09-3804-cv

United States Court of Appeals

for the

Second Circuit

IN RE: CITIGROUP ERISA LITIGATION

STEPHEN GRAY, JAMES BOLLA and SAMIER TADROS,

Lead Plaintiffs-Appellants

SANDRA WALSH, ANTON K. RAPPOLD and ALAN STEVENS,

Plaintiffs-Appellants

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR PLAINTIFFS-APPELLANTS AND SPECIAL APPENDIX

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– v. –

CITIGROUP INC., CITIBANK, N.A., THE PLANS ADMINISTRATION COMMITTEE, THE PLANS INVESTMENT COMMITTEE, CHARLES O. PRINCE, ROBERT E. RUBIN, JORGE BERMUDEZ, MICHAEL BURKE, STEVE CALABRO, LARRY JONES, FAITH MASSINGALE, THOMAS SANTANGELO, ALISA SEMINARA, RICHARD TAZIK, JAMES COSTABILE, ROBERT GROGAN, ROBIN LEOPOLD, GLENN REGAN, CHRISTINE SIMPSON, TIMOTHY TUCKER, LEO VIOLA, DONALD YOUNG, MARCIA YOUNG and JOHN DOES 1-20,

Defendants-Appellees.

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The Decision below was by the Honorable Sidney H. Stein, and reported as *In re Citigroup ERISA Litigation*, No. 07 Civ. 9790, 2009 WL 2762708, 47 Employee Benefits Cas. 2025 (S.D.N.Y. Aug. 31, 2009)

I. PRELIMINARY STATEMENT.

This action is brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), a statute which, as its name suggests, was enacted to protect employee retirement savings. In this case, Plaintiffs alleged that the fiduciaries of the two Citigroup 401(k) plans, the Citigroup Plan and the Citibuilder Plan (the "Plans"), breached their fiduciary duties by continuing to make and maintain investment in Citigroup, Inc. ("Citigroup" or the "Company") stock, when it was no longer a prudent Plan investment. As a result of these breaches, the Plans lost massive amounts of retirement savings that the fiduciaries were duty-bound to protect.

As the Supreme Court recently noted in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 552 U.S. 248 (2008), 401(k) plans like those at issue here, are now the primary vehicle for retirement saving in America, supplanting traditional defined benefit pension plans. In many cases, participants in plans heavily invested in company stock have lost large portions, or all, of their retirement savings, when the company stock lost most or all of its value. In many of these cases, these losses resulted from serious mismanagement by persons and entities who were themselves fiduciaries. These are the cases in the headlines: Enron, WorldCom, Global Crossing, Merrill Lynch, and now Citigroup.

The law's response to this situation is reflected in dozens of district court opinions, but only a few circuit court opinions, and none from this Circuit. In this case, and those like it, the parties dispute whether the plan documents *require* investment in company stock regardless of circumstances, or provide discretion to the fiduciaries to protect the plans from avoidable losses. Yet, beyond this dispute, a central theme in these cases is the extent to which the employer can sidestep the whole issue of fiduciary responsibility by "hard-wiring" company stock into the plan. The District Court found Defendants did that here. However, the Department of Labor and the overwhelming number of courts addressing the issue have held that the drafters of plan documents cannot so excuse themselves from ERISA's requirement that all plan options be prudent. Were the law otherwise, there is an obvious risk that plan sponsors would add to their plans the same language on which the District Court based its conclusions so that they too could exempt their plans' company stock investment from ERISA's stringent fiduciary protections. This would gut ERISA's stringent fiduciary protections for 401(k) savings. Because, for the reasons discussed below, the District Court's decision is wrong as a matter of law, and contrary to the fundamental purpose of ERISA to prevent the misuse and mismanagement of the nation's retirement savings, the decision should be reversed.

II. JURISDICTIONAL STATEMENT.

The District Court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). This Court has jurisdiction under 28 U.S.C. § 1291. A judgment disposing of all parties' claims was entered on August 31, 2009 (Brief and Special Appendix for Appellants ("SPA")-52), and a notice of appeal was timely filed on September 8, 2009. Joint Appendix ("A")-1294.

III. ISSUES PRESENTED FOR REVIEW.

1. Did Plaintiffs adequately allege that Defendants were ERISA fiduciaries with respect to the purchase and retention of Company stock by the two Citigroup 401(k) plans here at issue?

2. Did the District Court err in concluding that ERISA permits a plan sponsor to draft plan documents so as to effectively deny the plan fiduciaries any authority to sell Company stock, or suspend purchases of it, regardless of the circumstances?

3. Did Plaintiffs adequately allege that the Plans' governing documents in fact did grant the fiduciaries the discretion to sell Company stock or suspend purchases of it?

4. Were the fiduciaries entitled to a presumption that investment in Company stock was prudent, and if so, did the District Court improperly interpret

and apply that presumption, and disregard post-Complaint facts that supported Plaintiffs' allegations?

5. Did ERISA require Defendants to communicate truthfully with Plan participants and disclose critical information participants needed to make informed decisions regarding their Plan investment in Company stock, and if so, did the District Court err by dismissing Plaintiffs' claims based on the breach of these duties?

IV. STATEMENT OF THE CASE.

The Consolidated Class Action Complaint ("Complaint") was filed on September 15, 2008 (Certified Indexed Record on Appeal ("CIR"), Docket No. 75). Plaintiffs alleged that the fiduciaries of the Plans breached their fiduciary duties with respect to the Plans' massive investment in Citigroup stock. Defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), (CIR, Docket No. 81), arguing, among other things, that the Plans' documents did not permit the fiduciaries any discretion with respect to company stock, and, thus tied the fiduciaries' hands and prevented any action to protect the Plans from losses due to the Plans' investment in Citigroup stock. Plaintiffs opposed the motion, (CIR, Docket No. 87), but the District Court granted it, holding, on the central issue in the case, that "defendants had no discretion" – and could not have been "acting as

fiduciaries" – with respect to the Plans' investment in Citigroup stock. Order at SPA-14. This appeal followed.

V. STATEMENT OF FACTS.

A. The Parties.

Plaintiffs are Plan participants whose Plan accounts held shares of Citigroup stock in the Citigroup Common Stock Fund, and who suffered losses as a result. *See* A-109, A-112, A-115, A-116, A-118, A-120 ¶¶ 228, 241, 251, 258, 266, 279, 281.[1]

Defendants are Citigroup (A-42 ¶ 23), Citibank (A-42 ¶ 25), certain Citigroup directors,[2] and the members of the Citigroup Administration Committee ("Administration Committee") and the Citigroup Investment Committee ("Investment Committee") (collectively, "Committees"). A-44 ¶¶ 32-33.

The Citigroup Plan's assets were held in trust by a directed trustee, Defendant Citibank. A-50, A-59 ¶¶ 53, 87. The Trust Agreement authorized the Investment Committee to direct Citibank with regard to Plan investments. A-477-480 (Cplt. Ex. C, § 4.2).

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[1]References to "¶" are to paragraphs in the Complaint.

[2]Defendants Charles O. Prince ("Prince") and Robert E. Rubin ("Rubin"). A-43 ¶¶ 28-29.

Of particular importance to the Investment Committee's authority, § 7.09(e) of the Citigroup Plan 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 Common 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 should be modified, such duty shall be that of the Investment Committee.

A-662;[3] *see also* A-541 (Cplt. Ex. D, § 7.09(e)) (same).

B. <u>The Plans.</u>

The Plans are employee pension benefit plans within the meaning of 29 U.S.C. §§ 1002(3) and 1002(2)(A). A-57 ¶ 78. Both Plans are "defined contribution" plans, as defined under 29 U.S.C. § 1002 (34): they provide for individual accounts, with benefits based on the amount contributed to the participant's account and the earnings attributable thereto. *Id.* The purpose of the Plans is to help participants build retirement funds (A-57, A-61 ¶¶ 79, 95), through participant contributions and Company matches. A-58, A-62 ¶¶ 81, 98.

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[3]Unless otherwise indicated, all references to Plan documents are to the Citigroup 401(k) Plan, effective July 1, 2001 and include Amendments effective through January 1, 2008.

The Plans offered different Investment Funds, including the Citigroup Common Stock Fund ("Stock Fund"). Several Plan provisions address the Investment Funds generally, and the Stock Fund in particular. Section 7.01 provides that:

> 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. 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 Committee, including but not limited to any timing or frequency limitations approved by the Investment Committee . . . 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; *provided*, the Citigroup Common Stock Fund shall be permanently maintained as an Investment Fund under the Plan....

A-659 (Cplt. Ex. E).

While the Plans purport to make the Stock Fund a "permanent" Plan *option*, nothing in the Plans requires any Plan assets to be "permanently" *invested* in the Stock Fund. Indeed, the Plan states: "Each Participant shall be allowed to direct the manner in which any Salary Reduction Contributions, Company Matching Contributions, One-Time Shearson Transfer Supplemental Contributions and Rollover Account contributions will be initially invested among the Investment Funds." A-659 (Cplt. Ex. E, § 7.02(a); *see also* A-648 (Cplt. Ex. E, § 5.05(e)) (providing that Company Fixed Contributions are initially invested in the Stock Fund but may be re-directed by participants); *id.* § 5.06(a) (same for Company Transition Contribution). In addition, the Citigroup Plan states: "All Investment

Funds available under the Plan shall be subject to any restrictions or limitations imposed by the Investment Fund issuer or manager." A-661 (Cplt. Ex. E, § 7.08(a)).

C. The Failure Of Defendants Prudently And Loyally To Manage The Plans' Investment In Citigroup Stock.

1. Citigroup stock became an imprudent investment for retirement savings.

The Complaint alleges in detail that Citigroup stock became an imprudent investment for the Plans. A-65-101 ¶¶ 108-200. Allegations include Citigroup's heavy involvement in originating below-standard mortgages that carried a high risk of default, despite published warnings about those risks, thus putting Citigroup at risk of collapse. A-65 ¶¶ 108-09. In addition, beginning in early 2005, Citigroup senior management, including Defendants Prince and Rubin, caused Citigroup to become overexposed to the subprime market, and the collateralized debt obligation ("CDO") market. In so doing, Citigroup deliberately raised the Company's risk tolerance, without effective risk management policies and procedures. A-43, A-72, A-74, A-88, A-90, A-93 ¶¶ 28-29, 130-36, 174, 178, 189.

Despite numerous urgent and credible warnings that this segment of the market was fraught with risk (A-93-97 ¶¶ 189(a)-(y)), and warnings by industry watchdogs in 2004-2006 that relaxed lending practices were increasing risks in the overheated housing market (A-69-72, A-75 ¶¶ 116-29, 136), Citigroup increased

its exposure to the treacherous subprime market, even as that market was collapsing. A-72-74 ¶¶ 130-34.

Tripling down on its bet, Citigroup began generating additional CDO and securitization business by granting investors in mortgage-backed securities ("MBS"), backed by subprime loans, billions in "liquidity puts," which allowed MBS-buyers to sell them *back to Citigroup*, multiplying Citigroup's exposure. A-73 ¶ 131.

Further, before and during the Class Period, Citigroup became one of the largest participants in off-balance sheet structured investment vehicles ("SIVs"), without disclosing Citigroup's extraordinary liabilities or risks related thereto. A-38, A-90-91 ¶¶ 7, 176-82. While Citigroup touted to the SIVs' investors that the SIVs invested strictly in high quality debt securities (A-90 ¶ 179), in fact, those SIVs were largely exposed to risky subprime loans. A-90-91 ¶¶ 180-81. Investor complaints forced the SIVs to sell assets at substantially below book value, forcing Citigroup to make them whole. A-90-91 ¶¶ 180, 182. In addition, due to informal guarantees offered by Citigroup to lure investors into the SIVs, Citigroup was required to consolidate the SIVs' assets and liabilities onto its balance sheet which, despite prior denials of its SIV-related obligations, Citigroup did only after its exposure was publicly reported. A-91 ¶ 182.

Plaintiffs further alleged that Citigroup repeatedly misstated its financial condition, both in SEC filings and statements made by executives, thereby artificially inflating its stock price and subjecting it to multiple securities fraud lawsuits. A-74 ¶ 135.

Because of these facts, elaborated in greater detail in the Complaint, Plaintiffs allege that Citigroup was seriously mismanaged and faced dire financial circumstances. As evidence of Citigroup's deteriorating financial condition, Plaintiffs noted that the price of Citigroup stock declined precipitously from over $54 per share to $14 per share (a 74.1 percent decline) during the Class Period (A-89-90 ¶ 175), and continued its freefall to $3.77 a share on Nov. 21, 2008 (a 93 percent decline). A-1231 (Declaration of Andrew E. Lencyk ("Lencyk Decl."), Ex. B).

The mismanagement was further substantiated by, *inter alia*, the resignation of Defendants Prince and Rubin, the demotion of Citigroup's CFO Sallie Krawcheck, and Citigroup's slashing of over 17,000 jobs. A-41, A-76, A-78 ¶¶ 16, 138, 145. Additionally, the Complaint cited $54.6 *billion* dollars in write-downs and credit costs, and reports confirming the Company had some of the largest losses in the subprime market, comparing Citigroup to Bear Stearns' spectacular demise, and positing that a resultant "run on the bank" could cause a similar collapse. A-81-82, A-88, A-93 ¶¶ 153, 174, 189.

Furthermore, post-Complaint facts in the record, including the $354 billion government bailout of Citigroup on the eve of a potential bankruptcy, support Plaintiffs' claim that Citigroup faced dire financial circumstances, and was consequently an imprudent investment for participants' retirement savings. A-1235 (Lencyk Decl., Ex. D).

2. Defendants knew or should have known that Citigroup stock became an imprudent investment for participants' retirement savings.

The Complaint does not seek to hold Defendants liable for engaging in the corporate misdeeds described therein; rather, as an ERISA breach of fiduciary duty action, the Complaint asserts claims against the Defendant Plan fiduciaries for continuing to make and maintain investment in Citigroup stock despite the fact that they knew or should have known that the stock was overpriced and an imprudent Plan investment because of Citigroup's misconduct. As such, the Complaint asserts claims against Defendants who knew the full extent of Citigroup's problems, and because of their positions and their status as ERISA fiduciaries charged with the "highest duty known to law" would have known about these circumstances had they conducted the ERISA-mandated investigation into the ongoing prudence of investing in Citigroup stock. This is true especially given the abundant red flags regarding Citigroup's perilous condition. A-93 ¶¶ 188-190.

Specific red flags identified in the Complaint include:

- Reports that underwriting standards for home mortgage loans, and risk management practices of subprime lenders, were too lax, resulting in an unprecedented rise in defaults. A-68-70 ¶¶ 114-119.

- Published reports about the deterioration of the housing credit market, and corresponding subprime bond market crisis, in which Citigroup was heavily invested, in late 2005 and 2006. This included reports that the U.S. was facing the worst foreclosure crisis in the modern mortgage market, and that the subprime mortgage-backed securities market was going to experience significant losses. A-73, A-75, A-93-94 ¶¶ 133, 136, 189(a)-(f).

- The ABX, the subprime mortgage-backed securities index, had dropped significantly in early 2007. A-94-95 ¶ 189(g)-(i).

- Reports that as early as March 2007 dozens of major subprime mortgage lenders had failed, sought emergency bailout loans, or filed bankruptcy. A-95-97 ¶ 189(k), (n), (o), (s), (v), (x).

- Reports that the failure of the U.S. subprime mortgages would significantly affect the CDO market, in which Citigroup was also heavily invested. A-95 ¶ 189(l).

- Reports that Wall Street banks, such as Citigroup, may be hiding losses from the subprime mortgage fallout on their books and in off-balance sheet vehicles. A-96 ¶ 189(r).

- Reports that Bear Stearns hedge funds invested in subprime mortgage-backed securities had filed for bankruptcy. A-96 ¶ 189(q).

- Reports that major mortgage lenders were facing liquidity problems, had suspended withdrawals, and/or were delaying payment of dividends. A-96-97 ¶ 189(t), (u) & (y).

Thus, the Complaint alleges that despite the enormous amount of Citigroup stock in the Plans, the dire circumstances Citigroup faced due to its exposure to the subprime crisis, and the crashing value of the Plans' investment in Citigroup stock, Defendants failed to conduct any investigation, or take any action to protect the

Plan assets, notwithstanding that they knew or should have known Citigroup stock was artificially inflated and an imprudent Plan investment. *See* A-98, A-99-100, A-106, A-107-108, A-117-118 ¶¶ 192, 196, 221, 225, 265.

3. Defendants failed to provide critical information to participants regarding the risks of investment in Citigroup stock.

Defendants Citigroup, Prince and the Administration Committee regularly communicated with Plan participants about Citigroup stock through various Plan-related materials and regular "town hall" meetings, through which they encouraged investment in Citigroup stock, and made false statements, concealing material information about the risks to Citigroup stock, knowing employees required the truth. *See, e.g.*, A-98, A-100-102, A-110-112, A-121 ¶¶ 191, 197-200, 233-39, 283.

Citigroup and Prince denied and masked the true extent of Citigroup's subprime exposure and losses during the Class Period, depriving participants of critical information regarding their Company stock investments in the Plan. A-76, A-77-78, A-79, A-80 ¶¶ 138, 143, 147, 150. For example, Citigroup claimed on January 19, 2007 that "we have adequate reserves ... we review that ... and we feel very good, very good about the level of them" (A-76 ¶ 138), and on April 16, 2007, Prince stated that "[w]e are delivering on our plan" (A-79-80 ¶ 148). However, on July 20, 2007, Citigroup acknowledged it had been focused on

managing down its subprime exposure "for some time" (A-82 ¶ 155). Additionally, Citigroup initially denied its SIV liabilities (A-91 ¶ 182), and, contrary to assurances of a "return to a normal earnings environment in the fourth quarter" after its October 1, 2007 loss announcements, and that its "cash flow is very strong," Citigroup was compelled to acknowledge a series of additional losses (A-84-89 ¶¶ 158-74).

4. **Defendants' breaches of fiduciary duty caused the Plans to incur enormous losses.**

At the start of the Class Period, the single largest investment of each Plan was Citigroup stock. Citigroup stock comprised 32 percent and 34 percent of the Citigroup and Citibuilder Plans' total assets, respectively – over $4 billion total. Citigroup stock fell to $3.05 per share on November 21, 2008, and Citigroup avoided bankruptcy only through a government bailout.[4] A-1231 (Lencyk Decl., Ex. B). Thus, as a result of Defendants' failure to divest or even suspend new investment in Citigroup stock, Plan participants lost over a billion dollars of their retirement savings during the Class Period alleged in the Complaint, (A-99-100 ¶

[4]From the first trading day of the Class Period until November 21, 2008, Citigroup stock lost almost 95% of its value. A-1231 (Lencyk Decl., Ex. B). After the bailout, the stock fell to $0.97 per share on March 5, 2009, an over 98% decline. The Court can take judicial notice of these public, uncontroverted facts. *Ganino v. Citizens Util. Co.*, 228 F.3d 154, 167 n.8 (2d Cir. 2000) ("the district court may take judicial notice of well publicized stock prices").

196), and lost substantially more in the ensuing months. A-1231 (Lencyk Decl., Ex. B).

VI. SUMMARY OF ARGUMENT.

The District Court erred by interpreting ERISA and the Plans in a manner that not only undermined, but eradicated ERISA's fundamental purpose of preventing misuse and mismanagement of Plan assets. The District Court did so by sweeping aside the text of ERISA and decades of jurisprudence stating that ERISA trumps Plan terms where the terms require fiduciaries to act inconsistently with ERISA's stringent fiduciary standards. Indeed, since the *Enron* debacle, this basic ERISA premise has been confirmed in dozens of analogous company stock cases. In light of this black letter law, even if the Plans "required" investment in Citigroup stock, the District Court erred in concluding that the fiduciaries were required to abide by the Plan terms notwithstanding the sufficiently pled allegations of the imprudence of Citigroup stock. Additionally, the District Court erred by drawing inferences in Defendants' favor by reading out of the Plans any fiduciary obligation to prudently manage the Plans' investment in Citigroup stock – the Plans' largest single asset – and reading into the Plans a requirement to invest participants' retirement savings in Citigroup stock, regardless of how inappropriate.

The District Court also erred in concluding that Defendants were entitled to a "presumption of prudence" where the Complaint alleges they failed to engage in any evaluation of the prudence of investment in Citigroup stock, and where, at any rate, ERISA does not provide these fiduciaries with any such presumption with regard to Plan investment in Company stock. In addition to improperly applying such presumption, at the pleading stage, the District Court erred by concluding that the Complaint, which contained detailed allegations of Citigroup's serious mismanagement and dire financial circumstances, failed to allege sufficient facts to overcome the presumption, and by disregarding post-Complaint facts.

The District Court likewise erred by concluding, despite abundant authority otherwise, that ERISA does not require Plan fiduciaries to provide participants with truthful and accurate information critical to participants' ability to make informed decisions regarding investment in Citigroup stock. Finally, the District Court erred by dismissing the Complaint's monitoring and co-fiduciary liability claims based on its erroneous determination that the Complaint failed to allege a viable claim against Defendants for failing prudently to manage the Plans' investment in Citigroup stock. Accordingly, the District Court's decision should be reversed.

VII. ARGUMENT.

A. Standard Of Review.

The District Court's dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392 (2d Cir. 2008). The court considers the legal sufficiency of the complaint, "taking its factual allegations to be true and drawing all reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) (citing *Beretta*, 524 F.3d at 392). Drawing all inferences in plaintiff's favor, the court then determines whether the claim to relief "is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). Facial plausibility is established when a plaintiff's allegations are not mere conclusory statements, but contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, --U.S.--, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). Where, as here, the factual allegations "actively and plausibly suggest" a claim, the motion to dismiss should be denied. *Post Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007).

B. The District Court Erred In Holding That Defendants Had No Fiduciary Duty With Respect To The Management Of The Plans' Investments In Citigroup Stock.

1. The Count I Defendants are fiduciaries because they were responsible for the management and disposition of the Stock Fund.

The District Court erroneously concluded that the Defendants could not have acted as fiduciaries *because* they had no discretion to eliminate Citigroup stock under the terms of the Plan documents. Order at SPA-14. ERISA defines a fiduciary as a person who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises *any authority or control* respecting management or disposition of [a plan's] assets." 29 U.S.C. § 1002(21)(A)(i) (emphasis added). Thus, a person exercising control over plan assets is a fiduciary *even if the plan document gives him no discretion. LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) (individual with *no* discretion over plan assets was subject to ERISA fiduciary duties in deciding whether to forward plan assets to the trust); *Briscoe v. Fine*, 444 F.3d 478, 490-491 (6th Cir. 2006) (ERISA imposes fiduciary duties "on entities or companies that exercise 'any authority or control' over the covered assets.").

The District Court's holding that Committee members were not "'acting as fiduciaries'" (Order at SPA-17) because they had no discretion is plain error and "does violence to the [above-quoted] statutory text." *Chao v. Day*, 436 F.3d 234,

236 (D.C. Cir. 2006).[5] The purchase or sale of plan assets is quintessentially "management or disposition" of plan assets which triggers fiduciary duties. Indeed, in *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 27-28 (2d Cir. 2002), a case relied upon by the District Court, this Court noted that "the 'management or disposition' language in ERISA [that imposes fiduciary status even in the absence of discretion] refers to the common transactions in dealing with a pool of assets: selecting investments, exchanging an instrument or asset for another, and so on." *Id.* at 28 (quoting *Johnson v. Georgia-Pac. Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994)). This is precisely the type of conduct challenged here.[6]

Further, the District Court's construction would mean that, by eliminating investment discretion, a settlor could effectively render a plan "fiduciary-less," a conclusion contrary to ERISA's very structure. 29 U.S.C. § 1103, requires that all plan assets be held by a trustee who "shall have exclusive authority and discretion to manage and control the assets of the plan except to the extent that" the plan provides that the trustee or trustees are "subject to the direction of a named

[5]*See also Bd. of Tr. of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assocs., Inc.*, 237 F.3d 270, 272-273 (3d Cir. 2001); *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997).

[6]*Pegram v. Herdrich*, 530 U.S. 211, 226 (2000), also cited by the District Court, had nothing to do with the management of plan assets. It addressed whether an HMO breached its fiduciary duty in making decisions affecting medical treatment.

fiduciary," or such authority is delegated to an investment manager. By requiring that plan asset management be assigned to person with fiduciary status, Congress carefully crafted ERISA to assure that all decisions involving the management of plan assets would be subject to ERISA's fiduciary responsibility rules. *See Lowen v. Tower Asset Mgmt., Inc.* 829 F.2d 1209, 1218-19 (2d Cir. 1987). Plan documents cannot be drafted to remove fiduciary investment responsibility from the hands of actual persons. *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1366 (11th Cir. 1997).

Because the governing plan documents clearly gave the Investment Committee and Administration Committee Defendants authority over the Plans' investment in Citigroup stock, they were fiduciaries with respect to the Plans' Citigroup stock investments.[7] Specifically, the Investment Committee had the authority to direct the Plans' Trustee with respect to all Plan investments. A-477-480 (Cplt. Ex. C, § 4.2). Likewise, the Administration Committee and the Investment Committee together had the authority to impose timing and frequency restrictions on new investments in the Stock Fund. A-659 (Cplt. Ex. E). As explained above, even if the District Court correctly held that the Plan documents by their terms purported to confer this authority without the discretion to limit or

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[7]Additionally, as discussed below in Section VII.F.2, the Complaint adequately alleges Citigroup and Citibank's fiduciary status with respect to the management and disposition of Plan assets.

divest the investment in employer stock, the Committee members nevertheless retained fiduciary responsibility for the Plans' investment in that stock.

2. ERISA fiduciaries must override plan document provisions to the extent those provisions require them to manage plan assets imprudently or disloyally.

Even if the Plan Documents unequivocally stated that the Plans were required to invest in Citigroup stock regardless of the circumstances (which as discussed below, they do not), the District Court erred in holding that Defendants did not have a fiduciary duty to override the Plan terms where necessary to avoid imprudent action. Order at SPA-19.

The ERISA duty to override is stated plainly in the statute itself. 29 U.S.C. § 1104(a)(1)(D) provides that a plan fiduciary must comply with the documents governing the plan only "insofar as such documents and instruments are consistent with the provisions of this title...." The "provisions of this title," *i.e.*, Title I of ERISA, include the prudent man rule. 29 U.S.C. § 1104(a)(1)(B). Accordingly, when the Plan and the statute conflict with regard to prudent investment, the Plan must give way. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA").

Furthermore, ERISA invalidates plan provisions that excuse fiduciaries from compliance with the prudent man rule. Section 410 states that any plan provision

that "relieve[s] a fiduciary from responsibility or liability for any responsibility, obligation, or duty" under part 4 of Title I of ERISA, which includes ERISA's prudence provision, is "void as against public policy." 29 U.S.C. § 1110; *cf. Reich v. Hall Holding Co.*, 990 F. Supp. 955, 961 (N.D. Ohio 1998) (an agreement purporting to relieve an ESOP fiduciary of the requirement to pay no more than adequate consideration for employer stock would be void under 29 U.S.C. § 1110).

Consistent with the express language of ERISA, courts have overwhelmingly held that the determination by plan fiduciaries to acquire or retain employer stock is subject to the overriding duty of prudence. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102-1103 (9th Cir. 2008); *see also Fink v. Nat'l Sav. & Trust Co.,* 772 F.2d 951, 955-956 ("the requirement of prudence in investment decisions and the requirement that all acquisitions be solely in the interest of plan participants continue to apply" to an ESOP notwithstanding diversification exemption). *Cf. Armstrong v. LaSalle Bank, N.A.*, 446 F.3d 728, 732 (7th Cir. 2006) (ERISA's ESOP diversification exemption does not excuse a trustee from the duty of prudence). This has also been the consistent position of the Department of Labor. *See* U.S. Dept. of Labor Opinion Letter No. 90-05 (A), 1990 WL 172964, at *3 (Mar. 29, 1990) (despite plan provisions to contrary, it is responsibility of fiduciaries to determine, based on all relevant facts and circumstances, the prudence of investing plan assets in qualifying employer

securities); U.S. Dept. of Labor Opinion Letter No. 83-6(A), 1983 WL 22495, at *1-2 (Jan. 24, 1983) (same).

This is so even where the governing plan documents purportedly require the plan to invest in employer stock. *LaLonde v. Textron* 369 F.3d 1 (1st Cir. 2004) (reversing dismissal of prudence challenge to employer stock investment where plan document prohibited diversification out of employer stock); *NationsBank*, 126 F.3d at 1368-1369 (fiduciaries must override plan provision requiring the retention of unallocated shares if failure to tender would be imprudent); *Eaves v. Penn*, 587 F.2d 453, 459-460 (10th Cir. 1978) (trustee claiming to be bound by provisions of the plan and ERISA to invest in employer securities remained subject to duty of prudence).

The District Court's conclusion that the Plan terms dictate investment in Company stock, and, thus, no possible fiduciary liability for investing in the stock exists, defies the fundamental purpose of ERISA: to prevent the misuse or mismanagement of Plan assets, and preserve them for retirement purposes. *See Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 140 n.8 (1985). Indeed, by this reasoning all retirement plan investments could be controlled by plan amendment and placed beyond the reach of judicial review for prudence. Even those courts that apply a presumption of prudence (discussed *infra*) to the purchase or retention of employer stock have held that plan provisions cannot insulate those decisions

entirely from judicial review. *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995) ("the purpose and nature of ERISA and ESOPs preclude a plan's per se prohibition against diversification or liquidation....[A] plan provision that completely prohibits diversification of ESOP assets necessarily violates the purposes of ERISA"). The ensuing race to the bottom would pose a grave risk to retirement income security – the very focus of ERISA.

Without question, through 29 U.S.C. §§ 1104(a)(1)(D) and 1110, Congress made it clear that plan settlors could not absolve fiduciaries of their duty of prudence by requiring a particular investment in governing plan documents.[8]

[8]The District Court suggests that *Moench v. Robertson,* 62 F.3d 553 (3d Cir. 1995) and *Edgar v. Avaya, Inc.,* 503 F.3d 340 (3d Cir. 2007) "implied" that "if a plan were to require a fiduciary to invest in employer stock, the fiduciary would be ... 'immune from judicial scrutiny' for investment in employer stock." Order at SPA-29. Yet, *Moench* states, "we are not concerned with a situation in which an ESOP plan in absolutely unmistakable terms requires that the fiduciary invest the assets in the employer's securities regardless of the surrounding circumstances. ***Consequently, we should not be understood as suggesting that there never could be a breach of fiduciary duty in such a case.***" 62 F.3d at 567 n.4 (emphasis added). While *Moench* elsewhere discusses the trust law deference for "mandated" investments, the Court also noted limitations to this trust rule where "'compliance would be ... illegal." *Id.* at 571 (citing Restatement (Third) of Trusts § 228 cmt. e); and *see id.* at 567 (citing Restatement (Third) of Trusts § 228(a) ("In investing the funds of the trust, the trustee has a duty to the beneficiaries to conform to any applicable statutory provisions governing investment by trustees")).

3. The District Court erred by holding <u>the common law of trusts above ERISA.</u>

The District Court erred by ignoring the plain language of the statute, relying instead on trust law principles that Congress explicitly rejected. ERISA's legislative history makes clear that Congress recognized trust law "had developed in the context of testamentary and *inter vivos* trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor." S. Rep. No. 93-127, at 29 (1973) (describing Senate version of what is now Section 404(a)(1)(D); H.R. Rep. No. 93-533, at 12 (describing House version); 94 Cong. Rec. 18, 118 (1974) (describing House version). A settlor could include in the trust document "an exculpatory clause under which the trustee was relieved from liability for certain actions which would otherwise constitute a breach of duty" or the settlor could specify that "the trustee would be allowed to make investments which might otherwise be considered imprudent," and the trust law in many states was interpreted to allow the deviation. *Id.*

Congress recognized that this aspect of trust law was inappropriate for employee benefit plans. According to ERISA's legislative history, Congress intended for ERISA to disallow such deviation. The legislative history states that "[i]*n the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of*

deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature." *Id.* (emphasis added). Thus, common law rules relied on by the District Court that purportedly allowed "deviations" from the prudent man rule where intended by the settlor cannot be considered consistent with ERISA, as it is precisely these "deviations" that Congress rejected.[9]

Moreover, by elevating trust law above ERISA, the District Court ignored the Supreme Court's admonition that trust law "does not tell the entire story" because Congress expected the courts would interpret ERISA's fiduciary standards "bearing in mind the special nature and purposes of employee benefit plans." *Varity v. Howe*, 516 U.S. 489, 497 (1996) (citations omitted). A court must consider "whether or to what extent, the language of the statute, its structure, or its purposes require departing from the common-law trust requirements" and, in doing so, must consider competing interests, including "Congress' desire to offer employees enhanced protection for their benefits." *Id.*

4. The duty to override Plan terms that would produce an imprudent result is a fiduciary, not a settlor, function.

The District Court concluded that requiring the Defendants to override Plan terms mandating investment in Citigroup stock "would be the equivalent of

[9]Order at SPA-19-20, discussing Restatement (Third) of Trusts §§ 76(a), 91(b) (2007).

imposing a duty on plan sponsors to amend a plan." Order at SPA-21. This was error. Amending a plan, and deviating from its terms in order to prevent the mismanagement of Plan assets, are different – as the express language of the override provision makes clear. Whereas "ERISA assigns no fiduciary duties to sponsors when they 'amend, modify or terminate' ERISA Plans," Order at SPA-21 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443 (1999)), the duty to follow Plan terms only insofar as they are consistent with ERISA (and thus override them when they are not) is included in the section of the statute captioned "*fiduciary duties*." *See* ERISA § 404, 29 U.S.C. § 1104.

Because 29 U.S.C. § 1104(a)(1)(D) by its express language enjoins fiduciaries to follow Plan terms only insofar as they are consistent with ERISA, the provision imposes a *fiduciary duty* to depart from the Plan terms where necessary to comply with ERISA. *See, e.g., Kuper*, 66 F.3d at 1457 ("ERISA provides that a fiduciary may only follow plan terms to the extent that the terms are consistent with ERISA."); *In re Polaroid*, 362 F. Supp. 2d 461, 473-75 (S.D.N.Y. 2005) ("[b]y force of statute, Defendants had the fiduciary responsibility to disregard the Plan and eliminate Plan investments in Polaroid stock if the circumstances warranted").

The District Court's interpretation renders the override language of § 404(a)(1)(D) a dead letter; fiduciaries could follow Plan terms even if inconsistent

with ERISA since to depart from them would be a *de facto* amendment. ERISA should not be interpreted in a manner that renders any of its provisions a nullity.[10]

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) and *Lockheed Corp. v. Spink*, 517 U.S. 882, 893-894 (1996), which the District Court relied upon, are not to the contrary. *Hughes* and *Lockheed* both addressed whether a settlor can violate ERISA's fiduciary provisions when it adopts a plan amendment. In concluding that plan sponsors do not fall into the category of fiduciaries when they amend a plan, the Supreme Court distinguished acts of plan amendment from acts of plan administration. An act of plan administration includes "*uses* of plan assets that are potentially harmful to the plan," while an act of plan amendment "cannot reasonably be said to share that characteristic." *Id.* at 893 (emphasis added). Thus, the Supreme Court recognized that management and disposition of plan assets remains at all times subject to the rules governing fiduciary conduct, while amending a plan to change its benefit structure is solely the province of the settlor. This case, unlike *Hughes* and *Lockheed*, is about the management and disposition of plan assets, not the design of plan benefits.

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[10]*See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993) ("We will not read the statute to render the modifier superfluous...The authority of courts to develop a "federal common law" under ERISA, *see Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989), is not the authority to revise the text of the statute.").

Contrary to the District Court's analysis, it is not unfair to allow fiduciaries to be sued for imprudently following the plan document, because a decision to depart from the plan's language might possibly subject those fiduciaries to suit. Order at SPA-24-25. In fact, courts have been respectful of fiduciaries who made prudent decisions to sell employer stock. *See, e.g.*, *Bunch v. W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009). As in *Bunch*, plaintiffs challenging a fiduciary's decision to sell employer stock or suspend purchases of employer stock notwithstanding plan provisions to the contrary, will have a hefty burden to show that prudence did not require the fiduciary to cause the sale. Moreover, the possibility of a lawsuit should not be grounds for immunity, but rather, is the very nature of a standard. *Cf. Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 920 (8th Cir. 1994) ("The basis for personal liability in each [ERISA] case is the breach of duty, which is not a guarantee but a standard of conduct that Congress has imposed and that the fiduciary can satisfy by acting reasonably").

5. Congress did not intend to remove Plan investment in company stock from the duty of prudence.

The District Court purported to find evidence in ERISA's language that Congress intended to excuse plan fiduciaries from ERISA's prudent man rule where they act in compliance with plan provisions requiring the purchase and retention of employer stock. The District Court relied on provisions of ERISA that "explicitly [contemplate] that EIAPs and ESOPs will invest in employer stock, *see*

§ 1107(d)(3), (5)-(6) and do so without diversifying, *see id.* § 1104(a)(2)." Order at SPA-20.

The District Court erroneously relied on these provisions to excuse compliance with the prudent man rule. However, the provisions narrowly exempt EIAPs only from compliance with the 10 percent limitation on employer stock in 29 U.S.C. § 1107, the diversification rule in 29 U.S.C. § 1104(a)(1)(C), and the prudence requirement "only to the extent that it requires diversification" under 29 U.S.C. § 1104(a)(1)(B). The plain language of the statute makes clear that Congress intended the prudent man rule (exclusive of diversification) to apply to the acquisition and holding of employer stock. *See, e.g., Syncor*, 516 F.3d at 1102 ("29 U.S.C. § 1104(a)(2) 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.").

ERISA's legislative history confirms that Plaintiffs' reading of the statute, adopted by the overwhelming majority of courts, is correct. The pertinent statutory provisions all have their origins in ERISA's first progenitor, H.R. Rep. 90-1867 (1968). The Committee Report accompanying the original House legislation explained the interaction of these provisions exactly as Plaintiffs do today, categorically rejecting the reading adopted by the District Court:

> ....this proviso [exempting the diversification requirement for employer stock] *is not intended to insulate such plans from other*

> *applications of the prudent man rule.* Thus, if investment by a profit-sharing plan in the employer is completely unsound the prudent man rule should operate to preclude such investment. *All that the proviso says is that if investment in the employer is sound, no profit sharing or similar plan shall be precluded by virtue of a diversification requirement from investing part or all of the plan funds in the stock or securities of the employer to the extent the plan so requires.*

(emphasis added) H.R. Rep. 90-1867, at 7-8 (1968). The legislative history closer in time to ERISA's enactment is equally definitive. *Eaves*, 587 F.2d at 460 (quoting Senate Report 93-127, at 93 Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4867) ("It is emphasized, however, that even with respect to the transactions [involving employer stock] expressly allowed, the fiduciaries' conduct must be consistent with the prudent man standard."). There is simply no basis in ERISA or its legislative history to believe that Congress intended to exclude investments in employer stock, even those required by the plan, from the duty of prudence.

The District Court's holding that Congressional intent to encourage employee stock ownership requires courts to permit the imprudent acquisition or retention of employer stock cannot be squared with the statutory language and legislative history of ERISA. Nor does it follow that Congress's specific and cabined willingness to tolerate a lack of diversification in employer stock investments suggests a willingness to tolerate imprudent investments mandated by the plan document.

6. The District Court misinterpreted the common law of trusts.

While ERISA is stricter than the common law of trusts, even the common law fails to support the District Court's holding that plan terms requiring investments must be blindly followed. Traditional trust common law sets limits to the effectiveness of trust provisions requiring an imprudent investment. *E.g.,* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 N.W.U.L. Rev. 1105, 1119 n.73 (2004)(discussing 1947 case in which court refused to enforce trust provision preventing trustees from selling securities because it was not legitimate for settlor to prevent trustee from preserving trust estate); *see also supra* n.8 (citing Restatement (Third) of Trusts § 228(a)). This non-ERISA trust law has continued to develop, and now the duty to deviate from the settlor's directives in unusual circumstances is well-established. *See generally* Restatement (Third) of Trusts § 66(2) & comment on Subsection 2 (2003) (duty to deviate from trust document in a "situation of unanticipated circumstances in which the trustee believes substantial harm will result to the trust or its beneficiaries if action is not taken promptly"). Such unanticipated circumstances threatening the trust are precisely what the fiduciaries ignored in this case.

C. Defendants Had Discretion Under Plan Documents To Suspend Or Limit Investment In The Stock Fund.

Even if Congress had omitted the duty to override from ERISA, which it clearly did not do, the District Court decision still would be incorrect. Fairly read, the Plans' terms do not support the District Court's conclusion that Defendants had no authority or discretion with regard to the management of the Stock Fund. The District Court relied on § 7.01 of the Plan document, which provides the Stock Fund "shall be permanently maintained as an Investment Fund under the Plan." Order at SPA-7 (citation omitted). However, the District Court ignored other Plan provisions that undermine its conclusion.

Section 7.09(e) of the Plan document expressly provides that "if it is determined that there exists a duty on the part of any person ... to determine whether such provisions [requiring the Stock Fund option] should be modified, such duty shall be that of the Investment Committee." A-662 (Cplt. Ex. E). Because the Plan unequivocally states that *only the Company* has authority to amend or modify the Plan (*see* A-679 (Cplt. Ex. E, § 12.01); *see also* A-553 (Cplt. Ex. D, § 12.01)), the only reading of this provision consistent with § 12.01 is that the "duty to modify" referred to in the provision is not the settlor function of plan amendment, but, rather, a fiduciary duty expressly assigned to the Investment

Committee to determine whether the management or administration of the Stock Fund should be modified.

Since the authority to modify the management of the Stock Fund is fundamentally a fiduciary function, Plaintiffs plausibly assert that the Investment Committee was a fiduciary with respect to the Plans' investment in Citigroup stock. *See* 29 U.S.C. § 1002(21)(A)(i) (defining fiduciary as one who "exercises any authority or control respecting management or disposition of [plan] assets…."). *See, e.g., In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 907-08 (E.D. Mich. 2004) (distinguishing between amendment – a settlor function – and suspending investment in stock fund in order to protect the plan from losses – a fiduciary function – and upholding prudence claim based on the latter); *In re IKON Office Solutions, Inc. Sec. Litig.*, 86 F. Supp. 2d 481, 490-91 (E.D. Pa. 2000) ("while an employer may be acting analogously to a settlor when designing a plan, at such point that the employer begins to exercise 'discretionary authority or control over plan management or administration' it acts as a fiduciary").

The District Court found that the "exact meaning" of the provision was unclear, yet nonetheless concluded that the provision was "conditional" in that "the provision applies only 'if it is determined that there exists a duty on the part of any person … to determine whether such provisions should be modified.'" Order at SPA-26 n.6 (quoting § 7.09(e)). Because the District Court itself determined that

no duty to modify existed, the court concluded (in circular fashion) that the provision was inapplicable. *Id.*

The District Court overlooked that another, more plausible interpretation of § 7.09(e) is that the Investment Committee – rather than a court after-the-fact – was to determine whether, under the circumstances, a duty to suspend the Stock Fund or sell Company stock arose. The District Court's conclusion that Defendants had no discretion to suspend or limit investment in the Stock Fund conflicts with Plan terms that plausibly indicate that the Investment Committee members indeed had this discretion and were acting as fiduciaries when they failed to exercise it.

Similarly, the District Court's conclusion that § 7.01 provided no discretion to "discourage investment in Citigroup stock," (Order at SPA-18), is contrary to the plain meaning of this provision. *Whitescarver v. Sabin Robbins Paper Co.*, 313 Fed. Appx. 781, 787 (6th Cir. 2008) ("Courts must interpret a Plan's provisions according to their plain meaning."). Section 7.01 subjects the Investment Funds to "rules and procedures established by the [Administration] Committee" including "***any*** timing or frequency limitations approved by the Investment Committee." Order at SPA-17 (citing § 7.01) (emphasis added). Although this provision, on its face, would have allowed the Committees to, for example, initiate temporary restrictions on investment in the Stock Fund, the District Court concluded that

"[g]iven the Plans' edict requiring Citigroup stock as an investment option ... it is nonsensical to suggest" such discretion. *Id.* The Committees, however, could have suspended additional purchases of Citigroup stock and still maintained the Stock Fund. The District Court erred by reading this discretion out of the Plans, contrary to the plain meaning of the provision.[11]

Finally, the District Court's interpretation of the Plan documents by which no fiduciary is assigned any responsibility for Citigroup stock, the Plans' largest investment, stumbles not just on Rule 8's requirement to draw inferences in Plaintiffs' favor, but on ERISA itself, which, as discussed *supra*, through both its purpose and design, forbids an investment to which no fiduciary duties apply. Fairly read, the Plans take this principle into account by providing discretion to act where necessary to manage the Plans' assets in accordance with ERISA's stringent fiduciary duties.

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[11]The District Court's conclusion that in light of § 2.01 – providing that cash or short-term investment may only be used in the Stock Fund to purchase Citigroup stock or pay benefits – the "only plausible reading" of § 15.02 (stating that the ESOP component is designed to investment "primarily" in Citigroup stock) is that "the Investment Committee had no discretion to liquidate the Citigroup Common Stock Fund ..." is equally wrong. Order at SPA-16. Neither provision cited by the District Court in fact states that the Investment Committee lacks discretion to liquidate in whole or in part, or limit new investment in the Stock Fund. Moreover, as discussed above, § 7.09, as well as § 7.08(a), fairly construed, provide to the contrary.

D. The District Court Erred By Applying A Deferential Standard To Defendants' Decision To Continue Investing In Employer Stock.

1. This Court should not adopt the *Moench* presumption because ERISA does not give deference to a fiduciary's investment decisions.

Relying on *Moench* and certain cases following it, the District Court erroneously held that "plaintiffs can plead a breach of fiduciary duty claim only by alleging facts that, if true, would make it plausible that offering Citigroup stock as an investment option during the class period constituted an abuse of discretion." Order at SPA-30. But ERISA does not merely require fiduciaries to refrain from conduct that is arbitrary, capricious or in bad faith; instead, it requires them to affirmatively exercise the level of "care, skill, prudence, and diligence ... that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). The standard for judging prudence is an objective one, which requires a searching, rather than a deferential, inquiry to determine whether ERISA's prudence requirements have been met. *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984).

This Court expressly considered and rejected application of a deferential standard of review to fiduciary conduct that does not involve benefit determinations in *John Blair Comm'ns, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 369 (2d Cir. 1994). The Court

reasoned that a deferential standard "would allow plan administrators to grant themselves broad discretion over all matters concerning plan administration, thereby eviscerating ERISA's statutory command that fiduciary decisions be held to a strict standard." *Id.*

Adoption of the *Moench* presumption of prudence is contrary to the clearly expressed Congressional intent, discussed above, to depart from the common law and hold fiduciaries to a stringent standard of prudence even when the settlor requires that a particular investment be maintained in the trust. As discussed above, while Congress removed structural barriers to the creation of ESOPs primarily by exempting them from ERISA's diversification requirements, it expressly did not exempt ESOPs from ERISA's general prudence standards.

The *Moench* "presumption" has been questioned by numerous courts, and has never been adopted by this Circuit. As both the District of Columbia Circuit in *Fink*, 772 F.2d at 955-56 (Scalia, J., concurring in part, dissenting in part), and the Tenth Circuit in *Eaves, supra*, have held, ESOP fiduciaries' decisions to continue investing in employer stock are not entitled to deference but are instead subject to the stringent standards of loyalty and prudence. Recently, the Ninth Circuit, while not deciding the issue, questioned whether *Moench* was correctly decided, and expressly declined to adopt it. *Syncor*, 516 F.3d at 1102; *see also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 419 n.4 (4th Cir. 2007) (declining to decide

applicability of presumption of prudence standard); *LaLonde,* 369 F.3d at 6 (declining to decide applicability of presumption of prudence standard); *NationsBank,* 126 F.3d at 1368 (rejecting argument that following an ESOP plan provision to tender stock should be reviewed on an abuse of discretion standard). Based on the statute's plain meaning and supporting legislative history, courts should evaluate the investment in employer stock applying an undiluted standard of prudence and loyalty, excepting only the duty to diversify.

2. Even applying the *Moench* presumption, the Plan fiduciaries cannot be given deference to a decision they never made.

Because the Complaint alleges, plausibly, that Defendants never evaluated the prudence of investing in employer stock (A-93, A-99, A-100, A-105-106 ¶¶ 189, 196, 219, 221), it was improper for the District Court to grant any deference. "Where a trustee fails to act or to exercise his or her discretion, *de novo* review is appropriate because the trustee has forfeited the privilege to apply his or her discretion; it is the trustee's analysis, not his or her right to use discretion or a mere arbitrary denial, to which a court should defer." *Gritzer v. CBS, Inc.*, 275 F.3d 291, 296 (3d Cir. 2002); *Armstrong,* 446 F.3d at 733 ("a discretionary judgment cannot be upheld when discretion has not been exercised"); *see also Moench,* 62 F.3d at 567 (stating that *de novo* review was appropriate "because the record is devoid of any evidence that the Committee construed the plan at all); Restatement

(Second) of Trusts § 197, cmt. h. ("If the trustee without knowledge of or inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim exercises or fails to exercise a power, the court will interpose").

Accordingly, the District Court erred in giving deference and should have reviewed the Defendant fiduciaries' investment decisions *de novo*.

3. Even if *Moench* applies, it should not be applied at the pleading stage.

Even if the *Moench* presumption applied to this *case*, it cannot apply at this *stage*. The *Moench* presumption, like other presumptions, is an evidentiary standard controlling a plaintiff's burden of production, not a heightened pleading standard that would conflict with notice pleading under Rule 8(a).[12] As such, most courts have declined to apply it at the pleading stage.[13]

The District Court acknowledged cases that declined to apply the presumption at the pleading stage, but joined what it perceived as a "trend" of post-*Twombly* cases that applied the presumption on motions to dismiss. Order at SPA-30. But both before and after *Twombly*, the presumption has been applied on motions to dismiss in the narrow category of cases where plaintiffs effectively

[12]*See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) (under Title VII, presumption created by *prima facie* case does not heighten pleading standard, but simply governs employee's evidentiary burden).

[13]*See, e.g.*, *In re Pfizer Inc. ERISA Litig.*, 2009 WL 749545, at *11 (S.D.N.Y. Mar. 20, 2009) ("Whether a plaintiff can overcome the presumption of prudence is an evidentiary question 'ill-suited to resolution on a motion to dismiss.'").

"pled their way out of court." In *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004), for example, the defendant corporation was entirely sound and the basis of the claim was a failure to capture the "premium" generated by a merger. *Id.* at 1099. Similarly, in *Avaya*, the stock dropped slightly as a result of "corporate developments that were likely to have a negative effect on the company's earnings" but quickly fully recovered. 503 F.3d at 348-49 & n.13. Under such circumstances, some courts have concluded it appropriate to deviate from the general rule that evidentiary presumptions are not applicable at the pleading stage, because "Plaintiffs' alleged facts effectively precluded a claim under *Moench*, eliminating the need for further discovery." *Wright*, 360 F.3d at 1098; *see In re Gen. Motors ERISA Litig.*, 2006 WL 897444, at *9-10 (E.D. Mich. Apr. 6, 2006) (holding presumption inapplicable and reconciling cases on this basis). In contrast, Plaintiffs here allege sufficient factual content in support of their prudence claims to state a claim to relief that is plausible on its face – ruling out application of the presumption on Defendants' motion to dismiss.

4. Even assuming *Moench* applied, the District Court applied an overly restrictive standard for overcoming the presumption.

The *Moench* court recognized the tension between the competing two goals of an ESOP – employee stock ownership on the one hand, and safeguarding participants' retirement savings on the other. 62 F.3d at 569. The Third Circuit

acknowledged that "ESOP fiduciaries must, then, wear two hats, and are 'expected to administer ESOP investments consistent with the provisions of both a specific employee benefits plan and ERISA.'" *Id.* (citation omitted).

While a number of courts have paid less heed to employee ownership when evaluating the duty of prudence in an ESOP, *Moench* sought to balance the competing goals through the application of a presumption that investment by ESOP fiduciaries in employer securities is prudent. 62 F.3d at 571. The *Moench* court was careful to note, however, that it was a rebuttable presumption, overcome 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." *Id.* The court also cautioned that "[i]n considering whether the presumption that an ESOP fiduciary who has invested in employer securities has acted consistently with ERISA has been rebutted, courts should be cognizant that as the financial state of the company deteriorates, ESOP fiduciaries who double as directors of the corporation often begin to serve two masters," thus necessitating "'a careful and impartial investigation of all investment decisions.'" *Id.* at 572 (quoting *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir. 1992)). Courts following *Moench* have held, therefore, that a plaintiff may rebut the presumption "by showing that a prudent fiduciary

acting under similar circumstances would have made a different investment decision." *Kuper*, 66 F.3d at 1459.

The District Court, however, disregarded Congress's overarching concern of safeguarding retirement income by imposing a standard that elevated the employee ownership goal even higher than *Moench* itself. The District Court did so by requiring Plaintiffs to plead that the Company faced "a threat to [its] viability." Order at SPA-33-35.[14] Although *Moench* used the phrase "impending collapse," it was only to describe the plaintiffs' factual allegations there, and illustrate that such allegations, if proven on a fuller record, could overcome the presumption. 62 F.3d at 572. *Moench* nowhere suggested, let alone held, that allegations of imminent collapse were *necessary* to overcome the presumption of prudence. Indeed, the Third Circuit later expressly rejected that reading of *Moench*. *Avaya*, 503 F.3d at 349 n.13 ("We 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").

Other courts have similarly held that it is not necessary to plead impending collapse in order to overcome the presumption. *See Kirschbaum v. Reliant Energy,*

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[14]The scant attention the District Court paid to the goal of safeguarding retirement savings is particularly out of place here since according to the Plans themselves, they were "designed to encourage savings on the part of eligible employees." A-61 ¶ 95; *see also* A-57 ¶ 79.

Inc., 526 F.3d 243, 256 (5th Cir. 2008) ("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."); *Syncor*, 516 F.3d at 1102 (same); *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 908 (E.D. Mich. 2008) (rejecting "imminent collapse" standard because "[s]uch a standard is akin to requiring monitoring of a patient only after he is dead.").[15] As numerous cases have made clear, "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." *Syncor*, 516 F.3d at 1102.

5. The District Court erred in holding <u>Plaintiffs did not rebut the presumption.</u>

Assuming that the *Moench* presumption applies, the District Court erred in holding that Plaintiffs failed to overcome the presumption. Plaintiffs have amply met the standard that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper*, 66 F.3d at 1459.

As discussed above in Section V.C.2, the Complaint alleges Defendants knew or should have known that Citigroup stock was an imprudent investment because Citigroup: (1) was seriously mismanaged; (2) failed to conduct appropriate

[15] *See also Summers v. State St. Bank & Trust, Co.*, 453 F.3d 404, 411 (7th Cir. 2006) ("selling when bankruptcy is declared will almost certainly be too late").

risk management; and (3) engaged in accounting improprieties leading to artificial stock price inflation and securities fraud complaints, all of which caused Citigroup's financial condition to be dire, as its precipitous stock price decline and subsequent government bailout confirmed. The facts alleged are more than sufficient to rebut the *Moench* presumption, as they plausibly show that continued investment in Citigroup stock "would defeat or substantially impair the accomplishment of the purposes of the trust." *Moench*, 62 F.3d at 571 (citation omitted).

Abundant case law supports this conclusion. *See, e.g., LaLonde*, 369 F.3d at 6 (holding misrepresentations causing price of company stock to be artificially inflated sufficient to plead breach of fiduciary duty claim); *Syncor*, 516 F.3d at 1102 (finding that where company stock is "artificially inflated ... by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed," investing in the stock is necessarily imprudent); *Ford*, 590 F. Supp. 2d at 915 (affirming magistrate judge's determination that economically troubling data and serious mismanagement provided plaintiffs with "reasonably founded hope that with further discovery they can make out a case sufficient to rebut the presumption of prudence").

Even under the strictest interpretation of the *Moench* presumption, requiring an impending collapse, Plaintiffs *still* alleged facts that overcome the presumption.

Plaintiffs allege that Citigroup's fatal overexposure to the subprime market both through the origination of subprime loans, and through investment in subprime mortgage-backed securities, CDOs, SIVs and granting of liquidity puts, placed the Company on a train-wreck-course to collapse. A-88-89, 93 ¶¶ 174, 189. Moreover, on Defendants' motion to dismiss, Plaintiffs cited post-Complaint public facts that strongly supported the Complaint's allegations, including that Citigroup stock continued to crash, falling to $3.05 share, and the Company avoided bankruptcy only through government bailout. *See* CIR, Docket No. 87, at p. 9; A-1231 (Lencyk Decl., Ex. B).

The District Court discounted the post-Complaint facts, finding that they "[did] not suggest any threat to Citigroup's viability prior to January 15, 2008." Order at SPA-35. Yet, the collapse of the Company only months after the Class Period, allows at least a plausible inference that Citigroup's financial condition – for the reasons alleged in the Complaint – was unsustainable. Indeed, the subsequent facts were directly related to, and the natural consequence of, the highly risky practices alleged in the Complaint. It was error for the District Court to disregard this inference. *See Braden v. Wal-Mart Stores, Inc.*, --F.3d--, 2009 WL 4062105, at *7 (8th Cir. Nov. 25, 2009) (reversing 12(b)(6) dismissal of ERISA claim where district court "ignored reasonable inferences supported by the facts alleged [and] also drew inferences in [defendant's] favor").

The fact that Plaintiffs cited post-Complaint facts in opposition to Defendants' motion to dismiss does not preclude the Court's consideration of those facts. *See Ganino*, 228 F.3d at 167 n.8 ("the district court may take judicial notice of well publicized stock prices . . . ."); *Hubbard v. Port Auth. of N.Y. & N.J.*, 2008 WL 464694 (S.D.N.Y. Feb. 20, 2008) (Rule 15(b) permits Court to consider evidence outside of pleadings if doing so does not cause prejudice); *Miltland Raleigh-Durham v. Myers,* 807 F. Supp. 1025, 1051 (S.D.N.Y. 1992) (same). At most, citation to post-Complaint facts suggests a need to amend the pleadings to formally assert the facts and update the Class Period – something Plaintiffs sought leave to do in their opposition brief. *See* CIR, Docket No. 87, at p. 59 n.77.[16]

E. The Complaint Properly Alleges Defendants Failed To Investigate The Continued Prudence Of Plan Investment In Citigroup Stock During The Class Period.

ERISA requires that fiduciaries conduct an inquiry to determine whether an investment continues to be prudent for Plan participants' retirement savings. *See* 29 U.S.C. § 1104(a). "A fiduciary may breach his duties to plan beneficiaries by failing to investigate and evaluate the merits of his investment decisions," where there is "a causal link between the failure to investigate and the harm suffered by the plan." *Kuper,* 66 F.3d at 1459; *see also Donovan v. Mazzola*, 716 F.2d 1226,

[16]Of course, to the extent this Court believes amendment is necessary, Plaintiffs request the Court remand this case to allow Plaintiffs to amend their Complaint.

1232 (9th Cir. 1983) (recognizing fiduciaries must employ appropriate methods to investigate the merits of the investment); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 435 (3d Cir. 1996) (listing cases).

Because the District Court held that the investment of Citigroup stock was prudent, it held, dependently, that Defendants had not breached their duty to investigate. Order at SPA-36. Yet neither conclusion is correct. As discussed above, Plaintiffs alleged sufficient facts to support the plausible inference that Citigroup stock became an imprudent investment. Plaintiffs further alleged concrete examples of publicly available information in existence immediately before and during the Class Period that should have put a reasonable fiduciary on notice that an investigation was required. *See supra,* Section V.C.2 (describing red flags alleged in the Complaint, citing to A-68-75, A-93-97 ¶¶ 114-136, 189(a)-(y)).

The Complaint further alleges that Defendants' failure to investigate led to serious Plan losses because the investigation would have revealed the true risks of investing in Citigroup stock. A-109 ¶ 228. These allegations are more than sufficient to state a claim based on the failure to investigate. *See, e.g. Pfizer*, 2009 WL 749545, at *10, 12 (sustaining breach of fiduciary duty claims, where plaintiffs "assert[ed] that an evaluation of the prudence of the investments 'would have revealed to a reasonably prudent fiduciary the imprudence of continuing to make and maintain investments in the Company Stock Funds'"); *Polaroid*, 362 F.

Supp. 2d at 476-7 (same). Defendants are of course free to argue on the merits that they could not have discovered Citigroup's dire problems even if they had investigated; however, contrary to the District Court's determination, whether that is true or not cannot be resolved at the pleading stage.

F. Plaintiffs State A Plausible Claim That Citibank And Citigroup, The Sponsors Of The Citibuilder And Citigroup Plans, Respectively, Functioned As De Facto Fiduciaries.

1. ERISA uses a functional definition of fiduciary inappropriate for resolution on a motion to dismiss.

The District Court likewise erred by dismissing Plaintiffs' claims against Citibank and Citigroup in their respective capacities as *de facto* fiduciaries of the Plans. As discussed *supra* at Section VII.B.1, an individual or entity can qualify as a plan fiduciary not only by being named as such in plan documents, but also by meeting the functional fiduciary definition set forth in 29 U.S.C. § 1002(21)(A). A 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*, 508 U.S. at 262.

This Circuit has recognized that Congress intended ERISA's fiduciary definition "to be broadly construed." *LoPresti*, 126 F.3d at 40 (internal citations omitted). Indeed, "courts have generally applied a liberal interpretation to 'fiduciary' within the ERISA context, since '[a]pplying a restrictive judicial gloss

to the term 'fiduciary' would, in effect, enable trustees to transfer important responsibilities to a largely immunized administrative' entity. A clear congressional desire to expand the scope of fiduciary standards of conduct should not be so undermined." *Greenblatt v. Prescription Plan Servs. Corp.*, 783 F. Supp. 814, 820 (S.D.N.Y. 1992) (quoting *Lowen*, 653 F. Supp. at 1550).

Because of the fact-intensive inquiry involved in resolving fiduciary status, such resolution has been held by courts, including those in this Circuit, to be inappropriate at the pleading stage.[17] Indeed, it has even been deemed inappropriate at summary judgment. *See 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").

2. Plaintiffs properly alleged Citibank's and Citigroup's *de facto* fiduciary status.

The Complaint alleges that Citibank had authority or control over management of the Plans' assets based on its: (a) Plan-related duties requiring it to "manage, invest, and reinvest" the assets of the Citigroup Plan during the Class

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[17] *See Pfizer*, 2009 WL 749545, at *7 (sustaining breach of fiduciary duty claims that "track[ed] the language of ERISA's functional definition of fiduciary"); *In re Marsh ERISA Litig.*, 2006 WL 3706169, at *5 (S.D.N.Y. Dec. 14, 2006) (same).

Period (A-50 ¶ 53); and (b) retention of certain management and administrative duties it delegated to the Committees. A-50 ¶ 54.

Similarly, the Complaint alleges that Citigroup had authority or control over management of the Plans' assets based on its: (a) having "at all applicable times, effective control over the activities of its officers and employees, including their Plan-related activities," as well as "the authority and discretion to hire and terminate said officers and employees" (A-49 ¶ 50); and (b) exercising *de facto* authority and control with respect to the *de jure* responsibilities of Plan fiduciaries. A-50, A-115-16 ¶¶ 49, 256. Further, Plaintiffs allege that under the doctrine of *respondeat superior*, the actions of the Board, the Committees, or any other employee fiduciaries, are imputed to Citigroup. A-49 ¶ 50.

While the District Court noted these allegations (*see* Order at SPA-27-28), it found, without any explanation, that "[t]hose allegations are insufficient to state a plausible claim that either Citigroup or Citibank was a de facto fiduciary." *Id.* at 28. The District Court's holding is at odds with abundant authority holding otherwise.[18] Plaintiffs' allegations, which must be accepted as true for present

[18]*See Polaroid*, 362 F. Supp. 2d at 473 (holding that defendant who "exercised final decision-making authority regarding the Plan" was a functional fiduciary even though the plan afforded him no specific discretionary authority over plan investments) (citing *In re WorldCom Inc.*, 263 F. Supp. 2d 745, 759 (S.D.N.Y. 2003)); *Marsh*, 2006 WL 3706169, at *5 (same); *Pfizer*, 2009 WL 749545, at *7 (same).

purposes, are more than adequate at the pleading stage to state a claim that Citibank and Citigroup exercised fiduciary authority, control, and discretion regarding the management and disposition of the Plans' assets.

G. The District Court Erred In Finding Plaintiffs Failed To State A Claim Against Defendants For Providing Participants With Misleading, Incomplete, And Inaccurate Information.

1. ERISA prohibits misleading statements and requires fiduciaries to provide critical information necessary to make informed decisions.

The District Court ruled that Defendants had no affirmative duty to disclose material information about Citigroup's financial condition. Order at SPA-37-42. Further, the District Court held that Citigroup, Prince, and the Administration Committee were not fiduciaries with respect to communications. Each of these rulings was error.

First, the District Court ignored Plaintiffs' allegations that these fiduciaries made affirmatively misleading statements to participants. The Complaint alleges Citigroup masked and denied its subprime loan exposure and losses (A-76-80, A-82, A-91 ¶¶ 138, 143, 147, 150, 155, 182), and misled participants in direct communications with them by painting a rosy picture of Citigroup's financial health to Citigroup employees. A-100-101 ¶¶ 197-200. These statements are actionable under ERISA. *Varity*, 516 U.S. at 506 (explaining that "'[l]ying is

inconsistent with the duty of loyalty owed by all fiduciaries codified in section 404(a)(1) of ERISA'").

Second, this Circuit has long recognized that plan fiduciaries have both a duty to avoid issuing misleading statements to participants ***and*** a duty to disclose material information participants need to know to protect their interests.[19] In the context of company stock in 401(k) plans, courts have recognized that where adverse information about the employer or its stock could impact retirement benefit plans, fiduciaries must make that information available to participants.[20]

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[19]*E.g.*, *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 10 (2d Cir. 1997) (duty to disclose "complete and accurate information about [plan] options"). *See also Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001); *Dobson v. Hartford Fin. Servs. Group, Inc.*, 389 F.3d 386, 401-02 (2d Cir. 2004). Other circuits are in accord. *See, e.g., Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644 (8th Cir. 2007) (duty of loyalty requires fiduciary to disclose any material information that could adversely affect participant's interests); *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 . . . 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.'"); *Glaziers & Glassworks Union v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1181 (3d Cir. 1996) (recognizing duty to disclose material information is the core of fiduciary responsibility); *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 380 (4th Cir. 2001) (duty to provide complete and accurate information regarding plan assets so that participants can make informed investment decisions regarding their retirement savings).

[20]*See, e.g., Polaroid*, 362 F. Supp. 2d at 478-89 (allegations defendants "creat[ed] an inaccurate impression of the future prospects of the [c]ompany in [c]ompany-wide . . . statements," sufficient to state claim for breach of fiduciary duty to keep "participants informed of material adverse developments"); *Pfizer*, 2009 WL 749545, at *9-12 (fiduciaries have duty to disclose material information regarding prudence of investing in company stock). Nor can Defendants evade liability for

The District Court side-stepped all this law by asserting that those cases related to the alleged non-disclosure of "plan benefits." Order at SPA-40. The District Court held that the alleged non-disclosures here, on the other hand, related to the "financial status of plan investments." *Id.* at SPA 40-41. But in the context of an individual account plan, the distinction between information bearing on benefits versus investments is illusory. As the Seventh Circuit explained, "The benefit in a defined-contribution pension plan is . . . just whatever is in the retirement account when the employee retires." *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804-05 (7th Cir. 2007). Thus, given that the Plans were invested heavily in Citigroup stock, statements regarding the financial status of Citigroup – were indeed statements regarding benefits.

Contrary to the District Court's opinion, this Court's reasoning in *Bd. of Tr. v. Weinstein*, 107 F.3d 139 (2d Cir. 1997), does not foreclose Plaintiffs' disclosure claims. In *Weinstein*, a plan participant sought disclosure of actuarial valuation reports. *Id.* at 140. The plan administrators refused to provide the reports, arguing

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failing to take action by invoking the federal securities laws. *See, e.g.*, *Pietrangelo v. NUI Corp.*, 2005 WL 1703200, at *12-13 (D.N.J. July 20, 2005) (rejecting defendants' argument that compliance with fiduciary duties would result in violation of federal securities laws) (listing cases); *In re WorldCom Inc.*, 263 F. Supp. 2d 745, 765-67 (S.D.N.Y. 2003) (same).

the information was duplicative of that already provided. *Id.* The Court held that 29 U.S.C. § 1024(b)(4) did not require disclosure of "all" underlying documents used in the plan's operation, and further held that ERISA's general fiduciary duty provisions could not require the plan administrator to provide documents excluded from the list of documents specifically required to be disclosed under 29 U.S.C. § 1024(b)(4). *Id.* at 143-45. *Weinstein*, however, did not address whether failing to disclose *material* information that Plan participants needed to know to protect their investments was a breach of fiduciary duty.

2. The Complaint sufficiently alleges that Defendants communicated in a fiduciary capacity regarding Citigroup stock.

Plaintiffs allege that Citigroup and Prince "regularly communicated with ... the Plans' participants about Citigroup's performance, future financial and business prospects, *and Citigroup stock, the single largest asset of both Plans.*" A-100 ¶ 197 (emphasis added). Plaintiffs allege these communications were misleading because they failed to disclose the significance of, and the risks posed by, Citigroup's conduct, and Defendants knew or should have known that this information was material to the Plans and their assets. A-101-102 ¶ 200. These misleading communications were contained in newsletters, memos, letters, Plan-related materials, Citigroup's SEC filings which were incorporated by reference into Plan documents, and in-person meetings. A-100 ¶ 197-98.

Despite these allegations, the District Court held that Citigroup and Prince were not *de facto* fiduciaries because the statements they made about Citigroup stock were not "intentionally connected" to Plan benefits. Order at SPA-46 n.9. Yet, as discussed above, because company stock is a Plan "benefit," communications *with participants* regarding the financial health of Citigroup and the performance of its stock *are* connected to Plan benefits. As such, they are fiduciary communications based on the rationale of *Varity*, 516 U.S. at 503 (holding that "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation," constitutes an act of plan administration under ERISA). Numerous courts agree. *See, e.g., Stein v. Smith*, 270 F. Supp. 2d 157, 173-74 (D. Mass. 2003) (finding that statements made by CEO that addressed "in particular [employees'] investments in [company] stock" are fiduciary communications under *Varity* for which liability may be imposed under ERISA); *Nelson v. IPALCO Enters.*, 480 F. Supp. 2d 1061, 1081 (S.D. Ind. 2007) (where CEO made statement to both employee-plan participants and other shareholders at a shareholder meeting that "the best is yet to come" for the company, court held the statement was a fiduciary communication). Hence, the Complaint sufficiently alleges fiduciary communications by Defendants Citigroup and Prince.

Moreover, the Plan documents expressly direct Plan participants to "rely on" communications provided by Citigroup about the financial status of the Company in SEC filings. *See* A-919-920 (Cplt. Ex. G); A-1057 (Cplt. Ex. K). If Plan fiduciaries incorporate by reference or otherwise communicate the contents of SEC filings to Plan participants, that is a form of fiduciary communication on which liability may be based. *See, e.g., WorldCom*, 263 F. Supp. 2d at 766-67 (explaining that "ERISA fiduciaries ... cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings," and holding defendants liable under ERISA for transmitting material misrepresentations to Plan participants via SEC filings).[21]

As for the Administration Committee, the District Court recognized that it was a fiduciary was respect to communications, and had a duty to communicate truthfully (Order at SPA-46), but nevertheless held that Plaintiffs failed to plead a plausible claim that the Administration Committee knew or should have known of Citigroup's financial problems. Order at SPA-47. As discussed in Sections V.C.2

[21]*See In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 887 (S.D. Tex. 2004) (distribution of SPDs encouraging plan participants to review company SEC filings triggered affirmative duty to disclose material adverse information regarding risks of investing in company stock); *In re AOL Time Warner Sec. & ERISA Litig.*, 2005 WL 563166, at *7 n.13 (S.D.N.Y. Mar. 10, 2005) (sustaining ERISA claims for misstatements in SEC filings disseminated to plan participants).

and VII.E, *supra*, the District Court ignored the myriad red flags cited by Plaintiffs based on which the Administration Committee knew or should have known of Citigroup's dire financial circumstances. A-73-75, A-77-78, A-82, A-93-97, A-101, A-111 ¶¶ 133, 136, 143, 145, 155, 188, 189(g)-(y), 200, 237-38. Again, while Defendants may dispute their knowledge, that is factual question that should not have been resolved on a motion to dismiss.

H. The District Court Also Erred In Dismissing Counts III, IV And VI, As Well As Count V.

ERISA plan fiduciaries' primary duties, such as here, are those just discussed: to duty prudently and loyally manage plan assets, and provide participants complete and accurate information concerning those investments. Breaches of other important, albeit ancillary, duties, were alleged in the Complaint. Fiduciaries who appoint other fiduciaries have a duty to monitor their appointees. *See Polaroid*, 362 F. Supp. 2d at 477 (collecting cases). Fiduciaries with material information bearing on plan management must convey that information to other fiduciaries needing it. *See, e.g., Glaziers*, 93 F.3d at 1182. And, perhaps most generally, a fiduciary is liable for co-fiduciary breaches if he participates in, enables, or even knows of it. ERISA § 405(a). These breaches were alleged in Counts III, IV and VI.

As has been often noted, ERISA permits, even encourages, the dispersion of the fiduciary function among scores or even hundreds of people and institutions.

Langbein *et al.*, Pension and Employee Benefit Law 516 (4th ed. 2006). This dispersion is inevitable given "the complexity of the modern pension trust," *id.*, but it comes with a danger: where a breach has plainly occurred, but each fiduciary points the finger at another. The duties of monitoring, information sharing, and co-fiduciary liability guard against this danger. "The logic of this system is to facilitate specialization of function while always leaving the participant with an ERISA fiduciary who owes the participant ERISA fiduciary responsibilities with respect to plan functions that entail material discretion." *Id.* at 517.

In this case, once it is recognized that Plaintiffs did adequately plead breaches of the duties of prudent and loyal management and providing accurate and complete information, the adequacy of the allegations of these ancillary claims (A-113-115 ¶¶ 243-52; A-115-116 ¶¶ 253-59; A-118-120 ¶¶ 268-80) necessarily follows. Accordingly, the District Court's dismissal of Counts III, IV and VI should be reversed, or, in the alternative, remanded to the District Court for further consideration.[22]

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[22]The District Court also erred in dismissing Count V. The Complaint alleges Plan fiduciaries subordinated Plan participants' interests in favor of their personal and/or corporate interests in violation of ERISA codified in 29 U.S.C. § 1104(A)(1)(A). A-98-99, A-116-118 ¶¶ 193-95, 260-67. Specifically, the Complaint indicates Defendants Rubin and Prince benefited from personal sales of $18 million of Citigroup stock during and just prior to the Class Period, while Defendants failed to take appropriate action divesting the Plans' Citigroup stock when they knew or should have known it was an imprudent investment, thereby helping maintain the Citigroup's stock price. *Id.* This more than adequately states

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court reverse the Order dismissing this action, and remand the case to the District Court for further proceedings.

Dated: December 18, 2009

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a conflict claim. *See, e.g., Donovan v. Bierwirth*, 680 F.2d 263, 271 (S.D.N.Y. 1982) ("[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] participants. . ."). Because the Complaint's allegations state sufficient factual content plausibly to state a conflicts of interest claim (*see* A-116-118 ¶¶ 260-67), the District Court's dismissal of the claim should be reversed and remanded.

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CERTIFICATE OF COMPLIANCE

I, Robert I. Harwood, certify as follows:

1. I am an attorney admitted to practice law in this jurisdiction. I am a member of the law firm of Harwood Feffer LLP and am one of the attorneys assigned to represent plaintiffs-appellants in the above-captioned case.

2. Appellants' Opening Brief contains 13,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. Appellants' Opening Brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2003 SP3 in 14-point Times New Roman.

I declare under penalty of perjury under the laws of the State of New York that the facts set forth in this declaration are true and correct. Executed on December 18, 2009, New York, New York.

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