriate the prudence presumption to resolve a motion to dismiss. *See, e.g.*, *Agway*, 2006 U.S. Dist. LEXIS 74670, at *73 ("[I]n light of the complexity of the issues involved and the uncertainty surrounding the intersection between the requirements of a plan to invest in a company's stock and securities and duty owed under ERISA by plan fiduciaries, disposition of such claims on a motion to dismiss pursuant to Rule 12(b)(6), without the benefit of a more fully developed record, is generally not appropriate or desirable."). Requiring a plaintiff to plead facts overcoming the presumption also runs afoul of Rule 8's notice pleading standard governing ERISA breach of fiduciary duty actions. *See Ferro*, 422 F. Supp. 2d at 860 ("requiring a plaintiff to plead facts overcoming the *Moench* presumption conflicts with Rule 8(a)'s notice-pleading standard"); *Alvidres v. Countrywide Fin'l Corp.,* 2008 U.S. Dist. LEXIS 27431, at *4-5 (C.D. Cal. Mar. 18, 2008) (assuming *Moench* presumption was

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[28] The Court should follow the examples set by the District of Columbia, and Tenth Circuit in *Fink v. National Savings & Trust Company*, 772 F.2d 951, 955-56 (D.C. Cir. 1985) (Scalia, J. concurring in part, dissenting in part), and the Tenth Circuit in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), both of which held that ESOP fiduciaries are subject to strict fiduciary standards in determining whether plan assets should be invested in employer securities.

[29] *See, e.g., In re Fremont Gen. Corp. Litig.*, 564 F. Supp. 2d 1156, 1158 (C.D. Cal. 2008); *Polaroid*, 362 F. Supp. 2d at 475 ("Whether a plaintiff has overcome the presumption of prudence [under *Moench*] is an evidentiary determination that is ill-suited for resolution on a motion to dismiss."); *Lalonde v. Textron, Inc.*, 369 F.3d 1 (1st Cir. 2004) (further record development required to determine whether plaintiffs can rebut the *Moench* presumption); *Enron*, 284 F. Supp. 2d at 534 n.3 (determination whether ESOP fiduciary breached fiduciary duty should not be made on motion to dismiss, but only after discovery); *Ferro*, 422 F. Supp. 2d at 860 ("The Court has serious doubts as to whether it is appropriate to evaluate the *Moench* presumption [on a motion to dismiss]"); *In re Westar Energy, Inc.*, 2005 U.S. Dist. LEXIS 28585, at *70-71 (D. Kan. Sept. 29, 2005) (same); *Sprint*, 388 F. Supp. 2d at 1225 (same); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 829 (S.D. Ohio 2004) (neither necessary nor appropriate for court to address presumption on motion to dismiss because it is evidentiary); *In re Xcel Energy, Inc., Sec., Derivative & ERISA Litig.*, 312 F. Supp. 2d 1165, 1179-80 (D. Minn. 2004); *Kmart*, 278 F. Supp. 2d at 879.

at all applicable, it would properly be applied at the evidentiary, not pleading, stage).[30]

Moench itself was decided on the merits. *Moench*, 62 F.3d 553 (reversing summary judgment for defendants on presumption issue, and remanding to trial court for further proceedings wherein "the record may be developed...."); *see also Kuper v. Iovenko*, 66 F.3d 1447, 1452 (6th Cir. 1995) (cited by Defendants) (decided after trial); *Kirschbaum*, 526 F.3d 243, 254 (5th Cir. 2008) (decided on summary judgment).

Indeed, numerous courts have limited *Moench* to plans which are entirely ESOPs, specifically designed to promote company stock ownership, as opposed to diversified 401(k) plans, designed for the purpose of providing employees retirement benefits, where participants may remove stock from the company stock fund without restriction. *See, e.g., In re Westar Energy, Inc. ERISA Litig.*, 2005 U.S. Dist. LEXIS 28585, at *68-72 (D. Kan. Sept. 25, 2005) (rejecting argument that presumption applies to non-ESOP EIAPs as "unpersuasive"). Plaintiffs submit that in a 401(k) plan, even one with an ESOP company stock component, such as the Plan at issue here, unlike a stock bonus plan or ESOP, employee ownership is not one of the primary purposes of the plan. *See* Compl. ¶¶ 79, 81, 95 (Plans described as designed to help participants build income for retirement, and "to encourage savings on the part of eligible employees,"

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[30] Defendants' citation to *Twombly* in support of their prudence presumption argument is irrelevant. *Twombly* does not change the posture or fact patterns of cases relied on by Defendants. *Kirschbaum*, 526 F.3d at 256, was decided at summary judgment, not the pleading stage. Additionally, the case is factually distinguishable, as the complaint merely alleged "round-trip trading by a few employees and an initial drop in [ ] stock value of approximately forty percent." In *Edgar v. Avaya*, 503 F.3d 3740, 349 (3d Cir. 2007), cited in support of the notion that *Twombly*'s standard on a motion to dismiss influenced its outcome, the stock dropped slightly as a result of "corporate developments" likely to have "negative effect on the company's earnings," but it ultimately fully recovered, very unlike the present case. Defendants' other authorities are similarly inapposite. In *Pugh v. Tribune Co.*, 521 F.3d 686, 701 (7th Cir. 2008), the court cited data that refuted plaintiffs' claim that the disclosures caused a 25% drop in the value of Tribune's stock, and the charges against earnings reflected less than 2% of one year's revenues for the newspapers. In *Graden v. Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 462-63 (D.N.J. 2008), the court applied the presumption to a former plan but not a new plan, and during the time the former plan was in effect, the complaint did not allege financial detriment to the Conexant (unlike alleged here), but merely alleged that the merger at issue was not going as smoothly as expected. In *Halaris v. Viacom, Inc.*, 2008 WL 3855044, at *2 (N.D. Tex. Aug. 19, 2008), there were no allegations that the stock was artificially inflated due to nonpublic information. In *In re Radioshack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 614 (N.D. Tex. 2008), the write-down in obsolete and slow-moving inventory caused a minimal stock drop of merely 8.04%.

Compl. Ex., G, at 2; Ex. J, at 4).

Congress did not intend to immunize ESOP fiduciaries (much less fiduciaries of individual account plans holding employer stock) from the exacting standards of prudence and loyalty with respect to purchasing and holding employer stock. To do so would be inconsistent with the underlying purpose of ERISA – to protect retirement income of participants and beneficiaries. This is particularly so given that defined contribution plans, such as the Plans in this case, "dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1025 (2008). Where, as here, a substantial percentage of assets held by a plan is composed of employer stock, to exempt managing fiduciaries from compliance with their obligations would jeopardize such plans. Accordingly, the Court should not adopt the *Moench* presumption in this case.

b. The Standard for Overcoming the *Moench* Presumption

Even if the Court were to apply the prudence presumption in this case, which it should not, Plaintiffs' allegations would nonetheless overcome that presumption. *Moench* provides that the prudence presumption is overcome, *inter alia*, by showing "that the ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate." 62 F. 3d at 571.

Any number of reasons might lead a prudent fiduciary to decide an investment is no longer appropriate. As the Ninth Circuit stated:

> A prudent man standard based only upon a company's alleged financial viability does not take into account the myriad of circumstances that could violate the standard. A violation may occur where a company's stock did not trend downward over time, but was artificially inflated during that time by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed.

In re Syncor ERISA Litig., 516 F.3d 1095, 1102 (9th Cir. 2008); *see also Lalonde*, 369 F.3d at 6 (alleged misrepresentations and concealment of adverse facts which caused company stock to be

artificially inflated). Similarly, the DOL, which has primary authority to interpret and enforce Title I of ERISA, stated:

> ERISA's exacting fiduciary duty provisions not only protect a plan from a decision to buy a worthless asset, but also from a decision to overpay for that asset. Knowingly overpaying for an asset is neither prudent nor in the interest of plan participants and beneficiaries.

Brief of the Secretary of Labor as Amicus Curiae Supporting Appellants, at 14-19, *In re Calpine Corp. ERISA Litig.,* No. 06-15013 (9th Cir. Nov. 15, 2000), available at http://nww.dol.gov/sol/media/briefs/calpine(A)-11-15-2006.pdf.

Defendants argue that overcoming the presumption requires the Company be in dire straits and facing imminent collapse. Def. Br. at 29. However, Defendants' own cases refute this theory. *See Avaya*, 503 F.3d at 349 n.13 ("[w]e do not interpret *Moench* as requiring a company to be on the brink of bankruptcy before a fiduciary is required to divest a plan of employer securities."); *Kirschbaum*, 526 F.3d at 256 ("We do not hold that the *Moench* presumption applies only in the case of investments in stock of a company that is about to collapse."). As these authorities make clear, Defendants are not shielded from liability merely because Citigroup has managed (barely) to survive the repercussions of its own reckless conduct.

Under Defendants' myopic version of the law, even if they knew or should have known the Company was exposured to risky and illiquid CDO and subprime assets, and liabilities associated with SIVs, and knew that discovery of its exposure would cause the stock price to drop and the Plans to suffer enormous losses, no remedy could be had under ERISA because Citigroup still exists. This reading is impossible to square with ERISA's stated mission of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and [] providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1001(b). The standard urged by Defendants is akin to requiring

monitoring of a patient only after he is dead.[31]

c. The Complaint Alleges Sufficient Facts to Support Plaintiffs' Breach of Fiduciary Duty Claims

Even if the ESOP presumption of prudence is applied in this case, Plaintiffs allege sufficient facts to rebut the presumption. Plaintiffs have amply alleged the unacceptable level of risk borne by Plan participants as a result of the Plans' massive investment in Citigroup stock. *See, e.g.*, ¶¶ 130-84. Accepting these allegations as true, Citigroup knowingly exposed itself to massive amounts of risky and illiquid CDO and subprime assets and liabilities associated with SIVs, and was involved in every phase of the development of the acquisition, retention and securitization of such assets. The Company's senior management itself initiated and blessed taking on this additional risk. ¶¶ 28-29, 130-35, 185-87. Moreover, Defendants ignored numerous warning signs about the dangers of the Company's risky bets. *E.g.*, ¶ 189(a)-(y). As a result, Defendants knew or should have known that the skyrocketing level of risk made Citigroup stock an imprudent investment in the Plans. For these reasons, Defendants are not, and should not be protected by the so-called *Moench* presumption.

In any event, Citigroup ***was*** facing imminent collapse, coming within hours of certain bankruptcy, before being rescued by a massive, unprecedented government bailout.[32] Thus, any *Moench* presumption, if applied, is overcome.

d. The Cases Cited by Defendants Are of No Help to Them

The cases cited by Defendants are of no help to them, as the facts here are more compelling qualitatively and quantitatively. In *Kirschbaum*, decided on summary judgment, the

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[31] *See also Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006) ("selling when bankruptcy is declared will almost certainly be too late"); *Ford*, 2008 WL 5377955, at *7 (company need not be on verge of collapse to make for imprudent investment; rather, issue is whether company stock is too risky for plan participants due to, *inter alia*, the type of business the company is engaged in).

[32] *In re Bausch & Lomb Inc. ERISA Litig.*, 2008 U.S. Dist. LEXIS 106269, at *18-20 (W.D.N.Y. Dec. 12, 2008), is not to the contrary, as that case involved "broad allegations" and "mere stock fluctuations."

complaint merely alleged "round-trip trading by a few employees and an initial drop in [ ] stock value of approximately forty percent." 526 F.3d. at 255. Aside from the fact that the Plan terms are more favorable to Plaintiffs than those in *Kirschbaum*, *see* §§III.B.1.-2., *supra*, here, as detailed above, Citigroup's stock price dropped almost 95% from the beginning of the Class Period to November 21, 2008. The Company suffered total writedowns of nearly $60 billion (and counting); had $55 billion in U.S. sub-prime related direct exposures in its Securities and Banking (S&B) business; had off-balance sheet exposure of some $87 billion; and had a highly-leveraged and illiquid balance sheet and serious risk mismanagement. It is not difficult to assemble an abundance of "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest." *Id.* at 256.

Wright v. Or. Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004), did not involve a claim that the stock itself was an imprudent investment; rather, the court rejected the argument that the fiduciaries should have permitted diversification out of the company stock beyond the 85% level permitted by the plan. The complaint alleged neither fraud nor knowledge of impending collapse. With only allegations of a stock price drop, the court granted the motion to dismiss. In *Wright,* plaintiffs made *no allegations* of serious mismanagement, risky and potentially unlawful business conduct, or artificial inflation of the company stock, a far cry from the situation here. In *Avaya*, the stock dropped slightly, $2.68/share, as a result of "corporate developments that were likely to have a negative effect on the company's earnings" and then fully recovered, unlike here where the Company stock value was decimated. 503 F.3d at 348-49 & n.13. In *In re McKesson HBOC, Inc. ERISA Litig,* 391 F. Supp. 2d 812 (N.D. Cal. 2005), the court denied the motion to dismiss as to one plan where the defendant fiduciaries had discretion under their plan to sell company stock and granted the motion as to other plans without such discretion. Given the broad discretion granted to Defendants under the Citigroup Plans, *McKesson* is of limited

relevance.[33] Further, in both *McKesson* and *Calpine*, the court concluded that the fiduciaries would be compelled to take action in contravention to the plan documents only if the company faced imminent collapse. *McKesson*, 391 F. Supp. 2d at 830; *In re Calpine Corp. ERISA Litig.*, 2005 WL 1431506, at *5 (N.D. Cal. Mar. 31, 2005). The Ninth Circuit has since held that imminent collapse is not the appropriate standard. *See Syncor*, 516 F.3d 1095.

4. The Complaint Adequately Alleges Defendants Failed To Investigate The Prudence Of Continued Investment In Citigroup Stock

a. The Complaint Adequately Alleges that Defendants Knew or Should Have Known that Citigroup Stock Was an Imprudent Investment

Defendants argue that Plaintiffs fail to state a claim for the Prudence Defendants' failure to investigate, purportedly because the Complaint pleads no facts to show that Citigroup stock was an imprudent investment and no facts that "triggered any duty to investigate." Def. Br. at 33. This argument is without merit. As stated in Defendants' authority, *Kuper*, plaintiff must establish a causal link between defendants' failure to investigate the prudence of investing in company stock and the harm to the plan: "In order to establish this causal link, a plaintiff must demonstrate that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." 66 F.3d at 1459-60. In other words, plaintiffs must allege facts that defendants knew or should have known of the underlying alleged misconduct. *See, e.g., Polaroid*, 362 F. Supp. 2d at 476. Plaintiffs clearly satisfy this standard.

First, the Complaint alleges that, due to the Company's subprime exposure, its off-balance sheet SIV exposure, mismanagement of its risk, and persistent refusal to disclose all material information about its true financial condition, Citigroup stock posed an unduly

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[33] Similarly, the facts here are far more compelling, than in *Coca-Cola*, 2007 WL 1810211, where the company stock was a "robust and viable investment option." *Id.* at *10. Moreover, in *Coca-Cola*, the court dismissed the claims under Rule 9(b), but as established above, Rule 9(b) is inapplicable here. And in *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786 (W.D.N.C. 2003), the court incorrectly ignored allegations of fraud when concluding that plaintiffs failed to allege why the stock was imprudent.

hazardous, and thus imprudent, investment during the entire Class Period. ¶¶ 7, 108-183.

Second, the Complaint alleges that at all relevant times, Defendants Citigroup, Citibank, Prince, and Rubin knew that Citigroup stock was an imprudent Plan investment due to risk management deficiencies, the tremendous exposure that Citigroup took on with respect to the subprime markets, and the fact that Company would inevitably sustain heavy losses as a result of the impending collapse of the subprime mortgage industry. ¶¶ 55, 130-33, 186-87.

Third, the Complaint alleges that there is evidence that the Administration and Investment Committee Defendants were on notice of numerous "warning flags" that should have caused them to investigate the risks posed by Citigroup stock. *E.g.*, ¶ 189(a)-(y).

Fourth, the Complaint alleges that had the Administration and Investment Committee Defendants investigated the Company's subprime exposure, this would have revealed that Citigroup stock was an imprudent investment. A prudent fiduciary, acting under similar circumstances, would have taken appropriate steps to protect the Plans from losses due to the Company's improper conduct. ¶ 190.

While Defendants dispute these allegations, Plaintiffs clearly allege Defendants knew or should have known of Citigroup's dire financial problems, and a causal link between their failure to investigate or otherwise act prudently and the Plans' substantial losses. This is sufficient. *See*, *e.g., Kmart*, 278 F. Supp. 2d at 879 ("What the Outside Directors would have [plaintiff] do is ... to prove all of the facts in support of her claim;" "[t]his is not required in a complaint").

b. Defendants' Effort to Dispute the Factual Allegations Regarding "Red Flag" Events Is Misguided

Ignoring Rule 8(a), Defendants again introduce materials outside the Complaint to attack the factual bases of the "warning flags" identified in the Complaint. Def. Br. at 33-34. Even if Defendants' premature factual arguments are considered, they are meritless. Moreover, while Defendants refer cursorily to paragraph 189(a)-(y) of the Complaint, they ignore that the entire

Complaint abounds with warning flags, as paragraph 189 itself states (noting that the warning flags set forth therein are "[i]n addition to those alleged *supra*") (*e.g.*, ¶¶ 114-29, 133, 136).

First, Defendants argue that an August 2007 *Wall Street Journal* article cited in the Complaint suggesting that Citigroup might have subprime losses hidden on their books or in off-balance-sheet vehicles was published halfway through the Class Period and could not have triggered a duty to investigate. Putting aside the fact that it is remarkable that even those *outside* the Company discerned the problems at Citigroup during the Class Period, Defendants ignore numerous other warning flags cited in the Complaint leading up to this August 2007 report,[34] including reports showing a substantial decline in the value of subprime mortgages and the collapse of many subprime lenders going into the end of 2006 and the beginning of 2007; reports as early as March 2007 that the subprime meltdown was spilling over into the CDO market as many CDOs contained subprime mortgage assets; and reports in June 2007 suggesting that banks were not properly valuing their CDOs. ¶ 189 (a)-(p).

Defendants argue these warnings were insufficient because Citigroup eventually sold most of the mortgage loans it originated; that mortgage loans were only one part of the Company's business; the Company took steps to reduce its subprime mortgage business prior to the start of the Class Period; that at the end of 2006 "only" 38% of the Company-originated consumer mortgages were subprime (as reflected in SEC filings cited by Defendants); and the red flags did not trigger a duty to investigate the super-senior tranches of CDOs. Defendants ignore that, assuming they were aware of the percentage of Citigroup-originated mortgages that were subprime, they could have then easily inquired as to what the *total dollar amount of*

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[34] Defendants also ignore a November 3, 2007, article cited in the Complaint which reported that the SEC was investigating Citigroup with respect to its accounting for off-balance-sheet transactions (SIVs), and Citigroup's announcement on July 20, 2007, that it was seeing continued deterioration in consumer-credit quality, was managing down its subprime exposure, and would probably make "meaningful additions" to its loss reserves. ¶¶ 155, 163.

Citigroup's subprime exposure actually was, including, importantly, with respect to CDOs.[35] This was the crucial inquiry the Administration and Investment Committee should have made, to learn what the Company's total exposure to the subprime market was, as any reasonably prudent fiduciary would do in the face of such alarming reports, especially since Citigroup was a major participant in the CDO market (¶ 110).[36]

Defendants are free to pursue their theory at trial that the warning flags identified by Plaintiffs are of such insignificance that a reasonably prudent fiduciary charged with the "highest duties known to the law" would not have even questioned whether these events affected the prudence of Citigroup stock as a Plan investment. Defendants cannot, however, obtain a judgment on this theory at the pleading stage.

C. Count II States a Claim Against Citigroup, the Administration Committee, and Prince for Breaching Their Fiduciary Duty to Provide Complete and Accurate Information to Plan Participants

1. ERISA Fiduciaries Have a Duty to Disclose Material Information Plan Participants Need to Know to Protect Their Investments

Defendants argue they cannot be liable under ERISA for failing to disclose to participants, whose assets they held in trust, that Citigroup exposed itself to tens of billions of dollars in risky subprime mortgages and contingent liabilities in off-balance sheet entities, contending ERISA imposes no obligation on them to disclose such critical information to

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[35] Moreover, the fact that some portion of CDOs may have been in senior tranches certainly does not absolve the fiduciaries of inquiring into the fundamental question of how much risk Citigroup was exposed to in the imploding subprime market. *See* note 4 *supra*, *Remarks of John C. Dugan Comptroller of the Currency,* (Feb. 27, 2008), Pravda Decl. Ex. 17, at p. 10 ("the CDO pool remains very exposed to systematic risk: if an event occurs that leads to subprime losses generally, then losses on the super-senior tranche are likely to be extreme").

[36] As the court held in *Alvidres v. Countrywide Fin'l Corp.*, 2008 WL 803132 (C.D. Cal. Mar. 17, 2008):

> As to the Plan Defendants, the Complaint alleges, with adequate factual support, that the Plan Defendants knew or should have known about Countrywide's deteriorating financial condition, yet failed to investigate the merits of each investment. Compl. ¶¶ 166-75; 177-83 (describing why subprime investments were unduly risky, and how this risk should have become apparent upon adequate investigation). As such, Plaintiff's Complaint withstands the Plan Defendants' Motion to Dismiss. *See Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983) (recognizing that fiduciaries must employ the appropriate methods to investigate the merits of the investment). *Id.* at *2.

participants. Def. Br. at 22-24. Defendants misconstrue the law and the Complaint's allegations.

As the great weight of authority, including decisions by courts in this District, has recognized, ERISA fiduciaries have a duty to avoid issuing false statements to participants,[37] ***and*** an affirmative duty to disclose material information that participants need to know in order to protect their benefits. *See, e.g., Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 548 (6th Cir 1999) ("we agree with ... our sister circuits that the 'duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.'"); *Polaroid*, 362 F. Supp. 2d at 478.[38]

The rationale behind this duty is simple: an ERISA fiduciary, like a common law trustee, has a duty to advise his beneficiaries of circumstances that threatened the trust corpus. *See, e.g., Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 590 (7th Cir. 2000) ("we have made clear that fiduciaries must communicate material facts affecting the interests of plan participants or beneficiaries and that this duty to communicate exists when a participant or beneficiary 'asks fiduciaries for information, and even when he or she does not.'") (citation omitted). As Judge Pauley stated in *Polaroid* in rejecting the same argument advanced by Defendants here:

> While the ERISA statute contains no provision specifically embodying an affirmative duty to disclose material non-public information to Plan participants, "the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Varity Corp.*, 516 U.S. at 497. Under trust law, a trustee "is under a duty to communicate to the

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[37] *See In re Marsh ERISA Litig.*, 2006 U.S. Dist. LEXIS 90631 (S.D.N.Y. Dec. 14, 2006) ("breach of fiduciary duty claims based on misrepresentation have long been recognized as remediable" under ERISA).

[38] *See also Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *Glaziers & Glassworks Union Local No. 252 Annuity Fund v. Newbridge Sec. Inc.*, 93 F.3d 1171, 1181 (3d Cir. 1996) (reversing summary judgment, recognizing that "the duty to disclose material information is the core of a fiduciary's responsibility") (footnotes omitted); *Cress v. Wilson*, 2007 U.S. Dist. LEXIS 42632, at *28; *AOL*, 2005 U.S. Dist. LEXIS 3715, at *23 (sustaining ERISA claim for breach of fiduciary duty for "misrepresenting and failing to disclose material information to Plan participants"); *WorldCom,* 263 F. Supp. 2d at 765-67 (sustaining similar claims and rejecting argument that such claims impermissibly imposed continuous duty of disclosure).

> beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection." Restatement (Second) of Trusts § 173, cmt. d. ***This Court agrees with those decisions holding that an ERISA fiduciary has both a duty not to make misrepresentations to plan participants, and "an affirmative duty to inform when the [fiduciary] knows that silence might be harmful."*** *Bixler*, 12 F.3d at 1300; *see Krohn*, 173 F.3d at 548; *Eddy*, 919 F.2d at 750-51; *see also Devlin*, 274 F.3d at 88-89.

Polaroid, 362 F. Supp. 2d at 478 (emphasis added) (citations omitted).[39]

Defendants' argument distills down to the erroneous notion that, because disclosure of material facts critical to the Plans is not expressly included in the enumerated disclosure provisions in the statute, ERISA imposes no such duty. Defendants miss the point. As courts, including the Supreme Court, have observed:

> [T]he duties of an ERISA fiduciary are not limited by that statute's express provisions but instead include duties derived from common law trust principles. "Rather than explicitly enumerate all of the ... duties [of ERISA fiduciaries], Congress invoked the common law of trusts to define the general scope of their ... responsibility." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985) [Citation omitted.]

Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 750 (D.C. Cir. 1990); *see also Varity*, 516 U.S. at 496; *Griggs v. E.I. Dupont Nemours & Co.*, 237 F.3d 371, 380 (4th Cir. 2001); *Bixler*, 12 F.3d at 1299; *Enron*, 284 F. Supp. 2d at 546 (quoting *Varity* and *Central States*); *Pineiro v. Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 67, 103-04 (S.D.N.Y. 2003) ("the fiduciary duties created

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[39] Defendants' suggestion that the Second Circuit does not recognize an ERISA fiduciary's duty to disclose is simply wrong. As *Polaroid,* 362 F. Supp. 2d at 478 stated, if anything, the opposite is true:

> The Second Circuit has not had occasion to elucidate the scope of an ERISA fiduciaries' duty to disclose non-public information concerning the employer's financial situation. *But see Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001) (holding that a plan administrator breaches his fiduciary duty when he [] "fails to provide information when it knows that its failure to do so might cause harm" (quoting *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995)).

See also Dobson v. Hartford Fin. Servs. Group, 389 F.3d 386, 401-02 (2d Cir. 2004) ("[a] number of authorities assert a plan fiduciary's obligation to disclose information that is material to beneficiaries' rights under a plan, even if such information goes beyond the four corners of the plan itself); *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 10 (2d Cir. 1997) (finding duty to disclose "complete and accurate information about [plan] options").

by ERISA are to be interpreted in light of, and supplemented by, the common law of trusts.").[40] Consistent with this principle, numerous courts, in addition to those discussed above, have held that ERISA imposes affirmative disclosure obligations on fiduciaries that go beyond the specific statutory enumerations. *See, e.g., Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 451 n.6 (3d Cir. 2000) ("[T]he fiduciary duty to disclose and explain is not achieved solely by technical compliance with the statutory notice requirements.").

None of the cases cited by Defendants holds that fiduciaries need not disclose *material* facts affecting plan participant interests. Rather, they hold only that a fiduciary has no duty to disclose insignificant facts, or every possible future contingency, to plan participants. *E.g.*, *Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997) (ERISA provisions specifying the documents "under which the plan is established or operated" to be provided to participants did not require disclosure to participants of technical actuarial valuation reports used by plan administrators, as statute did not require disclosure of "all" documents used in the plan's operations). Here, Citigroup's highly reckless wrongful conduct went to the heart of its business operations and, as a direct consequence, had a devastating effect on Citigroup's stock price and the prudence of investing Plan assets in that stock. Given that the undisclosed wrongdoing led to the ouster and/or resignation of the Company's Chairman/CEO, CFO and COO within a year, and drove the Company to within hours of certain bankruptcy, the materiality of the undisclosed facts cannot seriously be questioned.[41]

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[40] *See also Jordan v. Fed. Express Corp.*, 116 F.3d 1005, 1013-14 (3d Cir. 1997), *quoting Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984) ("But Congress realized that the bare terms, however detailed, of these statutory [ERISA] provisions would not be sufficient to establish a comprehensive regulatory scheme. It accordingly, empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefit plans.").

[41] The remaining cases cited by Defendants are easily distinguishable. In *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985), the Court declined to read extracontractual "remedies" into ERISA, and did not discuss the breadth of a fiduciary's disclosure duties. In *Faircloth v. Lundy Packing Co.*, 91 F.3d 648 (4th Cir. 1996), nowhere does the court suggest that there is no duty of disclosure. The Fourth Circuit has more recently made clear that there

2. The Complaint Alleges Facts Sufficient to Establish That Citigroup, the Administration Committee, and Defendant Prince Acted in a Fiduciary Capacity When Communicating With Plan Participants

Defendants argue that Plaintiffs have not alleged facts sufficient to establish that misleading factual information communicated by Citigroup and Defendant Prince to Plan participants was communicated in a fiduciary capacity, or related to benefits or plan-related details. Def. Br. at 38-40. Notably, Defendants do not contest that the Administration Committee had a duty to disclose material information to Plan participants relevant to Plan benefits via, *e.g.*, Summary Plan Descriptions ("SPDs") and other Plan-related materials; nor do they challenge Plaintiffs' allegations of the Administration Committee's fiduciary status, as it was a named fiduciary of the Plans. ¶ 62. Plaintiffs allege that the Administration Committee issued misleading information in such communications, and omitted to disclose material information therein. (¶¶ 67, 197, 233-41).

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is such a duty, holding that a fiduciary sometimes has an affirmative duty to disclose information upon request to a beneficiary (as in *Faircloth*), and even when there has been no specific request, if, as here, the facts are material and may affect the interest of the beneficiary but are unknown to him. *See Griggs*, 237 F.3d at 380-81; s*ee also Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552 (5th Cir. 2000) (holding ERISA does not require certain disclosures where they would not conceivably have a significant impact on the plan); *Sweeney v. Kroger Co.*, 773 F. Supp. 1266, 1269 (E.D. Mo. 1991) (same); *Olson v. Chem-Trend Inc.*, 1995 U.S Dist. LEXIS 11016, at *18 (E.D. Mich. May 30, 1995) (holding on summary judgment that corporation was not required to inform employees of contingent event that it might be sold in future when its president retired); *Weiss v. Cigna Healthcare, Inc.*, 972 F. Supp. 748, 751-55 (S.D.N.Y. 1997) (information not material or "'harmful' to Plan participants"); *Mellot v. Choicepoint, Inc.*, 561 F. Supp. 2d 1305, 1318 (N.D. Ga. 2007) (holding that the allegedly misleading statements did not relate to plan benefits or finances, company performance or future performance, or investment in company stock and, thus, were not made in a fiduciary capacity); *Avaya,* 503 F.3d at 350 (holding that fiduciaries have a duty to inform, but are not required to give "investment advice," which is not what plaintiffs complain of here; dismissing disclosure claim where no loss could be linked to the alleged wrongdoing); *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357, at *9 (D. Minn. 1988) (holding that the company adequately disclosed the allegedly undisclosed information). *Baker v. Kingsley*, 387 F. 3d 649 (7th Cir. 2004), and *Sprague v. GMC*, 133 F.3d 388 (6th Cir. 1998), both involved the question of whether certain information was required to be in summary plan descriptions, even though the statute and the regulations did not require the inclusion of the information, and did not involve situations where participants were misled. Finally, Defendants' citation to the DOL's position that fiduciaries have no duty to provide investment advice is inapplicable, as Plaintiffs do not allege that Defendants failed to provide investment advice. Indeed, the DOL made clear in *Enron* that fiduciaries have a duty to disclose information sufficiently important to participant decision-making. Amended Brief Of The Secretary Of Labor As Amicus Curiae Opposing Motions To Dismiss at 21, *Tittle v. Enron Corp.,* No.H-01-3913 (S.D. Tex. Aug. 30, 2002) ("*DOL Enron Amicus*"), available at http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02.pdf.

The Complaint alleges that Citigroup and Defendant Prince were Plan fiduciaries in that they were, *inter alia*, responsible for appointing and monitoring the Administration and Investment Committee members. Compl. ¶¶ 44-46, 57, 246.[42] Accordingly, as Plan fiduciaries, Citigroup and Prince had a duty not to make misrepresentations to Plan participants, and an affirmative duty to inform Plan participants of information that might be harmful to the Plans. *Polaroid*, 362 F. Supp. 2d at 478.[43]

The Complaint further alleges that "Citigroup, Defendant Prince, and the Administration Committee regularly communicated with the Company's employees, including Plan participants, about Citigroup's performance, future financial and business prospects, *and Citigroup stock, the single largest asset of both Plans.*" ¶ 197 (emphasis added). These communications were contained in newsletters, memos, letters, Plan documents and other Plan- related materials, and Citigroup's SEC filings, incorporated by reference into Plan documents. *Id.* Participants were encouraged to rely on the Company's SEC filings, including Form 8-Ks attaching Citigroup press releases, 10-Qs and 10-Ks, many of which were misleading, and were signed by, or quoted, Defendant Prince. *E.g.*, ¶197 (citing SPDs).[44] The Complaint also alleges that Citigroup

[42] The Complaint also alleges Citigroup and Prince were fiduciaries because they appointed the Plan trustee. ¶¶ 47, 58, 61. *Liss v. Smith*, 991 F. Supp. 278, 310 (S.D.N.Y. 1998) ("It is by now well-established that the power to appoint plan trustees confers fiduciary status"). Similarly, Citigroup retained Plan management and administration duties, including the ability "in its sole discretion" to direct the Trustee (Citibank) to receive Company stock in lieu of cash dividends and "sell the shares so acquired" at market prices, and exercised *de facto* authority and control with respect to the *de jure* responsibilities of, among others, the Administration Committee. ¶¶ 48, 49.

[43] Defendants also argue that the misleading statements communicated to Plan participants through SEC filings, press releases, and analyst conference calls are exclusively governed by the securities laws, not ERISA. Def. at 39-40. The court in *WorldCom* made clear, however, that "ERISA fiduciaries ... cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings." 263 F. Supp. 2d at 766-67 (holding defendants Ebbers and Miller liable under ERISA for transmitting material misrepresentations to Plan participants via SEC filings); *see also AOL*, 2005 U.S. Dist. LEXIS 3715, at *23 & n.13 (sustaining ERISA claims for misstatements in SEC filings disseminated to plan participants).

[44] *See In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 887 (S.D. Tex. 2004) (distribution of SPDs encouraging plan participants to carefully review company SEC filings triggered affirmative duty to disclose material adverse information regarding risks and appropriateness of investing in company stock); *Pietrangelo v. NUI Corp.*, 2005 U.S. Dist. LEXIS 40832, at *19-20 (D.N.J. Jul. 18, 2005) (plaintiffs properly pled that defendants made misrepresentations in ERISA fiduciary capacity where complaint alleged that misrepresentations were made in SEC

representatives from Company headquarters held "mandatory town hall meetings about every three months where they would assemble Citigroup employees [Plan participants], and encourage employees to invest in Citigroup stock through the Plans" (¶198), and regularly emailed employees promoting investment in Citigroup stock (*id.*);[45] *see also* ¶¶ 30, 48, 60, 67, 197-200. Because these statements contained information about the value and prudence of the Plans' single largest investment, Citigroup stock, the statements related to Plan benefits.

Moreover, Defendants' attempt to describe the disclosure allegations as purely corporate and unrelated to Plan management misses the point. First, reasonable employees could believe that Citigroup, the Administration Committee and Prince were communicating with them both in their capacities as employers and as Plan fiduciaries when the communication related to Plan benefits. *Varity*, 516 U.S. at 504. In the context of an employee benefit plan invested in employer stock, communications from a company such as Citigroup to employees about the Company's viability may be viewed by employees as communications about plan benefits, depending on the factual context. Because it is an inherently factual inquiry as to whether such communications are made in a corporate or fiduciary capacity, such claims are not subject to a motion to dismiss. *See In re Cardinal Health ERISA Litig.*, 424 F. Supp. 2d 1002, 1045 (S.D. Ohio 2006) ("the law regarding a fiduciary's duty of disclosure" and whether one "is acting in a fiduciary capacity" makes such issue "not appropriate for a motion to dismiss"); *Agway*, 2006 U.S. Dist. LEXIS 74670, at *51. Second, the Complaint does not allege that Defendants violated

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filings incorporated by reference into plan-related documents); *see also AEP,* 327 F. Supp. 2d at 825, 832 (finding that where defendants chose to "incorporate AEP's SEC filings into the SPD, the SEC filings became fiduciary communications," and rejecting argument that defendants had no duty to investigate these SEC filings, explaining that, "once one who is acting in a fiduciary capacity endeavors to discuss the plan, he may 'not affirmatively miscommunicate or mislead plan participants about material matters regarding their ERISA plan.'").

[45] Defendants' contention that such allegations are insufficient because they fail to particularize specific misleading communications or identify which defendants made them is unavailing. As set forth above, the claims herein are subject to Rule 8(a), not Rule 9(b) pleading requirements. Plaintiffs need not identify each defendant "by name each time the Complaint makes an allegation that applies equally to all." *Polaroid*, 362 F. Supp. 2d at 470-71; *CMS*, 312 F. Supp. 2d at 890-91 (same).

ERISA by acting in corporate capacities. Rather, the claims are based on their failure to take appropriate action to protect the Plans in light of the Company's improper practices. This negligent conduct is not a corporate function; rather, it is a discretionary act of Plan administration and management, and failures thereof, which goes to the heart of Defendants' fiduciary responsibilities in this case. *See, e.g., CMS*, 312 F. Supp. 2d at 910-11 (rejecting similar effort to conflate allegations in ERISA company stock action with corporate conduct).[46]

Contrary to Defendants' argument, abundant case law confirms that Plaintiffs' allegations are sufficient to state a claim for fiduciary breach under ERISA.[47] *WorldCom*, 263 F. Supp. 2d at 766-67 ("[t]hose who are ERISA fiduciaries, however, cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings."); *Sprint*, 388 F. Supp. 2d at 1227 ("The key distinction … is that false statements in SEC filings cannot create fiduciary status, but they can form the basis for liability against a fiduciary.")[48]

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[46] Further, Citigroup and Prince had a duty to inform other fiduciaries, including the Administration Committee, of information necessary to protect Plan participants. *See* §III.E., *infra.*

[47] The cases cited by Defendants are all distinguishable. *See Kirschbaum*, 526 F.2d at 257 (declining to hold fiduciaries who prepare or sign SEC filings liable for making alleged misleading statements in those filings because the filings were not incorporated by reference in the SPD distributed to plan participants and thus the statements in the filings were not directed to plan participants); *Crowley v. Corning, Inc.*, 234 F. Supp. 2d 222, 228 (W.D.N.Y. 2002) (company was not an ERISA fiduciary with respect to the plan at all and court declined to hold that statements concerning future performance made it a fiduciary with respect to those statements); *WorldCom,* 263 F. Supp. 2d at 760-761 (certain director defendants were not otherwise alleged to have been fiduciaries and court declined to hold that the filing of SEC statements alone made them fiduciaries); *In re Calpine Corp. ERISA Litig.*, 2005 WL 3288469, at *9 (N.D. Cal. Dec. 5, 2005) (no allegations that the SPD directed plan participants to rely on the company's SEC filings); *Varity*, 516 U.S. 489 (1996) (same); *Marks v. Newcourt Credit Group Inc.*, 342 F.3d 444, 454 n.2 (6th Cir. 2003) (no allegations of misrepresentations regarding plan's largest holding or that the SPD directed plan participants to rely on the company's SEC filings); *Hull v. Policy Mgmt. Sys. Corp.*, 2001 WL 1836286, at *3 (D.S.C. Feb. 9, 2001) (declining to hold fiduciaries liable for misleading statements regarding the value of the company (and thus company stock) where there were no allegations that fiduciaries encouraged or caused the plan to purchase company stock, or that the SPD directed participants to rely on company's SEC filings).

[48] *See also Kmart*, 278 F. Supp. 2d at 875-78; *CMS*, 312 F. Supp. 2d at 915-16; *Ferro*, 422 F. Supp. 2d at 865; *In re Sears, Roebuck & Co. ERISA Litig.*, 2004 U.S. Dist. LEXIS 3241, at *6 (N.D. Ill. Mar. 3, 2004); *Pietrangelo*, 2005 U.S. Dist. LEXIS 40832, at *23; *In re Honeywell Int'l ERISA Litig.*, 2004 U.S. Dist. LEXIS 21585, at *9 (D.N.J. Sept. 14, 2004); *In re GM ERISA Litig.*, 2007 U.S. Dist. LEXIS 63209, at *10-14.

3. Truthful Disclosure Would Have Prevented Plan Losses

Contrary to Defendants' suggestion, whether correction of the previously misleading disclosures would have resulted in the same or greater losses is purely a factual question, inappropriate for resolution on a motion to dismiss. *See, e.g.*, *Enron*, 284 F. Supp. 2d at 566; *Westar*, 2005 U.S. Dist. LEXIS 28585; *Kling*, 323 F. Supp. 2d at 143.[49] *See also Ford*, 2008 WL 5377955, at *12 (rejecting argument that because the market values stock efficiently upon receipt of adverse information, plaintiffs could not show they were damaged by company's alleged non-disclosures). The *Ford* court noted that to adopt defendants' argument, it "would have to conclude that ESOP fiduciaries have no duty under ERISA to consider their plan beneficiaries' level of risk tolerance," and concluded that "this would, in one fell swoop, demote the ERISA duty of prudence from being 'the highest known to law,' to being largely illusory." *Id.* at *12.

Defendants also err in arguing that the Plaintiffs' theory of liability would require Plan fiduciaries to violate insider trading laws.[50] While insider trading laws prevent participants and

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49 The cases cited by Defendants are inapposite. *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. Ill. 2002), is not an ERISA case and provides no analysis applicable here. In *Avaya*, the stock dropped only slightly as a result of "corporate developments that were likely to have a negative effect on the company's earnings" and then fully recovered. 503 F.3d at 348-49 & n.13. *Graden v. Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 459-60 (D.N.J. 2008), which relied on *Avaya*, likewise involved primarily earnings shortfalls. In such case, as the court noted, disclosure of the earnings miss immediately brought about the stock drop attributable to the undisclosed facts. Here, the situation is not so simple, as there were a myriad of facts that should have been disclosed. Moreover, had Citigroup announced its subprime exposure at the end of 2006 (by which time Plaintiffs allege Citigroup, Prince and Rubin became aware of the impending collapse of the subprime mortgage industry), Citigroup stock may have declined a few points, but would certainly not have collapsed to the preposterous levels it ultimately did – and meanwhile the Plans could have avoided much of their losses by reducing holdings in Citigroup stock (in particular as the worst in the subprime mortgage market came later, beginning around June 2007, with news of the collapse of two Bear Stearns hedge funds heavily invested in subprime mortgages, ¶¶ 133, 152). Citigroup's share price also fell significantly due to a loss of the Company's credibility and its exposure to multi-billion dollar lawsuits from investors who were deceived by Citigroup's misrepresentations, which would not have occurred had the adverse information been disclosed right away. ¶ 184. Also, had Citigroup immediately disclosed that the SIVs it managed contained subprime mortgage assets, Citigroup could have avoided much of its losses as investors in the SIVs had not suffered heavy losses at the time, and thus could have sold before the subprime market came crashed in June-July 2007. Any new investors in the SIVs could not have claimed that Citigroup caused them to invest in the SIVs based on misleading statements that the SIVs were safe investments and contained no subprime assets. ¶¶179-81. At any rate, all this serves to underscore that such issues are not appropriate to resolve on this motion to dismiss. *See Ferro*, 422 F. Supp. 2d at 863 (loss causation is a "speculative issue" not appropriate on a motion to dismiss).

50 *In re McKesson HBOC Inc. ERISA Litig.*, 2002 WL 31431588 (N.D. Cal. Sept. 30, 2002), and *Hull v. Policy Mgt. Systems Corp.*, 2001 WL 1836286 (D.S.C. Feb. 9, 2001), have been severely criticized and rejected by numerous

plan fiduciaries from selling Citigroup stock based on non-public information, they do not prohibit disclosure of material information to plan fiduciaries, plan participants, or the public at large, or prevent fiduciaries with non-public information from refraining from further purchases of stock inflated by non-public information. For example, it would have been entirely consistent with the securities laws for Defendants Citigroup, Prince, or Rubin to simultaneously disclose the adverse information to other shareholders and the public at large. While some decisions may question whether disclosure can prevent losses on stock already held by the Plan, there is no question that timely disclosure of material information can spare plan participants from losses arising from the future purchase of additional stock inflated by undisclosed facts.

Defendants' position has been rejected by several courts including those in this District.[51] Insider trading rules are not implicated. At most, issues involving the interplay of ERISA and the securities laws raise issues of causation and damages, once again inappropriate for resolution on a motion to dismiss. *See, e.g., Pietrangelo*, 2005 U.S. Dist. LEXIS 40832, at *12-15; *JDS Uniphase Corp. ERISA Litig.*, 2005 WL 1662131, at *9 (N.D. Cal. Jul. 14, 2005).[52]

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courts. *See, e.g.*, *Westar*, U.S. Dist. LEXIS 28585, at *50-53; *Enron*, 284 F. Supp. 2d at 566. *Kirschbaum*, 526 F.3d at 256, does not categorically state that insider trading rules would be violated but states that "in some cases" that might be the case, indicating that the issue would not be an appropriate basis for dismissing a complaint. In *Harzewski v. Guidant Corp.*, 489 F.3d 799, 808 (7th Cir. 2007), the court stated it "probably" would be unlawful to sell the company's stock based upon inside information, but said nothing about restricting further purchase of company stock. *See Wright*, 360 F.3d at 1098 (same).

[51] *See WorldCom*, 263 F. Supp. 2d at 765 ("potential liability to employees who invested in WorldCom stock through the Plan for violations of the federal securities laws cannot shield him from suit over his alleged failure to perform his quite separate and independent ERISA obligations"); *AOL*, 2005 U.S. Dist. LEXIS 3715, at *20 (holding dismissal "not appropriate on this ground."); *Enron*, 284 F. Supp. 2d at 565-66 (the duties imposed by federal securities laws do not, absent express congressional intent, prevent the additional duties under ERISA); *DOL Enron Amicus* at 26 ("Defendants' duty to "disclose or abstain" under the securities laws does not immunize them from a claim that they failed in their conduct as ERISA fiduciaries").

[52] Plaintiffs intend to present evidence developed through discovery that if the facts that made Citigroup an inappropriate investment had been made known to Plan fiduciaries and the market-at-large, a prudent fiduciary would still have sold, sparing the Plans substantial losses.

D. Count III Properly Pleads Claims Against Citigroup and the Director Defendants for Failure to Monitor

1. ERISA Requires Appointing Fiduciaries to Monitor Their Appointees

The Complaint alleges that Defendants Citigroup, Prince, and Rubin had a duty to monitor Citibank, and the Administration and Investment Committees, which included a duty to provide them with complete and accurate information in their possession that they knew or reasonably should have known the monitored fiduciaries would need to prudently manage the Plans and the Plans' assets. ¶¶ 44-46, 57, 246.[53]

The duty to monitor is firmly entrenched under ERISA. As the DOL stated in an interpretive bulletin:

> FR-17 Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to these appointments?
>
> A: At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.

ERISA Interpretive Bulletin, 29 C.F.R. §2509.75-8 at FR-17; Brief of the Secretary of Labor as Amicus Curiae in Opposition to Motion to Dismiss at 4-5, *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y. Jan. 15, 2004) ("*DOL WorldCom Amicus*"), available at http://www.dol.gov/sol/media/briefs/WorldCom-1-16-04.pdf. ("The prudent appointment, retention and, if appropriate, removal, of plan fiduciaries and service providers is essential to the proper operation of benefit plans, and is an aspect of plan administration.").

Consistent with the DOL's position, legions of cases have held that the power to appoint carries with it a fiduciary duty to monitor one's appointees, and ensure they comply with their

[53] As set forth above, the Complaint also alleges that Citigroup and Prince were fiduciaries because they appointed the Citigroup Plan trustee, ¶¶ 47, 58, 61, and that Citigroup retained certain Plan management and administration duties. ¶¶ 48, 49.

fiduciary duties. *See Leigh v. Engle*, 727 F.2d 113, 135 & n.33 (7th Cir. 1984) (fiduciary responsible for selecting and retaining other fiduciaries is "obliged to act with an appropriate prudence and reasonableness in overseeing" the appointees' management of plan assets, including a duty of "surveillance and oversight" of the appointees).[54]

2. Defendants' "Monitoring" Arguments Are All Flawed

First, Defendants assert that because the underlying imprudence claim is not viable, it renders moot the monitoring claim. However, as set forth above, Plaintiffs have adequately pled the underlying imprudence claim.[55] Moreover, even if the imprudence claim were not upheld, Defendants overlook that the duty to monitor is an independent duty, requiring a separate analysis from the duty under Count I to manage the Plans' assets prudently and loyally, such that a monitoring claim may still be had.[56] *See, e.g.*, *JDS Uniphase*, 2005 WL 1662131, at *2-3

[54] *See also Polaroid*, 362 F. Supp. 2d at 477 ("An appointing fiduciary's duty to monitor his appointees is well-established.") (listing cases); *WorldCom*, 263 F. Supp. 2d at 765 (same); *Mehling v. N.Y. Life Ins. Co.*, 163 F. Supp. 2d 502, 509-10 (E.D. Pa. 2001); *Howell v. Motorola, Inc.*, 337 F. Supp. 2d 1079, 1099 (N.D. Ill. 2004) (citing cases).

[55] Defendants also argue that the monitoring claim should be dismissed as: 1) Plaintiffs failed to allege supporting facts; 2) neither the Monitoring Defendants, nor the monitored fiduciaries, had any discretion to divest Citigroup stock as an investment option under the Plans; 3) Citigroup stock was not an imprudent investment; and 4) ERISA provides no duty to keep other fiduciaries informed with information that might affect the value of the company's stock. Each of these grounds is mistaken. The Complaint provides specific detail as to Citigroup's undisclosed huge and risky venture into the subprime CDO and mortgage backed securities market (*see supra* at §II.; Compl. ¶¶ 130-135, 185-187); and the Administration and the Investment Committees and Citibank did have discretion to divest the Citigroup stock held by the Plans (*supra* §III.B.1.-2.); as described *supra*, §III.B.3.c.-d., Citigroup's massive exposure to the subprime mortgage market rendered the Company's stock an imprudent investment for the Plans; and Citigroup and the Director Defendants had a duty to provide this information to the Administration and Investment Committees and Citibank, yet failed to do so. *See infra* at §III.E.; ¶¶ 46-47, 57-59, 243-252.

[56] For example, if the Court dismissed Count I in its entirety upon a finding that the Administration and Investment Committees and Citibank could not have known that Citigroup stock was imprudent, and that Citigroup did not have a duty to investigate whether Citigroup stock was an imprudent investment, the Court can still find that Citigroup and/or the Director Defendants knew that Citigroup stock was imprudent and that they should have provided this information to the Administration and Investment Committees and/or Citibank. None of the cases Defendants cite hold that dismissal of prudence claims automatically moots monitoring claims. In *Coca-Cola*, 2007 WL 1810211, at *12, the court found that the company's stock was not an imprudent investment but was a "robust and viable investment option," so none of the defendants could have prevented any loss by satisfying their monitoring duties. *See also Pugh*, 521 F.3d at 699-700 (finding there were no allegations any of the defendants knew company's stock may have been imprudent); *Avaya,* 503 F.3d at 349 (finding that mere stock fluctuations are not sufficient to render a company's stock imprudent); *Wright*, 360 F.3d at 1099 (same). In *Smith v. Delta Air Lines, Inc.*, 422 F. Supp. 2d 1310, 1327 (N.D. Ga. 2006), the court held that it was possible for an appointing fiduciary to be liable for failing to

(dismissing claim for failure to manage plan assets prudently and loyally as to director defendants, but upholding the failure to monitor claim against these same director defendants).

Next, Defendants argue that *Coyne & Delany Co. v. Selman*, 98 F.3d 1457 (4th Cir. 1996), and *Calpine*, 2005 WL 1431506, at *6, advocate for an "appropriately narrow" view of the duty to monitor appointees. Def. Br. at 36-39. Plaintiffs do not necessarily dispute that the duty to monitor claim is a narrow one; however, as courts have held, an analysis of the precise contours of the Defendants' duty to monitor at the Rule 12(b)(6) stage is premature because appropriate ERISA-mandated monitoring procedures may vary in accordance with the nature of the plan and other facts and circumstances specifically relevant to the case at bar.[57]

Plaintiffs do not allege the Monitoring Defendants are liable for investment decisions or for second-guessing the decisions of the Investment or Administration Committee members. As explained by the Department of Labor, the duty to monitor does ***not*** require the appointing fiduciary to second-guess every decision of its appointee, guarantee the wisdom of the appointee's decisions, assume direct responsibility for duties properly allocated to other fiduciaries, or to vouchsafe every decision they make. *See DOL WorldCom Amicus*, at 6-9 (noting as well that "a[t] a minimum … the duty of prudence requires that they have procedures in place so that on an ongoing basis they may review and evaluate whether investment fiduciaries are doing an adequate job.").

Instead, consistent with DOL guidance and the authority cited above, the Complaint alleges that the Monitoring Defendants breached their fiduciary duty to monitor by failing to engage in ***any*** monitoring, or undertake ***any*** effort to provide their appointees with information

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provide its appointees with material information relating to the company's financial health, but dismissed the "failure to inform component of" the duty to monitor claim due to pleading deficiencies.

[57] *See, e.g.*, *EDS*, 305 F. Supp. 2d at 671 (E.D. Tex. 2004) ("at this stage of the proceedings, the Court will not endeavor to define the duty to monitor's outer edges with no factual record to indicate how far this case may or may not push those edges"); *CMS*, 312 F. Supp. 2d 898 (same).

Defendants knew or should have known would be critical to the Plans, or to remove appointees who failed to faithfully discharge their Plan duties. ¶ 250. These allegations are well pled as demonstrated by the many cases directly on point. *See Polaroid*, 362 F. Supp. 2d at 477 (sustaining similar monitoring claims where plaintiffs alleged defendant failed to take any steps to monitor appointees); *WorldCom*, 263 F. Supp. 2d at 765 (same).

Defendants also argue that the duty to monitor is not breached absent notice of "improper behavior" by the appointees, and that Plaintiffs fail to allege the requisite "causal link" between the failure to monitor and the Plan losses. Defendants continue to be wrong. The Complaint details why Citigroup stock was an imprudent investment for the Plans' assets, ¶¶ 120-303, and that the Defendants, including the Monitoring Defendants, knew or should have known this. ¶¶ 130-133, 155, 185-190. Thus, the Monitoring Defendants were on notice that their appointees were not fulfilling their fiduciary obligations when the appointees continued to maintain and permit the investment of the Plans' assets in Citigroup stock during the Class Period. In light of their appointees' ongoing fiduciary breaches, it is clear that, as alleged, the Monitoring Defendants failed to take any steps to monitor their appointees. ¶ 250. Monitoring fiduciaries cannot "appoint the committee members, then turn a blind eye to the appointees' performance of their duties." *Sprint*, 388 F. Supp. 2d at 1232.[58]

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[58] Defendants argue that even if the Monitoring Defendants removed their appointed fiduciaries for failing to perform their duties, the Complaint contains no allegations that the newly appointed fiduciaries would have believed Citigroup stock was not an imprudent investment. Def. Br. at 45-46. First, the Complaint describes other steps that could have been taken to avoid Plan losses, including assuring that "the monitored fiduciaries appreciated the true extent of Citigroup's highly risky and inappropriate business practices, and the likely impact of such practices on the value of the Plans' investment in Citigroup stock." ¶ 250. Moreover, nothing prevented the Monitoring Defendants from appointing fiduciaries that already understood the true extent of Citigroup's highly risky and inappropriate business practices. Further, had the Monitoring Defendants' newly-appointed fiduciaries adequately investigated Citigroup's subprime holdings, they would have determined that Citigroup's stock was an imprudent Plan investment. If they did not, they would have breached their fiduciary duties like the Administration and Investment Committees did here, and Defendants would be liable. Finally, Defendants' argument that Plaintiffs fail to adequately allege any harm caused by the failure to monitor is without merit. Had Citigroup or the Director Defendants informed the Administration and Investment Committees and/or Citibank of Citigroup's massive subprime exposure, the Plans would have avoided much of their losses. *See* discussion *infra*.

At minimum, the Monitoring Defendants should have informed their appointees of the undue risks posed by Citigroup stock and, had any appointees ignored such risks, removed them. *See* ¶ 250; *Polaroid*, 362 F. Supp. 2d at 477 (sustaining duty to monitor claims where plaintiffs alleged defendant "failed to ensure that the monitored fiduciaries had access to knowledge about the Company's business problems ..., failed to ensure that the monitored fiduciaries appreciated the huge risk inherent in the significant investment by rank and file employees in Polaroid stock, and conveyed incomplete and inaccurate information") (internal quotations omitted).[59] However, as the Plans lost billions of dollars in retirement savings, the Monitoring Defendants did nothing, strongly supporting the allegation that either they had no system in place to review and evaluate the performance of their appointees, or turned a blind eye to their appointees' breaches. ¶¶ 196, 248. Thus, the Monitoring Defendants breached their duties, causing the Plans to suffer huge losses. ¶ 251. Therefore, Count III should be upheld.[60]

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[59] As the Secretary of Labor herself explained:

> It is important to note, however, that designating another person or entity to manage a plan ***does not*** relieve the CEO -- or other named fiduciary – of responsibility or liability. The CEO or designating official has a responsibility to ***monitor*** the performance of the fiduciary of the plan. That means reading their reports, holding regular meetings regarding the performance of the plan, ***and providing the designated plan managers with necessary information***. It also means updating plan documents and taking action if the designated fiduciary makes imprudent decisions.

Elaine L. Chao, United States Secretary of Labor, Get it Right: Responsibilities of an ERISA Fiduciary (May 28, 2004) available at http://www.dol.gov/_sec/media/speeches/20040528_Yale.htm (additional emphasis added).

See also WorldCom, 263 F. Supp. 2d at 765 (same); s*ee also Enron*, 284 F. Supp. 2d at 659 (upholding monitoring claims against defendants for failing to investigate adequately, and failing to provide other fiduciaries with material information regarding the financial condition of Enron); *BellSouth*, 313 F. Supp. 2d at 1370 (upholding claim that defendants breached their duty to monitor by, *inter alia*, failing to disclose information to the investment committee "that would have led it to discover the imprudence of investing in Company stock."); *Sprint*, 388 F. Supp. 2d at 1232 ("[s]uffice it to say that, for purposes of resolving the Sprint defendants' motion at this procedural juncture, the court simply rejects the Sprint defendants' argument that the directors were free to appoint the committee members, then turn a blind eye to the appointees' performance of their duties."); *Southern*, 396 F. Supp. 2d at 1373 (duty to keep appointees informed has gained "wide acceptance as an inherent facet of the more general 'duty to monitor'") (citations omitted).

[60] Defendants' cases are unavailing. Plaintiffs in *Crowley*, 234 F. Supp. 2d 222, did not allege a duty to monitor claim. In *WorldCom*, the court dismissed monitoring claims against WorldCom's non-officer directors (while *sustaining* them against President and CEO Ebbers) because the complaint did not allege that the board actually appointed anyone. The court therefore concluded that plaintiffs had not sufficiently alleged that the directors

E. Count IV Properly Pleads Claims Against Citigroup and the Director Defendants for Breach of Fiduciary Duty To Disclose Necessary Information to Co-Fiduciaries

The Complaint also adequately pleads claims against Defendants Citigroup, Prince and Rubin for failing to disclose to their co-fiduciaries, in particular the Administration and Investment Committees, the above-described non-public information about the risks of Citigroup stock, which they knew such co-fiduciaries needed to fulfill their own duties to protect Plan interests. ¶¶ 255-59; *see Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec.*, 93 F.3d 1171 (3d Cir. 1996).[61]

Defendants' threshold argument that Citigroup, Prince and Rubin had no fiduciary duties with respect to the Plans is incorrect, as Plaintiffs adequately allege these Defendants' fiduciary status. *See* §III.C.2., *supra*.[62] In addition, contrary to Defendants' argument, Citigroup's and the Director Defendants' duty to appoint and remove fiduciaries (§III.D.2, *supra*)[63] includes the duty to provide such fiduciary appointees with information regarding the company's stock they need to effectively discharge their duty to prudently and loyally manage the investment.

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actually functioned as fiduciaries. *See Enron*, 284 F. Supp. 2d at 553, n.59 (upholding monitoring claims against board and distinguishing *WorldCom* on the basis that "WorldCom did not appoint anyone as a fiduciary and there apparently were no allegations that [the defendants at issue] functioned as fiduciaries, *i.e.*, actually appointed persons to or removed persons from such positions."). In *McKesson* and *Hull*, the plaintiffs did not allege failure-to-monitor-appointee claims. Moreover, the court in *Hull* recognized that a duty to appoint may include a duty to monitor. *Hull*, 2001 WL 1836286, at *7 (after dismissing the claims against the director defendant because there were no allegations of a failure to supervise, court noted that the Board's "right to remove Committee members might be stretched to include a duty of supervision."). Finally, the weight of both *Hull* and *McKesson* has been called into question by numerous courts. *See, e.g., Kmart*, 278 F. Supp. 2d at 876-78; *CMS*, 312 F. Supp. 2d at 914-15; *Enron*, 284 F. Supp. 2d at 565-67. *Beauchem v. Rockford Prods. Corp.*, 2003 U.S. Dist. LEXIS 5546, at *4-6 (N.D. Ill. Mar. 24, 2003), is in direct conflict with *Leigh*, where the Seventh Circuit held that fiduciaries responsible for selecting and retaining their close business associates as plan administrators had a duty to monitor appropriately the administrators' action. *Leigh*, 727 F.2d at 135; *see also Howell*, 337 F. Supp. 2d at 1097-98 (declining to follow *Beauchem*).

[61] The Administration and Investment Committee Defendants should have sought information concerning the risks posed by an investment in Company stock as part of a thorough and careful investigation but failed to do so. ¶ 257.

[62] Contrary to Defendants' suggestion, Plaintiffs do not allege that Citigroup undertook fiduciary duties merely as a result of sponsoring the Citigroup Plan. *See* §III.B.2.b., *supra.*

[63] *See also Liss*, 991 F. Supp. at 310 (power to appoint plan trustees confers fiduciary status).

Moreover, it is well-established that the duty to inform other fiduciaries of information they need to comply with their fiduciary duties exists even if the fiduciary does not otherwise have disclosure obligations.[64] Because both Citigroup and the Director Defendants were Plan fiduciaries, they had a duty to inform other fiduciaries of material information that they knew other fiduciaries did not have and that was necessary to protect the Plans and their participants.[65]

Finally, Defendants' argument that Citigroup, Prince, and Rubin should not be required to disclose the material adverse information about Citigroup stock to their appointed co-fiduciaries necessary for these co-fiduciaries to fulfill their duties, because, purportedly, this may have violated the securities laws, is inapposite for the same reasons as their similar argument seeking to disclaim liability for their nondisclosure to Plan participants. *See* §III.C.3., *supra*.[66]

F. Count V Properly States a Claim for Breach of Duty to Avoid Conflicts of Interest

It is well-settled that ERISA fiduciaries have a duty to avoid conflicts of interest in the performance of their fiduciary functions. *Donovan*, 680 F.2d at 271 ("[ERISA] imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to [Plan]

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[64] *See Glaziers*, 93 F.3d at 1181 (rejecting argument that disclosure of the information was outside the scope of the broker-dealer's fiduciary responsibility, noting that "[t]he duty to disclose material information 'is the core of a fiduciary's responsibility.'") (citation omitted); *Ream v. Frey*, 107 F.3d 147 (3d Cir. 1997) (holding that a bank trustee had the duty to disclose that it had resigned as trustee and was forwarding plan assets to the plan administrator which it knew was neglecting his fiduciary duties even though the trustee had no disclosure obligations); Department of Labor Field Assistance Bulletin No. 2004-03 available at http://www.dol.gov/ebsa/regs/fab_2004-3.html, (stating that a directed trustee, whose duties are generally limited to following directions, has a duty to inform other fiduciaries if it has inside information that continued investment in employer stock is imprudent).

[65] Defendants' argument that Plaintiffs' allegations fail to satisfy Rule 9(b) is without merit. *See supra*, §III.A.

[66] Defendants' lone authority, *Thompson v. Avondale Indus. Inc.*, 2003 WL 359932 (E.D. La. Feb. 14, 2003), is inapposite as it contains no analysis but simply makes a statement that insider trading rules would have been violated if material non-public information had been provided to other fiduciaries.

participants.").[67] Here, the Complaint alleges that Plan fiduciaries subordinated the Plan participants' interests in favor of their own personal and/or corporate interests. ¶¶193-195, 260-267. Specifically, Plaintiffs allege that the compensation and tenure of the Director Defendants was tied to the performance of Citigroup stock, and that, to serve their own pecuniary interests, and to avoid drawing attention to Citigroup's and their own inappropriate business practices, these Defendants failed to take appropriate action to swiftly reduce the amount of Citigroup stock and cease purchasing additional Citigroup stock for the Plans, when they knew or should have known that the stock was an imprudent investment. ¶¶ 264-65, 273-76. Indeed, Prince and Rubin benefitted from the personal sale of $18 million of Citigroup stock, while causing the Plans to retain all of their Citigroup stock to help prop up its price. ¶¶ 194-95, 264, 276.

Additionally, the Complaint alleges that all Defendants knew or should have known about Citigroup's massive subprime exposure, yet failed to take steps to avoid conflicts of interest, such as engaging independent advisors who could make independent judgments concerning the Plans' investment in Citigroup stock or notifying appropriate federal agencies, including the DOL, of the facts and transactions which made Citigroup stock an unsuitable Plan investment. ¶¶ 130-133, 265, 185-194; *see Donovan*, 680 F.2d at 271; *Shirk v. Fifth Third Bancorp*, 2007 U.S. Dist. LEXIS 26534 (S.D. Ohio Apr. 9, 2007) ("where the interests of the individual Defendants, as corporate officers, to protect the company and their own assets,

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[67] *See also Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984) ("The prudent man standard, combined with the duty of loyalty, "imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation."); *John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 367 (2d Cir. 1994) ("Where fiduciary duties arise under ERISA, they must be enforced without compromise to ensure that fiduciaries exercise their discretion to serve all participants in the plan."). Furthermore, when the activity in question relates to company stock transactions in which the loyalty of the fiduciaries can be questioned, the fiduciary standards are heightened even further. *See Howard v. Shay*, 100 F.3d 1484, 1488-89 (9th Cir. 1996) ("When it is possible to question the fiduciaries' loyalty, they are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries.") (citations omitted). *See also In re First Am. Corp. ERISA Litig.*, 2008 U.S. Dist. LEXIS 83832, at *22- 23 (C.D. Cal. July 14, 2008) (upholding duty to avoid conflicts of interest claim); *Ferro*, 422 F. Supp. 2d at 866 (under ERISA, the duty of loyalty includes the duty to avoid conflicts of interest); *In re GM ERISA Litig.*, 2006 U.S. Dist. LEXIS 16782, at *56 (E.D. Mich. Apr. 6, 2006) (upholding duty to avoid conflicts of interest claim).

conflicted with their interests to protect the Plan, allegations that the individual Defendants took no ameliorating steps such as appointing an independent fiduciary or seeking independent advice sufficiently states a claim at this stage of the case for breach of the duty to avoid conflicts of interest").[68]

In any event, the determination of the existence of a conflict is a question of fact that can only be determined after development of a full and complete record, rendering it inappropriate for disposition at this state of the pleadings. *See Sears,* 2004 U.S. Dist. LEXIS 3241 (declining to dismiss breach of loyalty claim where plaintiffs allege defendants' compensation was tied to price of company stock).[69] Here, Defendants are on notice of the claims against them and the grounds upon which those claims rest.

G. Count V Properly Alleges Co-Fiduciary Liability Against All Defendants

ERISA's co-fiduciary provisions ensure that fiduciaries cannot stand idly by while their co-fiduciaries act against participants' interests. *Enron*, 284 F. Supp. 2d at 581. Defendants' arguments on this point are meritless. To begin, Defendants restate the obvious when they note

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[68] Defendants' cases are again unavailing. *WorldCom*, 263 F. Supp. 2d at 768, did not find the absence of a conflict where it was alleged that compensation was tied to stock performance; rather it found those claims insufficient where the plaintiffs failed to also allege that the defendant's "personal investments caused him to take or fail to take any actions detrimental to the Plan *while* he was wearing his 'fiduciary hat.'" 263 F. Supp. 2d at 768 (emphasis added). Here, as detailed throughout the Complaint, Plaintiffs do allege that Defendants, while acting in a fiduciary capacity and while armed with knowledge of Citigroup's improper conduct, failed to avoid or remedy obvious conflicts of interest. ¶¶ 130-133, 265, 185-194. Similarly, in *Polaroid*, 362 F. Supp. 2d at 479, the court did not dismiss plaintiffs' conflict claims because they alleged that defendants' compensation was tied to stock performance but rather because: (a) only two of the defendants were actually compensated with stock; and (b) those two defendants actually took steps to minimize their stock-based compensation. 362 F. Supp. 2d at 479. Because this action bears no resemblance to the facts in *Polaroid* in this regard, the Court should not be swayed by Defendants' misplaced reliance on that case. *Calpine*, 2005 WL 1431506, at *8, held that the complaint failed to allege that stock sales by the director defendants conflicted with their fiduciary duties. Similarly, *AOL*, 2005 U.S. Dist. LEXIS 3715, held that allegations of stock sales alone are not sufficient to state a claim. Here, the Complaint does not rely on allegations of stock sales alone but specifically alleges that Defendants did not take any of the actions that would have satisfied their fiduciary duties "because Citigroup's compensation system for senior management and its corporate culture demanded unwaivering loyalty to Citigroup, its CEO, and the Company's interests." ¶¶ 192-94.

[69] *See also Herrington v. Household Int'l., Inc.* 2004 U.S. Dist. LEXIS 5461, at *17-18 (N.D. Ill. Mar. 31, 2004) ("it would be premature to dismiss the breach of loyalty claim based upon a conflict of interest at this juncture" where plaintiffs allege that that defendants' compensation was tied to the performance of company stock); *Southern,* 396 F. Supp. 2d 1368 (dismissal on a motion to dismiss inappropriate where plaintiffs have identified a likely conflict or have alleged "malfeasance on the part of the alleged fiduciary motivated by such a divided loyalty.").

that co-fiduciary liability attaches only to fiduciaries and only where there is a breach of fiduciary duty by another fiduciary.[70] As discussed herein, Plaintiffs have sufficiently identified the Plans' fiduciaries and the breaches they committed. *See, e.g., Kmart*, 278 F. Supp. 2d at 872 (where plaintiff sufficiently alleged fiduciary liability, it followed that plaintiffs had properly alleged co-fiduciary liability).[71]

Defendants' argument that the Complaint fails to allege the elements of co-fiduciary liability under ERISA §405 is equally unavailing. Section 405 provides for co-fiduciary liability on any of three grounds: a fiduciary's (1) knowing participation in or concealment of another fiduciary's breach; (2) enablement through failure to discharge his duties of another fiduciary's breach; and (3) failure to make reasonable efforts to remedy a breach of another fiduciary of which he has knowledge. The Complaint adequately alleges liability on each of these grounds:

> • Paragraph 272 alleges that the "Co-Fiduciary Defendants knew of the breaches by other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches."
>
> • Paragraphs 278 alleges that the "Co-Fiduciary Defendants' failure to monitor the other fiduciaries of the Plans enabled those fiduciaries to breach their duties."

These allegations clearly are sufficient to support a claim of co-fiduciary liability under ERISA §405.[72]

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[70] Defendants' suggestion that co-fiduciary liability can only extend to liability for the specific tasks for which each fiduciary was responsible is off the mark. Defendants ignore that "fiduciaries may be liable under §1105(a) even if their co-fiduciary's breach is beyond the scope of their own discretionary authority." *Polaroid*, 362 F. Supp. 2d at 480 (listing cases holding same); *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423, 445 (S.D.N.Y. 2005) (same). Defendants' reliance on *Kling v. Fidelity Mgmt. Trust, Co.*, 323 F. Supp. 2d 132, 144-145 (D. Mass 2004), is misplaced. In *Kling*, the court did not extend co-fiduciary liability to the Pension Committee (but did with respect to the Pension Committee members) because it found that plaintiff failed to plead that the Pension Committee was a fiduciary at all. *See Haber v. Brown*, 774 F. Supp. 877, 879 (S.D.N.Y. 1991) (same). Here, Plaintiffs have clearly pled that the Administration and Investment Committees were fiduciaries. ¶¶ 62-70; *see* §III.B.2.c.-d., *supra*.

[71] *CMS*, 312 F. Supp. 2d at 910 ("[h]aving declined to dismiss the fiduciary liability claims, the court will also decline to dismiss any of the co-fiduciary liability claims at this juncture").

[72] Nothing in the authorities cited by Defendants suggests otherwise. In *Lee v. Burkhart*, 991 F.2d 1004, 1011 (2d Cir. 1993) and *Haber*, 774 F. Supp. at 879, the courts concluded that the plaintiffs had failed to allege knowledge of the underlying fiduciary breach. Here, such knowledge is clearly alleged. The court in *Donovan v. Cunningham*,

H. ERISA §404(c) Does Not Require Dismissal of Any Aspect of the Complaint

Finally, Defendants argue that §404(c) of ERISA, 29 U.S.C. §1104(c), requires dismissal. Def. Br. at 50-53. This argument has been universally rejected on a motion to dismiss. Section 404(c) is an affirmative, fact-intensive defense that applies in a very limited set of circumstances, and is never suitable for resolution at the pleading stage. *Shirk*, 2007 U.S. Dist. LEXIS 26534 (holding that "'Section 404(c) provides defendants with a defense to liability; it does not mean that [Plaintiff have] failed to make out a claim against them.'") (citation omitted); *Woods v. Southern Co.*, 396 F. Supp. 2d 1351, 1367 (N.D. Ga. 2005) (collecting cases). The statute provides:

> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—
>
> > **(i)** such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
> >
> > **(ii)** no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control....

29 U.S.C. §1104(c). The "regulations of the Secretary" to which the statute refers are found at 29 C.F.R. §2550.404c-1. Under the regulation, a participant does not "exercise control" over his or her account, and hence the defense is not available, unless he exercises "independent control in fact." *Id*. This in turn "depends on the facts and circumstances of the particular case." *Id.*

Defendants' argument here fails for several reasons, including that Defendants failed to ensure effective participant control by providing complete and accurate material information to participants regarding Citigroup stock. ¶ 212, citing 29 C.F.R. §2550.404c-1(b)(2)(i)(B). *See*

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716 F.2d 1455 (5th Cir. 1983), remanded for resolution of the factual question of whether the co-fiduciaries had knowledge of the underlying breach. *Id*. at 1475. In *Stein v. Smith*, 270 F. Supp. 2d 157, 175 (D. Mass. 2003), the court dismissed the co-fiduciary liability claim because it concluded that the underlying fiduciary breach claims failed.

Compl. ¶¶ 208-214 for additional reasons why ERISA §404(c) is inapplicable.[73]

Moreover, the regulation is entirely irrelevant to claims that the investment being offered, company stock, is under the circumstances imprudent and should not be offered at all. ¶ 211. In the language of the statute, a loss from an imprudent investment does not "result from" the participant's exercise of control. The preamble to the regulation states:

> the act of designating investment alternatives … in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan.

Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans, 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992) (29 C.F.R. pt. 2550). The Department of Labor and the courts similarly hold that Section 404(c) is irrelevant to claims that an investment option is imprudent.[74] To remove any doubt as to the issue, the DOL is amending the regulation to reiterate its long held position that the relief afforded by this Section does not

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[73] *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 829 (S.D. Ohio 2004) ("The determination of whether an ERISA plan is an individual account plan is fact-intensive…Courts must look to the evidence and determine whether the participants could move their assets from one fund to another and whether the plan provided the participants with ample information, including adequate information to understand and evaluate the risks and consequences of alternative investment options*"); WorldCom,* 263 F. Supp. 2d at 764 ("a participant's control over his investment decisions is 'not independent' if a 'plan fiduciary has concealed material non-public facts regarding the investment from the participant'") (citation omitted).

[74] *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007); Amended Brief of the Secretary of Labor, Elaine L. Chao, As Amicus Curiae In Support of Plaintiffs-Appellants at 11, *Hecker v. Deere & Co.*, No. 07-3605 (7th Cir. Apr. 2, 2008) available at http://www.dol.gov/sol/media/briefs/Deere(A)-04-02-2008.pdf. Defendants' citation to *Langbecker v. Elec. Data Sys. Corp*., 476 F.3d 299, 312 (5th Cir. 2007), is inapposite, as the court recognized in that case that its holding would not be applicable to a situation like this case (citing *Enron* and *Worldcom*), "where the company's stock value ultimately rested on a financial house of cards." In *Hecker v. Deere & Co*., 496 F. Supp. 2d 967, 975-977 (W.D. Wis. 2007), which was not a company stock case and certainly not a "house of cards" case, the court warned that a motion to dismiss could be based on an affirmative defense such as §404(c) "only if the facts of the complaint establish all the elements of the defense," but found there from the face of the complaint that the company provided "precisely" the disclosures required by the applicable statute and there were no material nondisclosures.

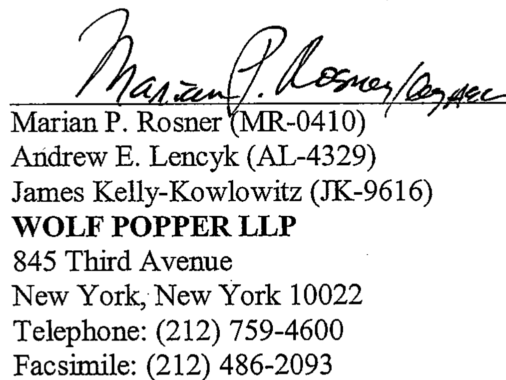
extend to a fiduciary's duty to prudently select and monitor investment options.[75]

The vast majority of cases to address the issue have held that §404(c) is an affirmative defense that must be pleaded and proved at trial and is not appropriately resolved at the pleading stage.[76] This Court should likewise hold that Plaintiffs have adequately alleged that the requirements for the §404(c) defense are not met, and that therefore Defendants cannot possibly carry their burden of establishing this affirmative defense.

IV. CONCLUSION

Plaintiffs sufficiently allege Defendants' breaches of their ERISA-mandated fiduciary duties and the devastation that those breaches caused. Although Defendants dispute Plaintiffs' allegations, Defendants' factual challenges are premature on their motion to dismiss. Moreover, the ERISA legal arguments made by Defendants have been rejected time and again in this Circuit and beyond, and should be rejected here as well. Accordingly, Defendants' motion should be denied.[77]

Dated: January 12, 2009



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[75] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Proposed Rule, 73 Fed. Reg. 43,018 (proposed July 23, 2008) (to be codified at 29 C.F.R. pt. 2550).

[76] *E.g., Worldcom,* 263 F. Supp. 2d at 764.

[77] Plaintiffs believe they have more than adequately stated claims on all Counts in the Complaint. In the event the Court should disagree in any respect, Plaintiffs respectfully request leave to amend. Fed. R. Civ. P. 15(a) directs that such leave "shall be freely given." *See also Foman v. Davis,* 371 U.S. 178, 182 (1962).

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