UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP ERISA LITIGATION	Master File No. 07 Civ. 9790 (SHS)(DCF) ECF Case
THIS DOCUMENT RELATES TO ALL ACTIONS	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

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Far from providing support, plaintiffs' opposition papers expose fatal flaws in their position. A central premise of plaintiffs' case is their claim that the Citigroup Plans do not require defendants to offer the Citigroup Common Stock Fund as an investment option, but rather give defendants the discretion to divest or limit participants' investments in Citigroup stock. But the governing documents provide the *opposite*: "*the Citigroup Common Stock Fund shall be permanently maintained as an Investment Fund under the Plan*." Therefore, plaintiffs' fundamental argument — that Plan fiduciaries failed to exercise this nonexistent authority to divest Citigroup stock — fails completely.

Some courts have stated that fiduciaries might be able to override plan terms and divest settlor stock in extraordinary situations where the plan sponsor is facing imminent collapse. As shown in our opening brief, however, plaintiffs' complaint does not and cannot plead "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest." *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008). Rather than contest that showing, plaintiffs now argue that events in November 2008, *after the class period* — when the world economy plunged into the worst downturn since the Depression — show that defendants should have predicted those unprecedented events and sold the Plans' Citigroup stock during the class period. Neither the defendants, nor the fiduciaries or managers of Citigroup's competitors such as Bear Stearns, Lehman Brothers, Merrill Lynch, Washington Mutual, and Wachovia — nor the plaintiffs themselves, who said nothing about this impending collapse when they filed their complaint in September 2008 — could have predicted these events.

ESOP fiduciaries do not act as advisors of a managed investment fund, charged with the responsibility of buying and selling assets to maximize returns, or predicting market

movements. Absent circumstances clearly not present here, they may not properly divest or limit investment in settlor stock. These principles were applied earlier this week when a federal court dismissed ERISA claims against the fiduciaries of the Huntington Bancshares 401(k) plan. Plaintiffs claimed that the fiduciaries should have halted investment in Huntington securities, after the stock lost over two-thirds of its value because of the bank's exposure to subprime mortgages. Rejecting that claim, the Court wrote:

> Defendants cannot be held to a standard that would require them to predict the future of the financial markets so as not to breach their fiduciary duties under ERISA.
>
> ….[I]t is clear that the federal courts are currently experiencing a significant rise in 'stock drop cases' due to the current status of the Stock Market and the economic climate in general, which of course includes the subprime lending crisis. However, ERISA was simply not intended to be a shield from the sometimes volatile financial markets.

In re Huntington Bancshares Inc. ERISA Litig., No. 2:08-cv-0175, 2009 U.S. Dist. LEXIS 9102, at *26-27 (S.D. Ohio Feb. 9, 2009).

For these reasons and those discussed in more detail below, the Complaint should be dismissed.

Argument

I. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF ANY DUTY TO PRUDENTLY AND LOYALLY MANAGE THE PLANS

Under the clear terms of the Plans, defendants had no discretion to remove or limit Company stock as an investment option. Nor have plaintiffs alleged sufficient facts to overcome the presumption applied by many courts that investment in settlor stock is prudent.

A. Defendants Were Not ERISA Fiduciaries <u>With Regard To The Plans' Investments In Citigroup Stock</u>

1. The Plans Mandated That Citigroup Stock Be Offered As An Investment Option

Our moving brief showed that the Plans require that the Citigroup Common Stock Fund be maintained as a permanent investment option, so that defendants did not have the discretion or authority to eliminate or restrict investment in Citigroup stock. (Def. Br. at 15-26.) Plaintiffs' argument to the contrary (Pl. Br. at 16-18) ignores the explicit language of the Plans.

The Plans could not more clearly mandate that Citigroup stock be offered as an investment option. The Citigroup Plan provides:

> <u>Investment Funds</u>. In order to allow each Participant to determine the manner in which his Accounts will be invested, *the Trustee shall maintain, within the Trust, the Citigroup Common Stock Fund* and other Investment Funds . . . . Any one or more of such Investment Funds may be eliminated, or new Investment Funds may be made available, at any time by the Investment Committee without consent by any Participant or Employer, <u>provided</u>, *the Citigroup Common Stock Fund shall be permanently maintained as an Investment Fund under the Plan*.

(Cplt. Ex. E, § 7.01, at 41 (underline in original, italics added); *see also* Cplt. Ex. D, § 7.01, at 29 ("[T]he Trustee *shall maintain*, within the Trust, the Citigroup Common Stock Fund . . . ."). This directive is reinforced by other parts of the Plans, which state that "provisions in the Plan *mandate the creation and continuation of the Citigroup Common Stock Fund*" (Cplt. Ex. E, § 7.09(e), at 44 (emphasis added); Cplt. Ex. D, § 7.09(e), at 32 (emphasis added)) and that "[t]he Plan *shall maintain* at least 3 Investment Funds in addition to *the Citigroup Common Stock Fund*" (Cplt. Ex. E, § 15.06(b), at 68 (emphasis added)).

Plaintiffs act as though this clear and unequivocal language doesn't exist. They focus on other language taken out of context in an effort to show that defendants could violate the intent of the Plans and eliminate or limit investments in Citigroup stock.

First, plaintiffs contend that the Citigroup Plans are designed to invest "primarily," but "not exclusively," in Citigroup common stock, so that the investment committee could have invested "all of the assets of the Citigroup Common Stock Fund in cash or short-term fixed investments." (Pl. Br. at 16-17.) The language on which plaintiffs rely is as follows:

> The Plan shall consist of a component that is designated as an ESOP within the meaning of Section 4975(e)(7) of the Code . . . . The component designated as an ESOP shall consist of any amount invested in the Citigroup Common Stock Fund under the Plan. . . . The component designated as an ESOP under the Plan *is designed to invest primarily in Citigroup Common Stock, a qualifying employer security* . . . .

(Cplt. Ex. E, § 15.01-02, at 67.) This language simply tracks Section 4975(e)(7) of the Internal Revenue Code, which defines an ESOP as a defined contribution plan that is "*designed to invest primarily in qualifying employer securities*." 26 U.S.C. § 4975(e)(7) (emphasis added). Like virtually all ESOP plans, the Citigroup Plan does not invest *all* of the Common Stock Fund in Citigroup stock, but maintains a small amount of cash and short-term investments to make distributions or pay benefits without needing to trade the stock on the open market. Thus, the Plans provide:

> *Solely in order to permit the orderly purchase of Citigroup Common Stock in a volume that does not disrupt the stock market and in order to pay benefits hereunder*, the Citigroup Common Stock Fund may hold cash and short-term investments in addition to shares of Citigroup Common Stock, in accordance with guidelines prescribed by the Investment Committee.

(Cplt. Ex. E, at 5; Cplt. Ex. D, at 3-4 (emphasis added).) Plaintiffs' argument that "the Plans expressly provide that the Citigroup Common Stock Fund may hold, with no stated limitations as to the percentage or amount, cash and short-term investments under the Plan" (Pl. Br. at 18 n.18) is wrong. Rather, the summary plan description provides that "The Citigroup Common Stock Fund is a collective investment fund that invests only in shares of Citigroup common stock, which are retained in this fund regardless of market fluctuations. *In the normal course, cash*

equivalents also will be held for liquidity purposes to meet administrative and distribution requirements." (Cplt. Ex. G, at CI-142 (emphasis added).) The "cash equivalents" are described as a "small portion of the fund." (*Id.*)

The plan in *Kirschbaum* contained language similar to that plaintiffs cite above, yet the Fifth Circuit found (as plaintiffs concede, Pl. Br. at 23 n.24) that the plan mandated offering of the stock fund with no apparent exceptions. There, the plan provided that the common stock fund was to be "*primarily* invested and reinvested" in the company's common stock, and that the common stock fund would hold a "short-term cash component as necessary to make any distribution or payment." 526 F.3d at 250. The Fifth Circuit had no difficulty concluding that neither the company nor the benefits committee were "given express direction to halt the purchase of REI common stock or invest Fund assets in other holdings." *Id.* Plaintiffs' cases are not to the contrary. For instance, *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1220-21 (D. Kan. 2004), found that the "primarily" language provided discretion only because the plan did not state that the cash or short-term investments in the stock fund could be used solely for liquidity purposes. And *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511, 668 (S.D. Tex. 2003), found that the plan "seemingly allowed complete discretion in how much may be invested in Enron stock" because it provided that the trustee "could hold up to 100 percent" of the assets in Enron stock and that the Company's matching contributions would be made "primarily" in Enron stock. *Id.* at 669.[1]

Second, plaintiffs argue that the investment committee had the discretion to "eliminate the requirement that certain contributions must remain in the Common Stock Fund"

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[1] *In re First American Corp. ERISA Litig.*, No. SACV 07-01357, 2008 U.S. Dist. LEXIS 83832, at *7 (C.D. Cal. July 14, 2008), and *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 859 (N.D. Ohio 2006), relied on *Sprint* and *Enron* without considering the specific factors that led those courts to find that the "primarily" language in those plans gave fiduciaries discretion.

and to "eliminate the Citigroup Common Stock Fund altogether, if under the circumstances there is a duty to do so." (Pl. Br. at 17.) This argument is based on language in the Plans that:

> 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 shall be modified, such duty shall be that of the Investment Committee.

(Cplt. Ex. E, § 7.09(e), at 44; Cplt. Ex. D, § 7.09(e), at 32.) This language means only that, "if it is determined" that a fiduciary duty exists to modify the plan, such modification should be done, not by a reviewing court, but by the investment committee. The language operates only after such a determination has been made — by no stretch does it give the investment committee, or anyone else, authority to override the requirement that the Citigroup Common Stock Fund be maintained.[2]

Third, plaintiffs argue that 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." (Pl. Br. at 18.) As we discuss below (*see* pp. 11 to 14, *infra*), these "rules and regulations" do not confer the power or discretion to limit or eliminate investments in Citigroup stock.

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[2] The language concerning the requirement that certain contributions be maintained in the Citigroup Stock Fund for a certain period of time is a relic from previous Plans. As the Complaint concedes, prior to the start of the class period, the Plans were amended — a settlor function — to eliminate the requirement that Citigroup matching contributions be maintained in the Common Stock Fund for any period of time. At all times during the class period, the Plans' participants had the ability to move those contributions out of the Common Stock Fund as soon as they were awarded. *See* Cplt. ¶¶ 85, 100.

2. Because The Plans Gave Defendants No Discretion With Respect To The Plans' Investments In Citigroup Stock, Defendants Were Not ERISA Fiduciaries With Regard To Those Investments

As the language of the Plans makes clear, none of the defendants had any discretion or authority over the Plans' investments in Citigroup stock and therefore were not ERISA fiduciaries with regard to those investments. Relying on cases that precede the Supreme Court's ruling in *Bell Atlantic* v. *Twombly*, 127 S. Ct. 1955 (2007), plaintiffs respond that they need only allege that defendants meet the statutory definition of fiduciary and that it is inappropriate to determine fiduciary status on a motion to dismiss. (Pl. Br. at 21.) To the contrary, fiduciary status is an element of a claim for breach of fiduciary duty under ERISA. As the Supreme Court held, "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1965. Thus, courts have dismissed claims for breach of fiduciary duty where plaintiffs have done no more than track the legal definition of fiduciary, with no supporting facts, as plaintiffs have done here. *See, e.g.*, *Gregory Surgical Servs., LLC* v. *Horizon Blue Cross Blue Shield of N.J., Inc.*, No. 06-0462, 2007 WL 4570323, at *5 (D.N.J. Dec. 26, 2007) ("The [complaint] alleges no facts supporting a finding that Horizon is a fiduciary, but instead states a legal conclusion that this Court is not bound to accept as true.").

(i) Plan Sponsors Citigroup And Citibank Did Not Function As Fiduciaries With Regard To Plan-Mandated Investments In Citigroup Stock

Plaintiffs do not dispute that Citigroup and Citibank are immune from suit for any actions taken in their settlor capacities and disclaim any intent to argue that Citigroup and Citibank were fiduciaries for purposes of Count I by virtue of their alleged appointment powers, alleged communications with employees, and corporate law tenets. (Pl. Br. at 22.) Instead, plaintiffs rely on the arguments that (1) Citigroup and Citibank were functional or *de facto* fiduciaries by exercising authority and control over the assets of the Plans and (2) Citigroup and

Citibank were fiduciaries under the doctrine of *respondeat superior*. (Pl. Br. at 21-23.) Plaintiffs' arguments are flawed.

First, plaintiffs' allegations that Citigroup and Citibank were functional or *de facto* fiduciaries are pled on *information and belief* and contain *no facts whatsoever* alleging that Citigroup or Citibank exercised any authority or control over the assets of the Plans. Plaintiffs point to paragraphs 49, 52, 56, and 256 of their Complaint to argue that they sufficiently alleged that Citigroup and Citibank were functional or *de facto* fiduciaries. (Pl. Br. at 21-22.) Those allegations — that Citigroup and Citibank were fiduciaries because they exercised "(i) fiduciary authority, control or responsibility over Plan management or Plan administration and/or (ii) authority or control over management of disposition of the Plans' assets" (*e.g.* Cplt. ¶ 52) — merely parrot the legal standard in 29 U.S.C. §§ 1002(21)(A)(i) and (ii). These paragraphs contain no supporting facts, and are therefore insufficient under *Twombly*. *See also Crowley* v. *Corning, Inc.*, 234 F. Supp. 2d 222, 228 (W.D.N.Y. 2002) (dismissing complaint that "contains no factual allegations which support a claim that Corning had de facto control over the Committee members"); Def Br. at 19.

Moreover, the Second Circuit has rejected the argument that an employer can be a *de facto* fiduciary where the plan designates a named fiduciary. *See Crocco* v. *Xerox Corp.*, 137 F.3d 105, 107-08 (2d Cir. 1998) (citing *Lee* v. *Burkhart*, 991 F.2d 1004, 1010 (2d Cir. 1993)). A district court within this Circuit recently applied that holding to the precise factual situation at issue here, ruling that Bausch & Lomb could not be a *de facto* fiduciary where plaintiffs alleged that Bausch & Lomb and its plan fiduciaries breached their fiduciary duties by failing to remove the company stock fund from a 401(k) plan. *See In re Bausch & Lomb Inc. ERISA Litig.*, No. 06-CV-6297, 2008 WL 5234281, at *11 (W.D.N.Y. Dec. 12, 2008).

Second, plaintiffs' reliance on the doctrine of *respondeat superior* is contrary to the law of this District. Although there is a split of authority among the federal courts as to whether *respondeat superior* applies to ERISA claims, district courts in this Circuit have uniformly held that it does not. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 8853, 2005 WL 563166, at *4 n.5 (S.D.N.Y. Mar. 10, 2005) (*respondeat superior* liability is inconsistent with ERISA's functional concept of fiduciary responsibility); *Harris* v. *Finch, Pruyn & Co., Inc.*, No. 1:05-CV-951, 2008 WL 2064972, at *7 (N.D.N.Y. May 13, 2008) ("*Respondeat superior* liability does not exist under ERISA's fiduciary liability scheme."). Other recent courts that have considered the split in authority have come out against a finding of *respondeat superior* liability. *See In re Coca-Cola Enters. Inc. ERISA Litig.*, No. 1:06-CV-0953, 2007 WL 1810211, at *13 (N.D. Ga. June 20, 2007) (agreeing that "there is no reason to recognize an implied ERISA cause of action under the doctrine of respondeat superior . . . since the statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" (quoting *AOL*, 2005 WL 563166, at *4 n.5)).[3]

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[3] Plaintiffs' lengthy attempt to distinguish *AOL* boils down to the plea that it was wrongly decided and "should not be followed." (Pl. Br. at 23 n.23.) Plaintiffs' suggestion that *Tatum* v. *R.J. Reynolds Tobacco Co.*, No. 1:02 CV 00373, 2007 WL 1612580 (M.D.N.C. May 31, 2007), somehow distinguished *AOL* is incorrect, as *Tatum* was not decided on the basis of *respondeat superior* at all, but was based on allegations "of specific facts" demonstrating that the company defendants "performed discretionary functions with respect to the Tobacco Plan's management, administration, and disposition of assets." *Id.* at *9. Moreover, plaintiffs do not address the other cases cited in defendants' brief (at p. 20) that rejected application of *respondeat superior* liability. And plaintiffs' cases do not support the argument that the Court should apply *respondeat superior* here. In *Bannistor* v. *Ullman*, 287 F.3d 394, 402 (5th Cir. 2002), the Fifth Circuit found that certain defendants were fiduciaries because they "exercised authority or control respecting management of disposition of plan assets," and *declined to consider* whether *respondeat superior* liability might apply. *Id.* at 408. In *Hamilton* v. *Carell*, 243 F.3d 992, 1001 (6th Cir. 2001), the Sixth Circuit specifically *declined to determine* whether the doctrine of *respondeat superior* could be applied in cases alleging a breach of fiduciary duty arising under ERISA. Indeed, the Sixth Circuit observed that "this area of the law has been muddled by the fact that many of those courts consistently have confused respondeat superior liability with direct liability." *Id.* In *Nat'l Football Scouting, Inc.* v. *Cont'l Assurance Co.*, 931 F.2d 646, 649 (10th Cir. 1991), the question of whether *respondeat superior* applied under ERISA was not before the court. Finally, *Stuart Park Assoc. Ltd. P'ship* v. *Ameritech Pension*

Finally, plaintiffs urge the Court to sustain their claims against Citigroup and Citibank because "[a]t this stage, it is impossible without discovery to ascertain the full scope of control Citigroup and Citibank exercised regarding Plan investments." (Pl. Br. at 24.) Discovery is inappropriate, as discovery is not a cure for a deficient complaint. It is well settled that "discovery is authorized solely for parties to develop the facts in a lawsuit in which a plaintiff has stated a legally cognizable claim, *not in order to permit a plaintiff to find out whether he has such a claim*." *Podany* v. *Robertson Stephens, Inc.*, 350 F. Supp. 2d 375, 378 (S.D.N.Y. 2004) (emphasis added). *Twombly* requires plaintiffs to provide sufficient facts to permit a court to determine the plausibility of their claim before they are "allowed to take up the time of a number of other people [in discovery], with the right to do so representing an *in terrorem* increment of the settlement value." 127 S. Ct. at 1966 (internal quotation marks omitted).

(ii) Citibank, In Its Capacity As Trustee, Did Not Function As An ERISA Fiduciary With Regard To Plan-Mandated Investments In Citigroup Stock

We showed in our moving brief that the Plan documents and the Trust Agreement gave Citibank, the trustee of the Citigroup Plan, no discretion to limit or eliminate investment in Citigroup stock. (Def. Br. at 23-24.) In response, plaintiffs point to a provision of the Trust Agreement, which they mischaracterize as requiring diversification of Plan assets. (Pl. Br. at 24.) The language plaintiffs cite tracks verbatim ERISA § 404(a)(1)(C), which provides that a fiduciary will discharge his duties of prudence "by diversifying the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C). But plaintiffs ignore that, as an ESOP, the Citigroup Common Stock Fund is *exempt from any diversification requirement*. *See* ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2) ("In the case of an eligible individual account plan

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Trust, 846 F. Supp. 701 (N.D. Ill. 1994), was a breach of contract dispute with no ERISA claim, and as such, has little relevance here.

. . ., the diversification requirement of paragraph (1)(C) . . . is not violated by acquisition or holding of . . . qualifying employer securities.").

Moreover, plaintiffs do not dispute the showing in our brief that Citibank was a directed trustee pursuant to the Trust Agreement. Without addressing any of the cases we cited, plaintiffs say those cases should be disregarded because Citibank was a subsidiary of Citigroup rather than an independent third-party trustee. (Pl. Br. at 24 n.24.) But plaintiffs cite no authority for the proposition that the law concerning directed trustees does not apply where the directed trustee is a subsidiary of the sponsor.

Finally, plaintiffs contend that even a directed trustee might have some fiduciary responsibility where it has reason to know that its investment directions are contrary to the plan or to ERISA. As we showed in our moving brief, the Complaint does not allege any facts showing that Citibank should have known that it received improper investment directions. Neither the allegation that Citibank made consumer mortgage loans in 2006 nor that it received contributions from Citigroup in 2007 suggests that Citibank had such knowledge.[4]

(iii) The Administrative Committee Did Not Function As Fiduciaries With Regard To Plan-Mandated Investments In Citigroup Stock

We showed in our moving brief that the administrative committee lacked discretionary authority over the Plans' assets. (Def. Br. at 20-22.) In response, plaintiffs argue that the administrative committee could have required participants to transfer their investments

[4] Neither of plaintiffs' cases justify imputing knowledge of a parent to a subsidiary in the ERISA context. In *DC Comics, Inc.* v. *Powers*, 482 F. Supp. 494, 496-97 (S.D.N.Y. 1979), the court simply held in the context of a copyright infringement action that knowledge by an agent of the parent that the subsidiary's trademark was being used by others could not be imputed to the subsidiary. Knowledge of another's use of a trademark is, of course, highly relevant to a copyright infringement claim, and the court's ruling (and the case it cited for the proposition) were specific to that context. In *Thompson* v. *Air Power*, 448 S.E.2d 598, 602-03 (Va. 1994), a case decided under Virginia law, the court held that the parent's knowledge of litigation concerning a lien would not be imputed to the subsidiary where the subsidiary was a bona fide purchaser for value without notice of the lien.

out of the Common Stock Fund, could have restricted investment in Citigroup stock, and could have reduced to zero the amount permitted to be invested in Citigroup stock. (Pl. Br. at 27.) Plaintiffs misread the Plans.

The Plans provide that "[e]ach 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 [Administrative] Committee." (Cplt. Ex. E, § 7.01, at 41; Cplt. Ex. D, § 7.01, at 29.) The Plans make clear that those "rules and procedures" refer to directions concerning how participants make contributions and investment choices. That is why the immediately following sections of the Plans explain that the administrative committee has the responsibility to prescribe the form in which participants can direct their initial contributions (§ 7.02(a)), to make rules for how participants can change those initial allocations (§ 7.02(b)), to prescribe the form in which participants can reallocate money among various investment options (§ 7.03), and to establish rules for alternate payees, beneficiaries, and spouses to direct investments among the investment funds (§ 7.04). By no stretch do these provisions give the administrative committee discretion or control over the Plans' assets.

Indeed, in a section establishing the powers and duties of the administrative committee, the Plans explicitly provide that the administrative committee "shall have no responsibility for or control over the investment or management of Plan assets." (Cplt. Ex. E, § 3.01(a), at 18; Cplt. Ex. D, § 3.01(a), at 13.) Although plaintiffs argue that this language is limited to the "selection or elimination of the Plans' investment funds, and the assets therein" (Pl. Br. at 26 n.26), the Plans' language is not so limited, and plaintiffs point to no basis for limiting it in that way.

Finally, plaintiffs' argument that the administrative committee could have reduced to zero the amount permitted to be invested in Citigroup stock fails. Aside from the fact that plaintiffs point to no language giving the administrative committee such power or authority, such discretion would be entirely inconsistent with the Plans themselves. It would defeat the purpose of requiring the Plans to offer the Citigroup Common Stock Fund as an investment option if the administrative committee could simply reduce the permitted amount of investment to zero.

(iv) The Investment Committee Did Not Function As Fiduciaries With Regard To Plan-Mandated Investments In Citigroup Stock

We showed in our moving brief that the investment committee lacked discretionary authority over the Plans' assets. (Def. Br. at 24-26.) We showed above (*see* pp. 3 to 6, *supra*) that the language of the Plans defeats plaintiffs' arguments that the investment committee could have eliminated the Common Stock Fund, invested all of its assets in other investments, or established rules governing allocation of investments.

Plaintiffs offer one other argument. Relying on the language that "[e]ach 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 [Administrative] Committee, *including but not limited to any timing or frequency limitations approved by the Investment Committee*," plaintiffs argue that 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." (Pl. Br. at 25.) But the only power given to the investment committee in this clause is the power to approve timing or frequency limitations. Such limitations would govern, for instance, how often a participant can change investment allocations during a pay period. It would be bizarre if a provision addressing the timing and frequency of participants'

investment activity could be used to make fundamental changes to the Plans, and override explicit language mandating the offering of the Citigroup Stock Fund.

3. Defendants Had No Duty To Override The Clear Terms Of The Plans

Plaintiffs next argue that, notwithstanding the Plans' requirement that the Common Stock Fund be offered, defendants had a fiduciary duty to override the Plans and order divestment of Citigroup stock. (Pl. Br. at 18-20.) However, as we explained in our moving brief, defendants have *no fiduciary role* with respect to investment in the Plans' assets and are merely implementing the mandate of the settlor. As a result, the defendants "are *immune from judicial inquiry*" concerning investments in employer securities. *Urban* v. *Comcast Corp.*, No. 08-773, 2008 WL 4739519, at *12 (E.D. Pa. Oct. 28, 2008) (emphasis added); *see also Edgar* v. *Avaya*, 503 F.3d 340, 346 (3d Cir. 2007) ("[I]f the 'trust' requires the trustee to invest in a particular stock, then the trustee is 'immune from judicial inquiry' for following that requirement.") (quoting *Moench* v. *Robertson*, 62 F.3d 553, 571 (3d Cir. 1995)). For this reason, the defendants cannot be liable for permitting investment in employer securities. While some courts have considered whether fiduciaries are required to override plan requirements, no court of which we are aware has actually imposed such a duty.

B. Plaintiffs Fail To Show That Plan Investments Are Not Presumptively Prudent Or To Overcome The Presumption Of Prudence

Even if the Court finds that defendants are not immune from judicial inquiry and had some discretion to limit investment in Citigroup stock, plaintiffs' claim still fails because investments in company stock are presumptively prudent, *see Moench*, 62 F.3d at 571-72 (presumption of prudence advances Congress's objective in ERISA of fostering employee stock ownership), and plaintiffs have failed to allege sufficient facts to rebut that presumption.

1. There Is No Basis To Reject The Presumption Of Prudence

Plaintiffs incorrectly criticize the presumption of prudence as "rejected, limited, and questioned by many courts," and urge that because the Second Circuit has not yet considered *Moench*, this Court should not apply it here. (Pl. Br. at 27-28.) But five separate Courts of Appeals, as well as numerous district courts, have applied the presumption.[5]

Plaintiffs argue that this Court should ignore all that precedent and instead follow two cases, decided more than twenty years ago, which they claim hold that "ESOP fiduciaries are subject to strict scrutiny standards in determining whether plan assets should be invested in employer securities." (Pl. Br. at 28 n.28.) *Moench* itself distinguished these cases, *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978), and *Fink* v. *Nat'l Savings & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985), noting that they would "render meaningless" ERISA's desire to encourage employee ownership and to exempt ESOPs from the duty to diversify. *Moench*, 62 F.3d at 570.[6] No court has followed *Eaves* or *Fink* in applying strict scrutiny to investments in employer securities. Indeed, the Fifth Circuit recently reiterated that following the approach of applying strict scrutiny standards would contravene the intent of ERISA, as it would "eviscerate the statutory preference for ESOPs" if a court were to "subject fiduciaries to the 'strict scrutiny' that applies under conventional trust law to a trustee who is simply authorized, but not encouraged or required, to make a particular investment." *Kirschbaum*, 526 F.3d at 254 (quoting *Moench*, 62 F.3d at 570).

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[5] Plaintiffs falsely claim that we misled the Court regarding the wide application of the *Moench* presumption by the circuit courts (Pl. Br. at 27 n.27), arguing that the Ninth Circuit never *adopted Moench*. As we wrote in our opening brief, however, the Ninth Circuit *applied* the presumption in *Wright* v. *Or. Metallurgical Corp.*, 360 F.3d 1090, 1098 (9th Cir. 2004), joining the Third, Fifth, Sixth, and Seventh Circuits in doing so.

[6] Moreover, district courts within the Tenth Circuit have assumed, notwithstanding *Eaves*, that *Moench* applies to prudence claims involving investments in employer securities. *See Sprint*, 388 F. Supp. at 1222 ("assum[ing], without deciding, that the Tenth Circuit would adopt the ESOP presumption" in *Moench*); *Bevel* v. *Higginbottom*, No. 98-CIV-474-X, 2001 WL 1352896, at *18-19 (E.D. Okla. Oct. 4, 2001) (endorsing rationale of *Moench* and applying presumption of prudence).

2. The Presumption Of Prudence Applies On A Motion To Dismiss

Plaintiffs next argue that the *Moench* presumption does not apply on a motion to dismiss (Pl. Br. at 27-29), an argument that ignores the Supreme Court's analysis of the pleading standard in *Twombly*. Many courts have applied the presumption at the pleading stage, including almost *all courts* to address the issue since *Twombly*. Indeed, the Third Circuit recently confirmed that, in light of *Twombly*, *Moench* applies on a motion to dismiss: "Quite simply, if a plaintiff does not plead all of the essential elements of his or her legal claim, a district court is required to dismiss the complaint . . . . [A] duty of prudence claim that is on its face inadequate as a matter of law obviates the need for discovery." *Avaya*, 503 F.3d at 349 & n.14.

In addition to *Avaya*, our moving brief cited five other cases decided after *Twombly* that considered the presumption at the pleading stage. (Def. Br. at 30-31 n.5.) Since then, another court within this Circuit applied the presumption on a motion to dismiss. *Bausch & Lomb*, 2008 WL 5234281, at *4-6 (dismissing claim for failure to rebut the *Moench* presumption). Plaintiffs attempt to distinguish these cases by arguing that their fact patterns are different than those at issue here. (Pl. Br. at 29 n.30.) But the factual circumstances are relevant only to whether the presumption of prudence is overcome, not whether it applies on a motion to dismiss. Although plaintiffs argue that "most courts" post-*Twombly* have declined to apply the presumption at the pleading stage, they cite only two post-*Twombly* cases, neither of which contains any analysis whether the presumption of prudence should apply on a motion to dismiss.

(Pl. Br. at 28 & n.29.)[7] Plaintiffs' remaining cases preceded *Twombly* and therefore are only of marginal relevance.[8]

3. The Presumption Of Prudence Applies To ESOPs And EIAPs

Plaintiffs next suggest — incorrectly — that the presumption does not apply to any plan which is not *entirely* an ESOP. To the contrary, a number of cases have applied the presumption to the ESOP component of a pension plan. *See, e.g.*, *Bausch & Lomb*, 2008 WL 5234281, at *5; *In re General Motors ERISA Litig.*, No. 05-71085, 2006 WL 897444, at *7-8 (E.D. Mich. Apr. 6, 2006); *Crowley* v. *Corning, Inc.*, No. 02-CV-6172, 2004 WL 763873, at *7 (W.D.N.Y. Jan. 14, 2004); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 793-94 (W.D.N.C. 2003). Indeed, in *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 474 (S.D.N.Y. 2005), this Court observed that "while this rule has generally been applied to ESOPs, it applies with equal force to 401(k) plans requiring that the employer's stock be an investment option." ERISA specifically permits inclusion of an ESOP within a non-ESOP plan. *See* 29 C.F.R. 2550.407d-6(a)(4) ("An ESOP may form a portion of a plan, the balance of which includes a qualified pension, profit-sharing, or stock bonus plan which is not an ESOP."). The lone case that plaintiffs cite did not even involve a plan that included an ESOP. *See In re Westar Energy, Inc. ERISA Litig.*, No. 03-4032, 2005 WL 2403832, at *18 (D. Kan. Sept. 29, 2005).

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[7] These cases are both from the same district court. *See Alvidres* v. *Countrywide Fin. Corp.*, No. CV 07-05810, 2008 WL 819330, at *2 (C.D. Cal. Mar. 18, 2008); *In re Fremont Gen. Corp. Litig.*, 564 F. Supp. 2d 1156, 1158 (C.D. Cal. 2008). The former contains no analysis of whether *Moench* applies on a motion to dismiss; the latter states that *Moench* is not applicable (and therefore when it should be applied was irrelevant).

[8] For instance, *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d at 860, actually applied the presumption on a motion to dismiss.

To the extent plaintiffs argue that the presumption does not apply to eligible individual account plans ("EIAPs")[9] that are not ESOPs (such as the Citibuilder Plan for Puerto Rico[10]), they ignore the vast weight of authority applying the presumption to all EIAPs.[11] Indeed, ESOPs and EIAPs "are treated the same for the purpose of fiduciary duty analysis." *Wright*, 360 F.3d at 1098 n.3 (citing *Foltz* v. *U.S. News & World Report, Inc.*, 865 F.2d 364, 373-74 (D.C. Cir. 1989)). That is because EIAPs, like ESOPs, are designed to encourage employee ownership. Thus, Congress has exempted all EIAPs (including but not limited to ESOPs) from ERISA's diversification requirement in order to encourage plans that give participants an ownership stake in their employers, *see* 29 U.S.C. § 1104(a)(2), because of the "strong policy favoring investment in employer stock," *Calpine*, 2005 WL 1431506, at *4.[12]

4. Plaintiffs Misstate The Standard For Overcoming The Presumption

Plaintiffs argue that the standard for overcoming the presumption of prudence does not require them to allege that Citigroup faced dire circumstances, impending collapse, or

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[9] An EIAP is defined as "an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities." ERISA § 407(d)(3)(A), 29 U.S.C. § 1107(d)(3)(A).

[10] The Citibuilder Plan was not designated as an ESOP because Puerto Rico tax law does not contain ESOP provisions analogous to Section 4975(e)(7) of the Code or related sections.

[11] *See, e.g.*, *Kirschbaum*, 526 F.3d at 254 ("The *Moench* presumption logically applies to any allegations of fiduciary duty breach for failure to divest an EIAP or ESOP of company stock."); *Avaya*, 503 F.3d at 345; *Pa. Fed'n* v. *Norfolk S. Corp. Thoroughbred Ret. Inv. Plan*, No. Civ. A. 02-9049, 2004 WL 228685, at *7 (E.D. Pa. Feb. 4, 2004) (distinction between ESOPs and other types of EIAPs is irrelevant; *Moench* presumption is applicable to a non-ESOP plan); *In re Calpine Corp. ERISA Litig.*, No. C 03-1685, 2005 WL 1431506, at *4-5 (N.D. Cal. Mar. 31, 2005) (granting motion to dismiss based on the failure to rebut the presumption of prudence of an EIAP); *Steinman* v. *Hicks*, 252 F. Supp. 2d 746, 757-58 (C.D. Ill. 2003) (applying the *Moench* presumption of prudence to a non-ESOP EIAP); *Landgraff* v. *Columbia/HCA Healthcare Corp. of Am.*, No. 03-98-0090, 2000 WL 33726564, at *6 (M.D. Tenn. May 24, 2000) (presumption of prudence applied to non-ESOP EIAP), *aff'd*, 30 Fed. Appx. 366 (6th Cir. 2002).

[12] *See also In re Honeywell Int'l ERISA Litig.*, No. Civ. 03-1214, 2004 WL 3245931, at *11 n.15 (D.N.J. June 14, 2004) ("[T]he argument for similar treatment appears to be a strong one: an EIAP no less than an ESOP calls for investment in employer securities, and it would seem appropriate to give the same deference in either case to fiduciary decisions . . . .").

threat to its viability as a going concern. (Pl. Br. at 30-32.) But that is indeed the standard. For instance, *Kirschbaum* described the presumption as a "substantial shield" and explained that it must be rigorously applied:

> Less than rigorous application of the *Moench* presumption threatens its essential purpose. A fiduciary cannot be placed in the untenable position of having to predict the future of the company stock's performance. In such a case, he could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded.

Kirschbaum, 526 F.3d at 256.[13] Thus, *Kirschbaum* held that the presumption of prudence requires that plaintiffs plead "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest." *Id.* Only where a company is on the brink of bankruptcy, or faces imminent collapse or a threat to its viability as a going concern can a fiduciary be certain that it is acting as the settlor would have intended. That is why numerous courts have adopted these standards. *See Kirschbaum*, 526 F.3d at 255-56; *Wright*, 360 F.3d at 1099; *Kuper*, 66 F.3d at 1457-59; *Bausch & Lomb*, 2008 WL 5234281, at *6; *Duke Energy*, 281 F. Supp. 2d at 795.[14] The lower standard plaintiffs advocate would leave fiduciaries "with no meaningful guidance as to when they should, or should not, ignore an ERISA plan's requirements to offer company stock," would "foster[] expensive, speculative

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[13] *See Moench*, 62 F.3d at 571-72 (stating that courts must recognize that a fiduciary's cautionary act of not maintaining an investment in employer's securities may lead to "liability for that caution, particularly if the employer's securities thrive."); *accord Kuper* v. *Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Honeywell*, 2004 WL 3245931, at *11; *Summers* v. *UAL Corp. ESOP Comm.*, No. 03 C 1537, 2005 WL 2648670, at *4 (N.D. Ill. Oct. 12, 2005); *see also Summers* v. *State Street Bank & Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006) ("[Plaintiffs] think that what State Street did wrong was to fail to second-guess the market . . . . Of course, if State Street had sold earlier and the stock had then bounced back, as American Airlines' stock did, State Street might well have been sued by the same plaintiffs . . . .").

[14] Plaintiffs argue that *Kirschbaum* and *Avaya* rejected the brink of bankruptcy or imminent collapse standard. (Pl. Br. at 31.) But *Kirschbaum* held that a fiduciary need divest only when there is a threat to the company's "viability as a going concern" and a "danger of [the stock] becoming essentially worthless," 526 F.3d at 255, while *Avaya* held that overcoming the presumption would require a "dire situation," 503 F.3d at 348-49.

litigation," and could "cause employers to be hesitant to offer the benefits of an ESOP to [their] employees." *Pedraza* v. *Coca-Cola Co.*, 456 F. Supp. 2d 1262, 1276 (N.D. Ga. 2006).

5. Plaintiffs Have Not Overcome The Presumption Of Prudence

Plaintiffs make no real effort to show that the allegations of the Complaint are sufficient to overcome the presumption of prudence. In a terse paragraph, plaintiffs simply repeat their allegations that Citigroup exposed itself to risky subprime assets and assert that Citigroup's stock was therefore such an imprudent investment that the fiduciaries were bound to order divestiture. (Pl. Br. at 32.) But these allegations are woefully insufficient to overcome the presumption. They do not come close to the "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest." *Kirschbaum*, 526 F.3d at 256. Nor do plaintiffs allege that Citigroup was facing imminent collapse or was on the brink of bankruptcy during the class period, let alone that Citigroup faced serious threats to its viability as a going concern. To the contrary, Citigroup remained a viable going concern throughout the class period, *i.e.*, the period in which plaintiffs allege that defendants breached their fiduciary duties.

Unsurprisingly, then, plaintiffs cite no authority supporting their argument that the Complaint alleges facts sufficient to overcome the presumption. Rather, plaintiffs strain to distinguish the cases on which defendants rely. (Pl. Br. at 32-34.) But, as we showed in our opening brief, courts have repeatedly found that the presumption had not been overcome even where company stock prices declined by 55% to 80%, far more than the 52% drop during the class period here. (*See* Def. Br. at 32.) Plaintiffs do not even address two cases which held that the presumption was not overcome where the stock dropped 80% during the class period. *See Kuper*, 66 F.3d at 1451; *Crowley*, 234 F. Supp. 2d at 227. And plaintiffs' efforts to distinguish other cases amount to asserting that they were wrongly decided. (*See, e.g.*, Pl. Br. at 34 n.33.)

Implicitly conceding that the allegations of their Complaint are insufficient, plaintiffs resort to the rank speculation that Citigroup was on the brink of bankruptcy in November 2008, ten months after the end of the class period. (Pl. Br. at 32-33.) These unsupported assertions are not part of the Complaint, did not occur during the class period, and are not relevant on this motion. Given the turmoil in the financial markets in the fall of 2008 — when the country saw the worst economic downturn in 80 years — the events of November 2008 do not demonstrate that the fiduciaries were bound to divest during the class period more than ten months earlier. Plaintiffs never point to any single moment during the class period and show that, based on the evidence then available, the fiduciaries should have divested the Plans of Citigroup stock.

C. Defendants Did Not Breach Any Duty To Investigate

We showed in our moving brief that plaintiffs' claim for breach of the duty to investigate fails as a matter of law for several reasons, one of which was that the 25 "red flags" alleged in their Complaint (only one of which even mentioned Citigroup) were insufficient to place the fiduciaries on notice that they should investigate the prudence of Citigroup stock. (Def. Br. at 32-34.) In response, plaintiffs contend primarily that there were other "red flags" that would have triggered a duty to investigate, citing an additional twenty paragraphs of allegations from their Complaint. The allegations plaintiffs now identify fall far short of sustaining the Complaint.

Most of these allegations also have nothing to do with Citigroup. Instead, they deal with developments in the general housing and mortgage markets from 2004 to 2006. (Cplt. ¶¶ 114-29.) Based on these market developments, plaintiffs then conclusorily assert that by the end of 2006 and thereafter, Citigroup (though not its administrative or investment committees) "became aware of the impending collapse of the subprime mortgage industry and the heavy

losses which the Company would inevitably sustain from subprime loans, and subprime related products (including CDOs)." (Cplt. ¶ 133.) Thus, plaintiffs' claims still boil down to speculation about general information concerning the mortgage and housing markets as well as two news articles in August and November 2007 (well into the class period) referencing how Citigroup accounted for off-balance sheet transactions. (Cplt. ¶¶ 163, 189(r).) Plaintiffs fail to explain why this should have triggered a duty to investigate by the administrative and investment committees.[15] *See Huntington Bancshares*, 2009 U.S. Dist. LEXIS 9102, at *24-25 (finding general news information discussing the "housing market and mortgage foreclosures" insufficient to trigger the duty to investigate).

II. COUNT II FAILS BECAUSE IT RESTS ON NON-FIDUCIARY SPEECH OR DISCLOSURES NOT REQUIRED BY ERISA

Plaintiffs' disclosure claim fails to satisfy the requirements of Rule 9(b). (Def. Br. at 13-14.) Plaintiffs respond that Rule 9(b) applies only in ERISA cases that are *entirely* premised on fraud, and that this is not that "rare case." (Pl. Br. at 14 n.13.) But plaintiffs' attempt to deny the applicability of Rule 9(b) fails. In *Toussaint* v. *JJ Weiser & Co.*, No. 04 Civ. 2592, 2005 WL 358634, at *8-9 (S.D.N.Y. Feb. 13, 2005), this court applied Rule 9(b) to one claim for fiduciary breach that sounded in fraud, but not to any of the other fiduciary breach claims in the case. As in *Toussaint*, the Court here can apply Rule 9(b) to those specific claims that sound in fraud, including the disclosure claim. Indeed, plaintiffs never respond to our showing that their disclosure averments sound in fraud. (*See* Def. Br. at 13-14.) Plaintiffs argue repeatedly in the Complaint and in their brief that defendants Citigroup, Prince, and the

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[15] *Polaroid*, the only case on which plaintiffs rely, demonstrates the insufficiency of plaintiffs' allegations. The *Polaroid* Court found that the complaint was sufficient because a bankruptcy examiner had found "a strong likelihood at the end of 2000 that Polaroid could not continue as a going concern." 362 F. Supp. 2d at 476. No such findings concerning Citigroup are alleged here.

administrative committee made material misstatements and omitted to state material facts relevant to Citigroup's business practices. Those allegations are plainly grounded on fraud.

A. **ERISA Imposes No Obligation To Provide The Information That Plaintiffs Claim Should Have Been Disclosed**

ERISA includes comprehensive reporting and disclosure requirements that impose the obligation to provide certain specifically prescribed plan information, including information about benefits, eligibility and plan expenses. (Def. Br. 35-38 & n.6.) The Second Circuit has firmly rejected the argument that fiduciary duties under ERISA create additional disclosure requirements relating to, for instance, company operations or financial results. *See Bd. of Trs. of the CWA/ITU Negotiated Pension Plan* v. *Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997) ("[It would be] inappropriate to infer an unlimited disclosure obligation on the basis of general [fiduciary] provisions that say nothing about disclosure.").

Plaintiffs seek to eviscerate this holding by arguing that the Second Circuit meant only that a fiduciary need not disclose insignificant facts or possible future contingencies. (Pl. Br. at 40.) But plaintiffs ignore both the rationale and the actual holding of the case. In *Weinstein*, the Second Circuit reviewed ERISA's disclosure requirements and noted that they are meant to afford participants knowledge of their rights and remedies under employee benefit plans. 107 F.3d at 143. The court held that ERISA did not require disclosure of certain actuarial valuation reports, even though they "*doubtless contain information that plan participants might find interesting or useful*." *Id.* at 145 (emphasis added). Rather, the Court held, the obligation to disclose is limited to the particular affirmative disclosures required by ERISA. As the Second Circuit explained, "[i]n light of the precise language used by Congress in the various sections of ERISA, we see no presumption favoring disclosure to participants beyond what is required by § 104(b)(4)." *Id.*

Plaintiffs reference cases standing for the unremarkable proposition that ERISA fiduciaries speaking as authorities on plan benefits must disclose information *about plan benefits*.[16] Not surprisingly, material about plan benefits is one of the categories of information that is specifically required to be disclosed under the statute. But plaintiffs cannot plausibly claim that information about "the value and prudence" of Citigroup stock relate to "Plan benefits." (Pl. Br. at 43.) We cited numerous cases holding that ERISA does not impose any duty to keep plan participants informed about a company's financial developments even where such developments might affect the value of company stock. (Def. Br. at 37.) If plaintiffs' disclosure claim (which is premised on the alleged failure to disclose non-public information concerning Citigroup's business practices) were adopted, every aspect of a company's business operations would "relate to plan benefits" and thus be subject to mandatory disclosure under ERISA. That result clearly would be contrary to ERISA's reticulated disclosure scheme.[17]

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[16] *See, e.g.*, *Cent. States, S.E. & S.W. Areas Pension Fund* v. *Cent. Transport, Inc.*, 472 U.S. 559, 564 (1985) (failure to provide employee records for plan audit); *Dobson* v. *Hartford Fin. Servs. Group*, 389 F.3d 386, 401-02 (2d Cir. 2004) (failure to disclose policy of paying interest on certain benefit payments); *Griggs* v. *E.I. Dupont Nemours & Co.*, 237 F.3d 371, 373 (4th Cir. 2001) (failure to adequately disclose tax treatment of benefits); *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 453 (3d Cir. 2000) (failure to provide information about termination); *Bowerman* v. *Wal-Mart Stores, Inc.*, 226 F.3d 574, 590 (7th Cir. 2000) (failure to provide adequate information about COBRA requirements); *Krohn* v. *Huron Mem'l Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999) (failure to provide information about long term disability coverage); *Estate of Becker* v. *Eastman Kodak Co.*, 120 F.3d 5, 9-10 (2d Cir. 1997) (failure to disclose effect on benefits of dying before retirement); *Jordan* v. *Fed. Express Corp.*, 116 F.3d 1005, 1007 (3d Cir. 1997) (failure to disclose irrevocability of benefit election); *Bixler* v. *Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1296 (3d Cir. 1993) (failure to disclose insurance options); *Eddy* v. *Colonial Life Ins. Co.*, 919 F.2d 747, 751 (D.C. Cir. 1990) (failure to provide coverage termination information); *Pineiro* v. *Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 67, 103-04 (S.D.N.Y. 2003) (failure to provide information regarding calculation of benefits).

Moreover, plaintiffs' citation to *Polaroid* is inapt, as *Polaroid* was decided several years before the Second Circuit rejected any general fiduciary obligation to disclose in *Weinstein*.

[17] *See, e.g.*, *Bausch & Lomb*, 2008 WL 5234281, at *7-8 (dismissing disclosure claims based on SEC filings incorporated by reference in SPDs); *Cokenour* v. *Household Int'l, Inc.*, No. 02 C 7921, 2004 WL 725973, at *8 (N.D. Ill. Mar. 31, 2004) (dismissing claim for failure to disclose non-public information because such a requirement "is too broad" and "would require defendants to continuously gather and disclose nonpublic information bearing some relation to the plan sponsor's financial condition."); *In re Tyco Int'l Multidist. Litig.*, No. MDL 02-1335-PB, 2004 WL 2903889, at *6 (D.N.H. Dec. 2, 2004) (finding that disclosure claims with respect to publicly traded securities should be addressed under the securities laws).

B. Plaintiffs Fail To Allege That Citigroup And Prince Acted As Fiduciaries When Communicating With Plan Participants

Plaintiffs fail to allege that Citigroup and Prince were acting as fiduciaries when communicating with participants. As discussed in our opening brief, the threshold question in every claim for breach of fiduciary duty is whether "that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram* v. *Herdrich*, 530 U.S. 211, 226 (2000). Plaintiffs ignore this principle in arguing that Citigroup and Prince were fiduciaries for purposes of communicating with the Plans' participants merely because they appointed the trustee and members of the administrative and investment committees. (Pl. Br. at 42 & n.42.)[18] Any fiduciary responsibilities that Citigroup and Prince had were limited to these alleged roles. They did not become fiduciaries with respect to the administration of the Plans or communication with the Plans' participants. *See Pegram*, 530 U.S. at 225-26.[19]

Nor does the allegation that Citigroup and Prince regularly communicated with Citigroup's employees make them fiduciaries. Statements not intentionally directed to plan participants and directly connected to plan benefits are not subject to ERISA's fiduciary

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[18] Plaintiffs also argue that Citigroup exercised *de facto* authority and control with respect to the responsibilities of the administrative committee. As discussed above (*see* pp. 7 to 8, *supra*), this cursory allegation is insufficient to plead fiduciary status. Plaintiffs also argue that Citigroup had the power to direct the trustee to receive Company stock in lieu of cash dividends and to "sell the shares so acquired, or an equivalent number of shares already held in the Trust, at such market price." (Cplt. ¶ 48.) These powers, set forth in Section 4.1(n) of the Trust Agreement, relate solely to dividend reinvestment plans, not to participant investment in Citigroup stock, and merely permit the Trustee to exercise its right to receive shares at a discount from market price and then sell those shares at market price, for the benefit of the Plans' participants. (Cplt. Ex. C, § 4.1(n), at 11.)

[19] *See Crowley*, 234 F. Supp. 2d at 229 ("The only power the Board had under the Plan was to appoint, retain, or remove members of the Committee. Thus, the Board's fiduciary obligations can extend only as to those acts."); *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328, 1339 (N.D. Okla. 2003) (same); *Ind. Ass'n. of Publishers' Employees, Inc.* v. *Dow Jones & Co., Inc.*, 671 F. Supp. 1365, 1367 (S.D.N.Y. 1987) (same). In *WorldCom*, the court rejected allegations similar to those raised here that sought to make directors general fiduciaries by virtue of their appointment powers: "The plaintiffs' argument goes too far. It would make any supervisor of an ERISA fiduciary also an ERISA fiduciary." *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003).

standards. *See Marks* v. *Newcourt Credit Group*, 342 F.3d 444, 454 n.2 (6th Cir. 2003). That is why SEC filings and other public statements prepared by company officers in a corporate capacity are not regulated by ERISA.[20] Nor can public filings incorporated by reference into Plan documents support an ERISA claim. (Pl. Br. at 42.) That proposition has been rejected:

> The SEC filings are documents that directors must execute to comply with a corporation's obligations under the securities laws. Although the SPD incorporates SEC filings by reference, and is part of the Section 10(a) prospectus, those connections are insufficient to transform those documents into a basis for ERISA claims against their signatories.

WorldCom, 263 F. Supp. 2d at 760.[21]

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[20] *See Crowley*, 234 F. Supp. 2d at 228, *aff'd on motion to amend*, 2004 WL 763873 (W.D.N.Y. Jan. 14, 2004) (statements made in SEC filings are not made in a fiduciary capacity); *accord In re Reliant Energy ERISA Litig.*, No. Civ.A. H-02-2051, 2006 WL 148898, at *4 (S.D. Tex. Jan. 18, 2006); *Calpine*, 2005 WL 1431506, at *6-7; *Stein* v. *Smith*, 270 F. Supp. 2d 157, 172-73 (D. Mass. 2003); *Williams Cos.*, 271 F. Supp. 2d at 1338; *Hull* v. *Policy Mgmt. Sys. Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286, at *4 (D.S.C. Feb. 9, 2001).

[21] *See Bausch & Lomb*, 2008 WL 5234281, at *7-8 (incorporating public filings into plan documents does not render them fiduciary communications); *In re Calpine Corp. ERISA Litig.*, No. C 03-1685, 2005 WL 3288469, at *9-10 (N.D. Cal. Dec. 5, 2005); *Stein v. Smith*, 270 F. Supp. 2d at 172-73; *In re RCN Litig.*, No. 04-5068, 2006 WL 753149, at *6 (D.N.J. Mar. 21, 2006); *see also Mellot* v. *Choicepoint, Inc.*, 561 F. Supp. 2d 1305, 1318 (N.D. Ga. 2007) ("The preparation of SEC filings, even if misleading and incorporated by reference in required ERISA disclosures, is not a fiduciary act under ERISA.") (vacated pursuant to settlement). Plaintiffs' attempt to distinguish the cases we relied on in our opening brief (*see* Pl. Br. at 47) rests on trivial distinctions, such as a supposed difference in merely incorporating SEC filings by reference in ERISA plan documents compared with directing plan participants in those documents to rely on SEC filings. Moreover, plaintiffs distinguish several cases by saying that in those cases the directors were found not to be fiduciaries for purposes of the disclosure claim. That is exactly the point we argue here.

Finally, plaintiffs' suggestion, based on *Varity Corp.* v. *Howe*, 516 U.S. 489, 505 (1996), that employees might reasonably believe that Citigroup and Prince were communicating with them in an ERISA fiduciary capacity is flawed. In *Varity*, the company was acting both as the employer and as plan administrator, so there was a reasonable basis for employees to think that the company might be communicating with them in a fiduciary capacity when talking about benefits. Here, in contrast, neither Citigroup nor Prince were plan administrators nor did they have any fiduciary role that involved communicating with company employees, so there was no basis for Citigroup's employees to think that Citigroup or Prince were speaking in an ERISA fiduciary capacity when speaking to all employees or to the market about Citigroup's financial performance.

C. Plaintiffs Fail To State A Claim That The Administrative Committee Breached A Duty To Disclose

The only defendant with possible fiduciary responsibility for disclosing information to the Plans' participants is the administrative committee. *See* 29 U.S.C. §§ 1021-31. But the Complaint does not adequately plead that the administrative committee knew or should have known of the risk exposures that plaintiffs claim should have been disclosed. This failure to allege when the adverse information was available or known to the administrative committee (if ever) defeats any claim that the committee breached a duty to disclose such information. *See Crowley*, 234 F. Supp. 2d at 230 (dismissing disclosure claim against defendants who were not alleged to have knowledge of the purportedly undisclosed information).

Moreover, plaintiffs allege no misleading statements by the administrative committee. As described above, the incorporation of SEC filings by reference in Plan materials, such as summary plan descriptions, does not transform such SEC filings into ERISA communications. Nor is the administrative committee alleged to have been involved in "town hall" meetings or email messages that plaintiffs point to as allegedly promoting investment in Citigroup stock. Thus, plaintiffs have failed to allege that the administrative committee made material misstatements to the Plans' participants or omitted to state material facts.[22]

D. Plaintiffs Fail To Plead Proximate Causation

Finally, plaintiffs cannot show that their alleged damages were proximately caused by any alleged failure to disclose. If defendants disclosed information to plaintiffs prior to disclosing it to the market and trades were made on that basis, the insider trading laws would

[22] *See Bausch & Lomb*, 2008 WL 5234281, at *7 ("[T]he fiduciary responsible for communications to the Plan Participants . . . is not alleged to have any responsibility, fiduciary or otherwise, for corporate disclosures. In addition, Plaintiffs do not allege that the [administrative committee] was responsible for any of the alleged misleading disclosures cited in the Complaint.")

have been violated. *See, e.g.*, *Bausch & Lomb*, 2008 WL 5234281, at *9 ("[S]uch a disclosure to the Plan Participants before the information was disclosed to the public would have been in violation of federal securities law that prohibit trading on nonpublic adverse information.") (citing *Nelson* v. *Hodowal*, 512 F.3d 347, 350-51 (7th Cir. 2008)); *Pa. Fed'n*, 2004 WL 228685, at *5 ("[The fiduciaries] are not required to engage in what would essentially amount to insider trading by disclosing non-public information solely to [plan] participants and beneficiaries."). Plaintiffs seem to concede as much by arguing that defendants should have disclosed the adverse information simultaneously to other shareholders and to the public. But had defendants done that, in an efficient market any adverse disclosures would have been immediately reflected in Citigroup's stock price, thus causing the same loss to plaintiffs. (Def. Br. at 41-42.) As a result, plaintiffs cannot plead proximate causation.[23] Indeed, plaintiffs acknowledge that the "efficient capital market" cases "question whether disclosure can prevent losses on stock already held by the Plan." (Pl. Br. at 46.)[24]

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[23] The cases plaintiffs cite are inapposite. The *Enron* court did not analyze *McKesson's* efficient capital markets hypothesis at all, though it acknowledged that *McKesson's* holding applied to ESOPs that are not subject to ERISA's diversification requirement. 284 F. Supp. 2d at 565. The *Westar* plaintiffs alleged harm "not limited to the drop in stock value" and the court relied on the now-defunct "no set of facts standard" from *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), to defer the loss causation issue. *Westar*, 2005 WL 2403832, at *14. *Kling* did not consider whether an earlier disclosure would have led to a loss. *Kling* v. *Fidelity Mgmt. Trust Co.*, 323 F. Supp. 2d 132, 142-43 (D. Mass. 2004). And while the *Ford* court addressed the efficient capital markets hypothesis, it did so in the context of prudence analysis, and thus the court never considered whether an earlier disclosure would have eliminated plan losses. *In re Ford Motor Co. ERISA Litig.*, No. 06-11718, 2008 WL 5377955, at *6 (E.D. Mich. Dec. 22, 2008).

[24] Plaintiffs' assertion that they will present evidence that a prudent fiduciary with knowledge of the facts alleged in the Complaint would have sold, sparing the Plan from losses, is irrelevant to the issue of proximate cause given that disclosure of the allegedly withheld information would have caused the stock price to drop before any fiduciary could have sold.

III. PLAINTIFFS' REMAINING CLAIMS ALSO FAIL

A. <u>Plaintiffs Fail to State a Claim For Breach Of Duty To Monitor</u>

Plaintiffs fail to support their claims that Citigroup, Prince and Rubin breached any alleged duty to monitor.[25] *First*, plaintiffs incorrectly argue that a claim for breach of the duty to monitor cannot be dismissed on the pleadings. Numerous cases have done so. *See, e.g.*, *Bausch & Lomb*, 2008 WL 5234281, at *10; *In re Dell, Inc. ERISA Litig.*, 563 F. Supp. 2d 681, 694-95 (W.D. Tex. 2008); *In re Radioshack Corp. "ERISA" Litig.*, 547 F. Supp. 2d 606, 616 (N.D. Tex. 2008).[26] *Second*, plaintiffs argue that their claim for breach of the duty to monitor can survive even if the court dismisses the prudence claim. But an appointing fiduciary cannot be liable for failing to monitor an appointed fiduciary who has committed no breach. *See Huntington Bancshares*, 2009 U.S. Dist. LEXIS 9102, at *37-38 (duty to monitor claim cannot

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[25] Although plaintiffs claim that the appointing fiduciaries owed a duty to disclose information to their appointees (Pl. Br. at 51), many courts have rejected such a duty. *See, e.g.*, *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 900-01 (S.D. Tex. 2004) (dismissing duty to monitor claims that alleged only failure to disclose material information about Dynegy stock to appointees); *In re Reliant Energy ERISA Litig.*, 336 F. Supp. 2d 646, 659 (S.D. Tex 2004) (dismissing duty to monitor claims because duties to appoint and remove committee members "do not give rise to the expansive duty to disclose all allegedly pertinent information to the Plan fiduciaries"); *Hull*, 2001 WL 1836286, at *7 (dismissing claim that director owed duty to provide information to the plan because such duty did not relate to his appointment power).

Even if such a duty exists, plaintiffs' cases provide no support for its application here. In *Worldcom*, the duty to disclose information arose from officer's control over plan assets, not from his appointment power. 263 F. Supp. 2d at 765. In *Hill* v. *BellSouth Corp.*, 313 F. Supp. 2d 1361, 1370 (N.D. Ga. 2004), the court did not consider whether the duty to monitor contained a duty to disclose information. And in *Woods v. Southern Co.*, 396 F. Supp. 2d 1351, 1373-74 (N.D. Ga. 2005), and *Sprint*, 388 F. Supp. 2d at 1232, the courts did not reach the issue whether the duty to monitor included a duty to disclose non-public information.

[26] Plaintiffs cite two pre-*Twombly* cases for the mistaken proposition that failure to monitor claims cannot be addressed at the motion to dismiss stage (Pl. Br. at 49 & n.57.) Even before *Twombly*, however, numerous courts had addressed — and dismissed — duty to monitor claims at the pleading stage. *See, e.g.*, *Dynegy*, 309 F. Supp. 2d at 900-01; *Crowley*, 234 F. Supp. 2d at 229; *In re McKesson HBOC, Inc. ERISA Litig.*, No. C00-20030, 2002 WL 31431588, at *16 (N.D. Cal. Sept. 30, 2002).

survive dismissal of underlying claim of fiduciary breach claim); *see also* Def. Br. at 44 (citing cases).[27]

Third, plaintiffs have not satisfied *Twombly* because they have not pled specific facts alleging that Citigroup, Prince, and Rubin failed to monitor their appointees. Plaintiffs argue that they have pled "specific detail as to Citigroup's undisclosed huge and risky venture into the subprime CDO and mortgage backed securities market." (Pl. Br. at 48 n.55.) But this allegation has nothing to do with the monitoring claim. Plaintiffs next argue that "it is clear" that Citigroup, Prince, and Rubin breached their duties to monitor because their appointees "continued to maintain and permit the investment of the Plans' assets in Citigroup stock during the Class Period." (Pl. Br. at 50.) This is no more than circular reasoning.

Finally, plaintiffs' claim that Citigroup, Prince, and Rubin failed to monitor their appointees merely because the appointees committed an underlying breach is inconsistent with ERISA's careful delineation of fiduciary responsibility. While recognizing that the duty to monitor is narrow and that the monitoring defendants have no obligation to second-guess the decisions of their appointees or to assume responsibility for their appointees' actions (Pl. Br. at 49), plaintiffs nevertheless urge a result that is contrary to both of those principles. Plaintiffs'

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[27] Plaintiffs' attempt to distinguish these cases (Pl. Br. at 48 n.50) rests on semantics. Plaintiffs seem to suggest that in these cases the monitoring claims were not automatically dismissed when the prudence claims were dismissed, but rather were dismissed because the failure to monitor did not cause any loss since the company stock was not an imprudent investment. This is no different than saying the monitoring claim fails because the prudence claim fails. Moreover, the sole case on which plaintiffs rely is not to the contrary. Plaintiffs argue that *In re JDS Uniphase Corp. ERISA Litig.*, No. C 03-04743, 2005 WL 1662131, at *10 (N.D. Cal. July 14, 2005), stands for the proposition that monitoring claims can survive even when prudence claims do not because the prudence claims against the monitoring fiduciaries were dismissed but the monitoring claims against the monitoring fiduciaries were not. But plaintiffs misunderstand the case. The prudence claims against the appointed fiduciaries (i.e., the fiduciaries appointed by the monitoring fiduciaries) survived the motion to dismiss, thus so did the monitoring claim against the monitoring fiduciaries.

position would make monitoring fiduciaries strictly liable for any breach by appointees, a result clearly contrary to ERISA.[28]

B. Plaintiffs Fail To State A Claim For Breach Of Fiduciary Duty To Disclose Necessary Information To Co-Fiduciaries

Plaintiffs' claim that Citigroup, Prince, and Rubin were required to disclose material, non-public information to the administrative and investment committees fails. *First*, plaintiffs do not challenge our showing that this claim fails because the underlying prudence claim fails. (Def. Br. at 43.) *Second*, as discussed above, plaintiffs' disclosure claim is subject to Rule 9(b). (*See* pp. 22 to 23, *supra*.) Plaintiffs' conclusory allegations that Citigroup, Prince, and Rubin intentionally withheld information from the administrative and investment committees sound in fraud, but fail to satisfy the heightened pleading standard of Rule 9(b).

Third, plaintiffs continue to ignore the limited scope of ERISA fiduciary duties, instead arguing that a person or entity assumes a fiduciary obligation to disclose material information to co-fiduciaries, even if that person or entity is a fiduciary only for a limited purpose (such as appointing the trustee) and does not otherwise have any disclosure obligations.[29] As shown above, any fiduciary responsibilities that Citigroup, Prince, or Rubin had were limited to areas in which they exercised discretionary authority or control, and did not extend to providing information to others.

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[28] *See Williams Cos.*, 271 F. Supp. 2d at 1338-39; *Crowley*, 234 F. Supp. 2d at 229; *McKesson*, 2002 WL 31431588, at *16; *Dow Jones & Co.*, 671 F. Supp. at 1367.

[29] The cases plaintiffs cite do not help them. *Liss* v. *Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998), is irrelevant to this claim, as it does not address any fiduciary duty to disclose material, non-public information. Neither of the two Third Circuit cases on which plaintiffs rely involves alleged disclosures which are even remotely comparable. *See Ream* v. *Frey*, 107 F.3d 147, 151 (3d Cir. 1997) (trustee's failure to inform plan *beneficiary* that trustee had resigned); *Glaziers & Glassworkers Union Local 252 Annuity Fund* v. *Newbridge Secs., Inc.*, 93 F.3d 1171, 1181 (3d Cir. 1996) (investment advisor defendants had reported another advisor's suspect activity to NASD, but failed to inform other plan fiduciaries).

Finally, plaintiffs' claims continue to run up against the insider trading laws. Plaintiffs urge that Citigroup, Prince, and Rubin should have disclosed material, non-public information to their alleged co-fiduciaries to enable trading in Citigroup stock. But plaintiffs cite no cases for the proposition that a fiduciary may disclose material non-public information to a co-fiduciary without running afoul of the securities laws. And plaintiffs fail to distinguish our case law showing that precisely this type of disclosure would violate the securities laws.[30]

C. Plaintiffs Fail To State A Claim For Breach Of The Duty To Avoid Conflicts Of Interest

Plaintiffs' conflict of interest claim fares no better. *First*, contrary to plaintiffs' argument that this claim cannot be resolved on a motion to dismiss, many courts have resolved such claims at the pleading stage. *See, e.g.*, *Halaris* v. *Viacom, Inc.*, No. 3:06-CV-1646, 2008 WL 3855044, at *3 (N.D. Tex. Aug. 19, 2008); *Radioshack*, 547 F. Supp. 2d at 616.[31]

Second, plaintiffs' argument that defendants were conflicted because their compensation was stock-based and therefore tied to the Company's performance would preclude virtually all employees (many of whom receive stock options, participate in ESOP plans, or otherwise invest in company stock) from serving as ERISA fiduciaries for their own company's plan, contrary to ERISA's explicit directive that such employees may serve as plan fiduciaries. 29 U.S.C. § 1108(c)(3). That is why numerous courts, including courts in this District, have held that allegations of compensation-based conflicts are insufficient as a matter of law. *See, e.g.*, *Huntington Bancshares*, 2009 U.S. Dist. LEXIS 9102, at *14 n.6 (dismissing conflict of interest

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[30] Plaintiffs merely say that *Thompson* v. *Avondale Indus. Inc.*, No. Civ.A. 99-3439, 2003 WL 359932 (E.D. La. Feb. 14, 2003), is inapposite, but concede that the case provides that insider trading rules would have been violated if material non-public information had been provided to other fiduciaries. (Pl. Br. at 53 n.66.)

[31] Each of the three cases plaintiffs cite in support of this argument preceded *Twombly*. And plaintiffs ignore the many courts that have decided conflict of interest claims on motions to dismiss prior to *Twombly*. *See, e.g.*, *Polaroid*, 362 F. Supp. 2d at 479; *AOL*, 2005 WL 563166, at *8; *Calpine*, 2005 WL 1431506, at *7-8; *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 834-35 (N.D. Cal. 2005).

claim because "[a]s opposed to creating a conflict, compensation in the form of company stock aligns the interests of plan fiduciaries with those of plan participants"); *Polaroid*, 362 F. Supp. 2d at 479 (allegation that "[d]efendants' compensation was stock-based . . . fails to state a claim for breach of fiduciary duty"); *WorldCom*, 263 F. Supp. 2d at 768; *McKesson*, 391 F. Supp. 2d at 834-35.[32]

Finally, plaintiffs' allegation that Prince and Rubin sold Citigroup stock during the class period is irrelevant because plaintiffs do not allege that those sales created any conflict with Prince's and Rubin's alleged fiduciary roles of appointing other fiduciaries of the Plans. *See, e.g.*, *AOL*, 2005 WL 563166, at *8; *Calpine*, 2005 WL 1431506, at *8.[33]

D. Plaintiffs Fail To State A Claim Under Co-Fiduciary Liability Theory

Plaintiffs' opposition brief shows why plaintiffs fail to state a claim for co-fiduciary liability. Citing two paragraphs of their Complaint (Pl. Br. at 56, citing Cplt. ¶¶ 272, 278), plaintiffs argue that those allegations are sufficient to state a claim. But those allegations do no more than parrot the language of the statute and make conclusory assertions that defendants violated it. Such allegations are plainly insufficient to satisfy *Twombly*, which rejects the formulaic recitation of the elements of a cause of action and instead requires that plaintiffs plead specific facts alleging which of the defendants supposedly participated in, enabled, or

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[32] Plaintiffs' cases are inapposite. In *Shirk* v. *Fifth Third Bancorp*, No. 05 Civ. 49, 2007 WL 1100429, at *2 (S.D. Ohio Apr. 10, 2007), the fiduciaries accused of conflicts had broad discretion over the management and disposition of plan assets, unlike the fiduciaries here. And *Donovan* v. *Bierwirth*, 680 F.2d 263, 266-68 (2d Cir. 1982), in which corporate officers used their positions as fiduciaries to buy company stock through the pension plan in an effort to stave off a takeover bid, is not remotely relevant to the allegation that stock-based compensation creates any conflict of interest.

[33] Plaintiffs seek to distinguish *Calpine* and *AOL* by arguing that plaintiffs in those cases failed to allege that the directors' stock sales conflicted with their fiduciary duties. That is precisely the situation here as well. Plaintiffs' response that Citigroup's corporate culture required unwavering loyalty to the company (Pl. Br. at 55 n.68) has nothing to do with Prince's and Rubin's appointment responsibilities.

knew of purported breaches by other fiduciaries. Courts routinely dismiss co-fiduciary duty claims based on such insufficient allegations.[34]

IV. THE COMPLAINT SHOULD BE DISMISSED UNDER ERISA § 404(C)

Plaintiffs' assertion that ERISA § 404(c) "is never suitable for resolution at the pleading stage" (Pl. Br. at 57) is wrong. Indeed, *Hecker* v. *Deere & Co.*, 496 F. Supp. 2d 967, 975-77 (W.D. Wisc. 2007), applied *Twombly* and dismissed a complaint on this basis. The factors relevant to the Section 404(c) defense are established based on the facts appearing on the face of the Complaint and in the Plan documents attached to the Complaint. (*See* Def. Br. at 50.)

Plaintiffs also contend that Section 404(c) does not apply to a claim that an investment option is imprudent. While plaintiffs rely on statements of the Department of Labor (Pl. Br. at 58-59 & n.74), courts have recognized that the Secretary of Labor's view is contrary to the language of ERISA. The Fifth Circuit held that the Secretary's view "does not reasonably interpret § 404(c)," "contradicts the governing statutory language," and "*would render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary*." *Langbecker* v. *Elec. Data Sys. Corp.*, 476 F.3d 299, 311 (5th Cir. 2007) (emphasis added); *see also In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996)

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[34] *See, e.g.*, *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02 C 8324, 2004 WL 407007, at *8 (N.D. Ill. Mar. 3, 2004) (dismissing co-fiduciary duty claim where complaint contained conclusory allegations); *McKesson*, 2002 WL 31431588, at *17 (same); *Lee*, 991 F.2d at 1011 (dismissing claim because plaintiff failed to allege facts sufficient to show that any of the ERISA fiduciaries knew about breaches by another fiduciary); *Davidson* v. *Cook*, 567 F. Supp. 225, 237 (E.D. Va. 1983) (same); *Sprint*, 388 F. Supp. 2d at 1230 (dismissing claim that did nothing more than parrot the language of the statute).

Plaintiffs' state that our authorities, *Kling*, 323 F. Supp. 2d at 145, and *Haber* v. *Brown*, 774 F. Supp. 877, 879 (S.D.N.Y. 1991), stand for the proposition that co-fiduciary liability does not attach to non-fiduciaries. (Pl. Br. at 56 n.70.) That is precisely why we cited those cases, as defendants were not fiduciaries with respect to any of the allegations in this Complaint and therefore cannot be liable under a co-fiduciary liability theory.

(holding that Section 404(c) defense applies to a claim for "breach of duty in making an investment decision").[35]

Conclusion

For the foregoing reasons as well as those set forth in our moving brief, the Complaint should be dismissed with prejudice.

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[35] Plaintiffs rely on dicta in a footnote from *DiFelice* v. *U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007). Because the court had held that the company stock fund was prudent, its discussion of the Secretary's commentary was irrelevant to its holding.