UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
<u>MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT</u>

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Defendants respectfully submit this memorandum of law in support of their motion to dismiss plaintiffs' Consolidated Class Action Complaint (the "Complaint") pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

The nation is experiencing the most severe credit and liquidity crisis of the last 80 years, with substantial adverse consequences to all financial institutions. This lawsuit asserts that the resulting decline in the price of Citigroup stock was caused by alleged breaches of fiduciary duties under ERISA. Plaintiffs allegedly are participants in the Citigroup 401(k) Plan and the Citibuilder 401(k) Plan for Puerto Rico (together, the "Plans") who directed their employee contributions into Citigroup stock. Their central allegation is that defendants should have foreseen what government officials and peer financial institutions did not — that this broad-based credit and liquidity crisis would batter the financial industry and cause a decline in the price of Citigroup stock. As a result, plaintiffs say, defendants should have taken the extraordinary steps of prohibiting participants from choosing to invest in Citigroup stock and divesting the billions of dollars of Citigroup stock held by the Plans, even though ERISA was designed to encourage employee stock ownership, even though the governing plan documents expressly require that Citigroup stock be made available as an investment option, and even though, throughout the class period, Citigroup remained one of the largest and most successful companies in the world.

Such "hindsight" claims have repeatedly been rejected by the courts. Indeed, if plaintiffs' theories of fiduciary liability were credited, fiduciaries at every financial institution to suffer the adverse consequences of the credit and liquidity crisis — that is, almost every major financial institution — should have liquidated sponsor stock.

The Complaint fails to state a claim, and should be dismissed with prejudice, for several independent reasons:

First, the Complaint does not even allege that defendants functioned as ERISA fiduciaries in connection with Plan investments in Citigroup stock — and, as a matter of law, defendants did not. Fiduciary liabilities under ERISA simply do not extend to settlor functions, such as matters of plan design. Here, as a matter of plan design, Citigroup stock was required to be offered as an investment option for the Plans' participants. That design was fully consistent with Congress's strong policy, expressed when it enacted ERISA, to encourage employee ownership of employer stock. Under the Plans, defendants had neither the authority nor the responsibility to eliminate Citigroup stock as an investment option, nor to second-guess participants' choices to invest in the stock. The Plans guarantee that Citigroup stock remain as an investment option, and numerous courts have held that such choices must be enforced.

Second, Citigroup stock was not an imprudent investment as a matter of law. When, as here, a Plan mandates the offering of sponsor stock, ERISA establishes a strong presumption that investments in employer stock are prudent. This presumption of prudence can be overcome only where the corporate sponsor foreseeably faced dire circumstances or an impending collapse. In order to state a claim, a plaintiff must show "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest." *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008).

The presumption recognizes that plans that invest in employer securities are designed to promote employee ownership and long-term savings. ERISA is not an insurance policy against declines in stock prices, and ERISA fiduciaries are not expected to predict the direction and magnitude of stock market movements. ERISA requires that fiduciaries be

prudent, not prescient. Thus, there can only be ERISA liability where company stock is no longer a viable long-term savings option, and the salutary purposes of employee stock ownership have been rendered moot. That is not alleged here.

Third, plaintiffs' claim that defendants breached their duty to disclose fails because plaintiffs seek to graft additional disclosure requirements on top of ERISA's comprehensive disclosure scheme, an approach to ERISA that has been rejected by the Second Circuit. The allegedly false and misleading statements of which plaintiffs complain are Citigroup's securities filings and related press releases, not communications with the Plans' participants made by ERISA fiduciaries, and are not actionable under ERISA. And given that disclosure of any adverse information would have immediately been reflected in Citigroup's stock price, plaintiffs cannot show that their alleged damages were proximately caused by the supposed failure to disclose.

Fourth, plaintiffs' remaining claims — assorted claims that defendants are liable for breaches of the duties to monitor and disclose information to appointed fiduciaries and co-fiduciaries, for breaches of the duty of loyalty, and for breaches by their co-fiduciaries — are all derivative of their claim that Citigroup stock was an imprudent investment. Because Citigroup stock was not an imprudent investment and because defendants did not act as fiduciaries with regard to the Plans' investments in Citigroup stock, plaintiffs' remaining claims fail. Those remaining claims also fail on their merits, as discussed below.

Finally, plaintiffs' claims are barred by ERISA § 404(c). The decisions to invest in Citigroup stock were made by the Plans' participants, and defendants are not liable for losses suffered as a result of participants' own investment decisions.

For these reasons and for those that follow, the Complaint should be dismissed.

STATEMENT OF FACTS[1]

A. The Parties

The lead and named plaintiffs claim to be six current or former employees of Citigroup who are participants in the Citigroup 401(k) Plan (the "Citigroup Plan") and held Citigroup stock in their retirement investment portfolios during the class period of January 1, 2007 through January 15, 2008 (the "class period"). (Cplt. ¶¶ 2, 16–21.) Plaintiffs purport to represent a putative class of "all participants and beneficiaries" in the Citigroup Plan and the Citibuilder 401(k) Plan for Puerto Rico (the "Citibuilder Plan") during the class period. (Cplt. ¶ 10.)

Plaintiffs allege claims against Citigroup Inc., Citibank N.A., the members of Citigroup's administrative and investment committees, Charles Prince, and Robert Rubin. (Cplt. ¶¶ 23–33.) Citigroup is a major financial services company and the world's largest bank by revenue as of 2008. (Cplt. ¶ 23.) It employs a "diversified financial services" model that offers a broad range of financial services to consumer and corporate customers throughout the world. (Declaration of Douglas M. Pravda ("Pravda Decl."), Ex. 1, at p. 2.) Citigroup has more than 200 million customer accounts and does business in more than 100 countries. (Cplt. ¶ 23.) For the fiscal year ended December 31, 2007, Citigroup's total assets exceeded $2 trillion and total net revenue was approximately $82 billion. (Pravda Decl., Ex. 1, at pp. 3, 21.)

Citigroup established the Plans and is the sponsor of the Citigroup Plan. (Cplt. ¶ 24; *id.* Ex. E, § 1.04, at p. 1.) Citigroup contributes funds to participants' accounts. Such contributions totaled $80.4 million for the year ended December 31, 2007. (Cplt. ¶ 82.)

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[1] On this motion to dismiss, the Court may consider the ERISA plan documents and related materials attached to the Complaint and incorporated by reference therein. *See ATSI Commc'ns Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).

Citigroup has no responsibility for managing or controlling the operation and administration of the Plans, establishing investment options, or controlling Plan assets. (Cplt. Ex. C, § 2.1, at p. 4.)

Citibank is the sponsor of the Citibuilder Plan and the trustee of the Citigroup Plan. (Cplt. ¶¶ 26, 53–54.) Citibank's responsibilities do not include the authority to manage or control the operation and administration of the Citigroup or Citibuilder Plan, establish investment options, or control the assets of the Citibuilder Plan. (Cplt. Ex. C, § 2.2, at p. 5; Cplt. Ex. D, § 3.01(a), at p. 13; *id.* § 7.01, at p. 29.) As trustee, Citibank holds the funds contributed into the Citigroup Plan in a trust fund and follows the directions given to it regarding investment and reinvestment of the fund. (Cplt. Ex. C, § 2.2, at p. 5; *id.* § 4.2(a), at p. 12.)

The administrative committee is the administrator of the Plans. (Cplt. Ex. D, § 3.01(a), at p. 13; Cplt. Ex. E, § 3.01(a), at p. 18.) It manages the operation and administration of the Plans and is responsible for filing the Plans' annual reports as well as completing other administrative functions mandated by ERISA. (Cplt. Ex. D, § 3.02, at p. 14; Cplt. Ex. E, § 3.02, at pp. 18–19.) However, the Plans specifically state that the administrative committee "shall have no responsibility for or control over the investment or management of Plan assets." (Cplt. Ex. D, § 3.01(a), at p. 13; Cplt. Ex. E, § 3.01(a), at p. 18.)

The investment committee is responsible for administering the investment of the Plans' assets, and has the power to create or eliminate investment funds other than the Citigroup Common Stock Fund. (Cplt. Ex. D, § 7.01, at p. 29; Cplt. Ex. E, § 7.01, at p. 41.) The Plans provide that each participant, rather than the investment committee, "direct[s] the investment of his Accounts in any Investment Fund or combination of Investment Funds." (Cplt. Ex. D, § 7.03, at p. 30; Cplt. Ex. E, § 7.03(a), at p. 42.) The Plans provide that the investment committee shall not "have any authority, discretion, responsibility or liability with respect to the

Participant's selection of an Investment Fund in which their Accounts will be invested." (Cplt. Ex. D, § 7.06(a), at p. 31; Cplt. Ex. E, § 7.06(a), at p. 43.)

Charles Prince served as the Chief Executive Officer and a director of Citigroup from 2003 through November 4, 2007. (Cplt. ¶ 28.) Robert Rubin served as a director of Citigroup, a member of the Office of the Chairman, and Chairman of the Executive Committee of Citigroup during the class period. (Cplt. ¶ 29.) Plaintiffs allege that Prince and Rubin, in their capacity as members of the Board of Directors, appointed the members of the administrative and investment committees. (Cplt. ¶ 30.) Plaintiffs also allege that Prince communicated with employees regarding Citigroup and Citigroup stock. (*Id.*) Prince and Rubin are not alleged to have any other role with respect to the Plans.

B. The Plans

Eligible Citigroup employees can contribute directly to the Plans, and Citigroup will under certain circumstances make matching contributions. (Cplt. ¶ 81.) As of the start of the class period on January 1, 2007, participants in the Plans could choose from approximately 20 different investment options, consisting index funds and actively managed funds. (Pravda Decl., Ex. 2.) During the class period, Citigroup revised those investment options, allowing participants to invest in approximately 40 index, actively managed, and retirement date funds as of September 4, 2007. (Pravda Decl., Ex. 3.) (*See generally* Cplt. Exs. I & J.)

One of the investment options available to participants under the Plans is the Citigroup Common Stock Fund. The Plans require that the Citigroup Common Stock Fund *must* be maintained as an investment alternative at all times. (Cplt. Ex. D, §7.01, at p. 29 ("[T]he Trustee *shall maintain*, within the Trust, the Citigroup Common Stock Fund . . ."); Cplt. Ex. E, § 7.01, at p. 41 ("[T]he Citigroup Common Stock Fund shall be *permanently* maintained as an Investment Fund under the Plan") (emphasis added).)

Participants' investment choices are within their sole discretion. Each participant is permitted to direct investment contributions towards "any Investment Fund or combination of Investment Funds, as determined pursuant to his investment elections." (Cplt. Ex. D, § 7.02(a), at p. 29; Cplt. Ex. E, § 7.02(a), at p. 41; *see also* Cplt. Ex. D, § 7.01, at p. 29; Cplt. Ex. E, § 7.01, at p. 41 ("Each Participant's Accounts shall be invested in such Investment Funds in the proportions directed by the Participant").) Citigroup's matching contributions are automatically invested in the Citigroup Common Stock Fund. However, at all times during the class period, participants were permitted immediately to transfer those matching contributions into other investment options. (Cplt. ¶¶ 85, 100.)

Plan fiduciaries have no power to override a participant's chosen investment allocation. The Plans each state:

> Notwithstanding any other provisions of the Plan or instrument evidencing the Trust, neither the Trustee, the [Administrative] Committee, nor the Investment Committee shall have any authority, discretion, responsibility or liability with respect to the Participant's selection of an Investment Fund in which their Accounts will be invested. Except for [Company] contributions expressly required to be invested in the Citigroup Common Stock Fund under the terms of the Plan, the entire authority, discretion, responsibility and any results attributable with respect to the investment of a Participant's Accounts shall be the responsibility of the individual Participant.

(Cplt. Ex. D, § 7.06(a), at p. 31; Cplt. Ex. E, § 7.06(a), at p. 43.)

Confirming participants' control over investment decisions, Plan documents provide that the Plans are participant-directed individual account plans, within the meaning of § 404(c) of ERISA and 29 C.F.R. § 2550.404c-1. (Cplt. Ex. D, § 7.06(b), at p. 31; Cplt. Ex. E, § 7.06(b), at p. 43.) As such, Plan fiduciaries are "relieved of liability for any losses which are the

direct and necessary result of investment instructions given by . . . participants or beneficiaries." 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(i).

C. The Subprime Mortgage Crisis

The subprime mortgage crisis began with the bursting of the United States housing bubble in 2006. (Cplt. ¶¶ 121–23.) Rising delinquencies on subprime mortgages led to the failure of certain subprime mortgage originators in 2007 (Cplt. ¶ 189), as well as to declines in the value of lower-rated tranches of subprime mortgage-related securities (Pravda Decl., Ex. 4).

Plaintiffs allege that Citigroup stock was an imprudent investment during the entire class period because of the supposed impact of the subprime mortgage crisis on Citigroup's business. They allege that Citigroup's mortgage origination business and Citigroup's mortgage securitization and participation in the collateralized debt obligation ("CDO") market exposed the Company to risks that were inadequately disclosed to investors, including Plan participants. (*See* Cplt. ¶¶ 108–35.) Plaintiffs' allegations, however, entirely ignore the steps Citigroup took prior to and during the class period to manage its risk, as well as the impact of the unforeseen and unforeseeable credit crisis that hit the U.S. and worldwide economy in mid and late 2007.

Citigroup's consumer mortgage origination business involves the origination and funding of residential and commercial mortgage loans. (Pravda Decl., Ex. 5, at p. 94.) Before the subprime mortgage crisis, Citigroup made a decision in 2005 "to avoid offering teaser rate and interest only mortgages to lower FICO score customers." (Cplt. ¶ 132.) To further manage credit and liquidity risk, Citigroup sold most of the mortgage loans that it originated. (Pravda Decl., Ex. 5, at p. 94.) Because of these risk management efforts, at the end of 2006, Citigroup's

first mortgage portfolio held only 34% non-prime mortgages and its second mortgage portfolio held only 4% non-prime mortgages. (*Id.*)

The mortgage securitization and CDO businesses at issue in this action were housed in Citigroup's Securities and Banking segment of the Corporate and Investment Banking group (which has since been combined into the Institutional Clients Group). Securitization of residential mortgages is a structured finance process in which pools of mortgage loans are converted into residential mortgage-backed securities ("RMBS"), which are bonds whose payments are based on the payments of a collection of individual mortgages. (*See* Cplt. ¶ 108.) RMBS are divided into a number of senior, mezzanine and equity layers or "tranches," that bear different risk profiles and credit ratings.

CDOs are complex securities in which the underlying collateral consists of asset-backed securities, including RMBS and other CDOs. (Cplt. ¶ 110.) Similar to RMBS, CDOs are structured into a number of senior, mezzanine and junior layers or "tranches," each of which have different interest rates, payment priorities, and credit ratings. The most junior "equity" tranche, which receives the highest interest rate, typically has no credit rating and is the riskiest investment because it is the first to absorb losses. The most senior or "super-senior" tranche, which receives the lowest interest rate, is typically rated AAA or above AAA and is the last to absorb losses. The highest-rated super-senior tranche will not experience losses unless and until all the lower tranches have been wiped out. As a result, no less an authority than the International Monetary Fund opined that "there should be a very low probability of [super seniors] not receiving their promised payments." (Pravda Decl., Ex. 6, at p. 56.)

During the second quarter of 2007, as a result of the subprime mortgage crisis, Citigroup's Markets & Banking division took steps to reduce its exposure to subprime assets in its secured lending business. (Pravda Decl., Ex. 7, at p. 18.)

In mid-August 2007, a credit crisis struck the worldwide economy as credit markets froze, liquidity dried up, the commercial paper market collapsed, and interbank lending rates rose dramatically. (Pravda Decl., Ex. 8.) At this time, investors started pulling back from subprime-mortgage related assets. (Pravda Decl., Ex. 9.) As a result of these market dislocations, Citigroup — like virtually every other bank on Wall Street — reported disappointing results in the third quarter of 2007. (*See* Cplt. ¶¶ 158–59.) On October 15, 2007, Citigroup reported in its third quarter results that it would write-down $1.56 billion on subprime-related assets. (Cplt. ¶ 159.)

As the financial crisis evolved, in late October 2007, a series of rating agency downgrades of subprime mortgage securities resulted in a massive decline in the value of such securities. In mid-October, Moody's and Standard & Poor's announced downgrades on tens of billions of dollars worth of subprime-backed RMBS, including the more senior tranches. (*See, e.g.*, Pravda Decl., Exs. 10 & 11.) These rating agency actions were followed shortly by additional significant downgrades on CDO tranches. (*See, e.g.*, Pravda Decl., Ex. 12.) As a result, the value of the junior tranches of CDOs were driven to extremely low levels, which increased — for the first time — the riskiness of the more senior tranches. Prior to October 2007, there had been virtually no downgrades of AAA CDO tranches. (Pravda Decl., Ex. 13, at p. 2.)

Nonetheless, as a result of unprecedented late-October downgrades, on November 5, 2007, Citigroup announced subprime-related write-downs of $8 billion to $11 billion. (Pravda

Decl., Ex. 14, at p. 1.) On January 15, 2008, Citigroup reported that, following the conclusion of a tumultuous fourth quarter, write-downs on subprime-related exposures would ultimately total $18.1 billion, the majority of which resulted from write-downs on its portfolio of super-senior positions. (Pravda Decl., Ex. 1, at p. 48.) Other global financial institutions, including Merrill Lynch, UBS, and Morgan Stanley, announced comparable significant losses on super-senior CDO positions beginning in October 2007.

While these losses were substantial, they were also unforeseeable. Plaintiffs parrot in conclusory fashion that defendants ought to have foreseen this dramatic market collapse (*see, e.g.*, Cplt. ¶¶ 133, 143, 150), but do not explain how such prescience could have been possible. Indeed, most market participants did not anticipate the contagion effect of the subprime mortgage dislocations on the broader economy or the ultimate extent of what we now know, by virtue of hindsight, to be the beginning of a market collapse. For example:

- In early November 2007, Colm Kelleher (CFO, Morgan Stanley) called the collapse of super seniors so extreme that "**no stress model in the world would ever have had it**." (Pravda Decl., Ex. 15.)
- In December 2007, Marcel Ospel (CEO, UBS) reported that "[I]n spite of [UBS's] conservative appetite for risk, the current credit market has hurt us. . . . It is no comfort that UBS is not alone in losing money as a result of the falling value of fixed income securities [that a]lmost everyone in the financial industry had come to believe carried next to no risk of default. . . . **Th[ere] has never in financial history been an AAA rated bond that fell so far so fast**." (Pravda Decl., Ex. 16, at pp. 2, 3.)
- In February 2008, the Comptroller of the Currency, John C. Dugan, described super-senior tranches of CDOs backed by subprime mortgages as "the least risky parts of the subprime securities pyramid," and said that "regulated firms . . . thought they had conservatively purchased 'safe' securities." (Pravda Decl., Ex. 17, at p. 1.) And Mr. Dugan recognized that "**nearly all market participants made [the] mistake" of "grossly underestimat[ing] the risk of super-senior tranches of ABS CDOs**." (*Id.* at 11.)

D. Throughout the Class Period, Citigroup Has Remained Viable

Plaintiffs' allegations boil down to the assertion that Citigroup "did not fare well" in this broad-based credit crisis. (Cplt. ¶ 136.) Citigroup was not alone in not performing well during the class period but, arguably, it performed better than some of its peer firms. Citigroup earned approximately $82 billion in net revenues in 2007. (Pravda Decl., Ex. 1, at p. 21.) Through its diversified business model, Citigroup's wealth management, transaction services and international businesses helped smooth out its earnings results while its U.S. mortgage-related activities suffered losses. (*Id.* at 4.)

During the class period, analysts covering Citigroup consistently viewed the Company's long-term performance and potential as strong, even while recognizing the increasingly extreme market challenges it faced. Indeed, immediately following Citigroup's November 4, 2007 release estimating fourth quarter losses upwards of $11 billion, analysts continued to recognize "significant long-term value in Citigroup's franchise." (Pravda Decl., Ex. 18, at p. 4; *see* Pravda Decl., Ex. 19, at p. 2.)

Following the November 2007 losses, Citigroup raised more than $30 billion of new capital from sophisticated investors in December 2007 and January 2008, showing that these investors maintained their confidence in Citigroup's future prospects. (Pravda Decl., Ex. 1, at p. 4.) For the fiscal year ended December 31, 2007, Citigroup's total assets exceeded $2 trillion. (*Id.*)

While — like virtually all its peers — Citigroup suffered significant write-downs and stock price declines during the class period, these did not represent the type of threat to Citigroup's viability that has been required to find that ERISA fiduciaries are obligated to override the terms of a plan and prevent participants from exercising the option of investing in employer stock.

ARGUMENT

Dismissal of a complaint or cause of action for failure to state a claim is appropriate where the complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1974 (2007). Plaintiffs' complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief'" by providing factual allegations "plausibly suggesting (not merely consistent with)" the required elements of the asserted cause of action. *Id.* at 1966. Thus, where plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 1974; *see also Goldstein* v. *Pataki*, 516 F.3d 50, 56 (2d Cir. 2008) (complaint must be dismissed where plaintiff fails to "provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level" (internal quotation marks omitted)). This pleading standard "'obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.'" *Boss* v. *Kelly*, No. 07 Civ. 2113 (SHS), 2007 WL 2412261, at *3 (S.D.N.Y. Aug. 23, 2007) (quoting *Iqbal* v. *Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

Moreover, certain of plaintiffs' claims must satisfy the heightened pleading requirements of Rule 9(b) because the allegations with respect to those claims are grounded on averments of fraud. *See Rombach* v. *Chang*, 355 F.3d 164, 170–71 (2d Cir. 2004) (applicability of Rule 9(b) turns on "the conduct alleged, and is not limited to allegations styled or denominated as fraud"). Courts have specifically recognized that where a complaint for breach of fiduciary duty sounds in fraud, it is subject to Rule 9(b). *See In re Calpine Corp. ERISA Litig.*, No. C 03-1685, 2005 WL 3288469, at *6 (N.D. Cal. Dec. 5, 2005) (dismissing breach of fiduciary duty claim under ERISA and finding that Rule 9(b) applies to "*all* averments of fraud regardless of whether fraud is an essential element of the underlying cause of action." (emphasis

in original)); *see also In re Coca-Cola Enters. ERISA Litig.*, No. 1:06-CV-0953, 2007 WL 1810211, at *6 (N.D. Ga. June 20, 2007) (dismissing ERISA claims under Rule 9(b) and noting that "[n]one of the Plaintiffs' claims can succeed if this fraudulent scheme cannot be proven"); *Henneberry* v. *Sumitomo Corp. of Am.*, 532 F. Supp. 2d 523, 555 (S.D.N.Y. 2007) ("Rule 9(b)'s heightened pleading standards apply to breach of fiduciary duty claims where the breach is premised on the defendant's fraudulent conduct."); *Toussaint* v. *JJ Weiser & Co.*, No. 04 Civ. 2592, 2005 WL 356834, at *9 (S.D.N.Y. Feb. 13, 2005) (where ERISA claim rests on allegations of fraud, the pleaded facts must give rise "to a strong inference that the defendant[] had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth" (quoting *Conn. Nat'l Bank* v. *Fluor Corp.*, 808 F.2d 957, 962 (2d Cir. 1987))).

Here, it is clear that certain of plaintiffs' allegations, such as plaintiffs' disclosure claims, presuppose the existence of fraud. Plaintiffs generally allege that Citigroup made false and misleading statements to its investors with respect to Citigroup's subprime loan exposure and losses. (Cplt. ¶¶ 7, 136–83.) The Complaint is replete with allegations of misleading statements, material omissions, incomplete disclosures, and intentionally concealed facts, all of which allegedly contributed to plaintiffs' losses. (*See, e.g., id.* ¶¶ 7, 132, 136, 148, 150, 154, 184, 197, 219, 237, 273, 283.) For instance, plaintiffs allege that defendants "withheld material, non-public facts and provided inaccurate and incomplete information" about Citigroup's "true health" (*id.* ¶ 283), and that defendants "fostered an inaccurately rosy picture of the soundness of Citigroup stock," thereby preventing the Plans' participants from appreciating the true risks of investing in Citigroup stock (*id.* ¶ 199.) Although the Complaint does not assert a cause of action for fraud, these allegations of fraud underlie certain of plaintiffs' ERISA claims. As described below, those allegations fail to satisfy the strictures of Rule 9(b).

I.

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

In Count I, plaintiffs allege that Citigroup, Citibank, and the administrative and investment committees (the so-called "Prudence Defendants") breached their duties of loyalty and prudence by continuing to offer Citigroup stock as an investment option for employer contributions, by investing the Citigroup Common Stock Fund in Citigroup stock rather than in cash or short term investments, by failing to restrict participants from investing in Citigroup stock, and by failing to divest the Plans of their investments in Citigroup stock. (Cplt. ¶ 227).

As we explain below, Count I fails because (a) the Prudence Defendants did not have fiduciary responsibilities with respect to the Plans' investments in Citigroup stock; (b) Citigroup stock was not – as a matter of law – an imprudent investment; and (c) the Prudence Defendants did not breach any duty to investigate.

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

The Complaint fails to allege that defendants functioned as ERISA fiduciaries with regard to the Plans' investments in Citigroup stock. The Plans require that the Citigroup Common Stock Fund *permanently* be offered as an investment option. Accordingly, defendants had no discretionary authority to divest the Plans of Citigroup stock or restrict investment in Citigroup stock. Absent that authority, defendants did not function in a "fiduciary" capacity with regard to the conduct alleged in the Complaint.

As the Supreme Court has stated, the "threshold question" in every case alleging breach of ERISA fiduciary duty is "whether [the defendant] was acting as a fiduciary . . . *when taking the action subject to the complaint.*" *Pegram* v. *Herdrich*, 530 U.S. 211, 226 (2000) (emphasis added). That is because a person or entity "may be an ERISA fiduciary with respect

to certain matters but not others." *Harris Trust & Sav. Bank* v. *John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 28 (2d Cir. 2002) (internal quotation marks omitted); *see also Beddall* v. *State Street Bank*, 137 F.3d 12, 18 (1st Cir. 1998) ("[F]iduciary status is not an all or nothing proposition."); *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 760 (S.D.N.Y. 2003) ("ERISA liability arises only from actions taken or duties breached in the performance of ERISA obligations."). An individual or entity can become an ERISA fiduciary with respect to specific matters by being designated a named fiduciary in a plan document or identified as fiduciaries through a plan-specified procedure, *see* 29 U.S.C. § 1102(a), or by exercising "discretionary authority" or "discretionary responsibility" over those matters, *see* 29 U.S.C. § 1002(21)(A). Indeed, plaintiffs acknowledge that they "do not allege that each Defendant was a fiduciary with respect to all aspects of the Plans' management and administration. Rather, . . . Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them." (Cplt. ¶ 41.) Thus, to plead adequately that defendants were fiduciaries for purposes of Count I, plaintiffs must plead specific facts alleging that each defendant was assigned or exercised discretionary authority to prohibit the Plans' participants from investing in Citigroup stock, to prohibit employer contributions into the Citigroup Common Stock Fund, and to liquidate the Plans' Citigroup stock holdings. As explained below, plaintiffs have not and cannot do so.

1. Plan Sponsors Citigroup and Citibank Did Not Function As ERISA Fiduciaries With Regard To The Plan-Mandated Investment In Citigroup Stock

It is a bedrock principle of ERISA jurisprudence that plan sponsors do not act as ERISA fiduciaries when designing, adopting, amending or even terminating ERISA plans. *See Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1996); *Pegram*, 530 U.S. at 226 ("[A]n employer's decisions about the content of a plan are not themselves fiduciary acts."); *Hughes*

Aircraft Co. v. *Jacobson*, 525 U.S. 432, 443–45 (1999) ("ERISA's fiduciary duty requirement simply is not implicated" where a plan settlor "makes a decision regarding the form or structure of the Plan."); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 890 (1996) (when plan sponsors undertake actions to adopt, modify or terminate an employee benefits plan, "they do not act as fiduciaries but are analogous to the settlors of a trust"). Even where an employer serves as a fiduciary for some purposes with respect to an ERISA plan, it may continue to wear "two hats" and "take actions to the disadvantage of employee beneficiaries" when acting in a non-fiduciary capacity as plan sponsor. *Pegram*, 530 U.S. at 225.

The exemption of an employer's plan-design decisions from fiduciary review is a necessary ingredient in ERISA's legislative balance. One of Congress' purposes in adopting ERISA was to encourage the formation of benefit plans by employers. *See Siskind* v. *Sperry Ret. Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) (citing H.R. Rep. No. 533, 93rd Cong., 2nd Sess. 1, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639)); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160–62 (3d Cir. 1990) (subjecting sponsor's plan design decisions to fiduciary review would sweep away the "limitations so meticulously built into" ERISA's statutory scheme).

Here, Citigroup and Citibank, the plan sponsors of the Citigroup and Citibuilder plans, respectively, designed the Plans to require Citigroup stock to be maintained as an investment option: The Citigroup Plan states that "the Citigroup Common Stock Fund shall be permanently maintained as an Investment Fund under the Plan. (Cplt. Ex. E, § 7.01, at p. 41.) The Citibuilder Plan similarly directs that the "Trustee shall maintain . . . the Citigroup Common Stock Fund." (Cplt. Ex. D, § 7.01, at p. 29.) In so designing the Plans, Citigroup and Citibank acted as settlors, not as ERISA fiduciaries. As discussed above, such settlor functions are

immune from fiduciary review. *See Kirschbaum*, 526 F.3d at 249–53 ("Because the Plan's requirements to invest in [company] stock are mandatory and were treated as such by [the company and alleged ERISA fiduciaries], we agree with the district court that no fiduciary duties are inherent in the Plan other than to follow its terms."); *Crowley* v. *Corning, Inc.*, 234 F. Supp. 2d 222, 228 (W.D.N.Y. 2002) (dismissing imprudent investment claim against Corning, the plan sponsor, because "Corning could not control investment options").

Plaintiffs seek, through artful pleading, to urge that Citigroup and Citibank had the fiduciary authority that they expressly lack under the terms of the Plans' governing documents. They allege that Citigroup exercised fiduciary authority or control over "management or disposition of the Plan's assets" (Cplt. ¶ 52) as a result of (i) Citigroup's alleged power to appoint members of the investment and administrative committee and the trustee, (ii) Citigroup's alleged communications with employees regarding the Company and Company stock, (iii) Citigroup's alleged *de facto* authority and control over the other fiduciaries, (iv) the doctrine of *respondeat superior*, and (v) "basic tenets of corporate law" (Cplt. ¶¶ 44–51). Plaintiffs similarly allege that Citibank exercised authority or control over the Plans' assets by virtue of being "imputed with the knowledge Citigroup had regarding the alleged misconduct" under "basic tenets of corporate law." (Cplt. ¶¶ 55–56.)

These allegations fail to demonstrate that Citigroup and Citibank, as the Plans' sponsors, had fiduciary authority over the Plans' investments in the Citigroup Common Stock Fund. *First*, Citigroup's power to appoint the trustee and members of the administrative and investment committees is irrelevant given that fiduciary responsibility for appointment can extend only to the acts and duties inherent in appointment. *See Crowley*, 234 F. Supp. 2d at 228–29 ("The only power the Board had under the Plan was to appoint, retain, or remove members of

the Committee. Thus, the Board's fiduciary obligations can extend only as to those acts."); *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328, 1339 (N.D. Okla. 2003) (same); *Ind. Ass'n. of Publishers' Employees, Inc.* v. *Dow Jones & Co., Inc.*, 671 F. Supp. 1365, 1367 (S.D.N.Y. 1987) (same). The appointment power simply does not give Citigroup the fiduciary authority to eliminate Citigroup stock as an investment alternative under the Plans. *See In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 473 (S.D.N.Y. 2005) ("ERISA does not attach liability for investment decisions to fiduciaries whose roles were limited to appointing, retaining and removing other fiduciaries.").

Second, Citigroup's communications with employees are also similarly irrelevant. Even if communicating with employees about general corporate matters were a fiduciary act (and, as discussed below, it is not), it does not give rise to any fiduciary responsibility over the Plans' investments. (*See* pp. 38 to 41, *infra.*)

Third, the claim that Citigroup, "upon information and belief," exercised *de facto* authority and control over the other fiduciaries is precisely the formulaic and conclusory recitation, with no supporting facts, that is insufficient to state a claim under *Twombly*. *Twombly*, 127 S. Ct. at 1965. Even before *Twombly*, courts held that it was not enough merely to recite the "magic words" that defendants had "discretion" or "control" over a plan because pleading fiduciary status in general was not sufficient to state a claim. *See Haber* v. *Brown*, 774 F. Supp. 877, 879 (S.D.N.Y. 1991) ("Beyond these conclusory statements, not a single fact is alleged" to invoke ERISA fiduciary duties); *Clapp* v. *Greene*, 743 F. Supp. 273, 276–77 (S.D.N.Y. 1990) ("[C]onclusory allegations merely stating the general legal conclusions necessary to prevail on the merits and which are unsupported by facts are not taken as true."), *aff'd*, 930 F.2d 912 (2d Cir. 1991).

Fourth, this Court has flatly rejected application of *respondeat superior* liability as inconsistent with ERISA's functional concept of fiduciary responsibility. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 02 Civ. 8853, 2005 WL 563166, at *4 n.5 (S.D.N.Y. Mar. 10, 2005) (dismissing a claim for breach of fiduciary duty based on corporate *respondeat superior* liability and observing that "there is no reason to recognize an implied ERISA cause of action under the doctrine of *respondeat superior* . . . 'since the statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly'" (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 254 (1993))); *see also Walsh* v. *Emerson*, Nos. 88-952-DA, 88-1367-DA, 1990 WL 47319, at *3 (D. Or. Jan. 19, 1990) (corporation "cannot be liable under ERISA on a non-fiduciary *respondeat superior* basis"); *Crowley*, 234 F. Supp. 2d at 228–29 (rejecting *respondeat superior* argument).

Finally, the assertion that "basic tenets of corporate law" give Citigroup and Citibank control over the disposition of the Plans' assets fails for the same reason. Courts will simply not infer new causes of action that are not expressly established by ERISA. *See AOL Time Warner*, 2005 WL 563166 at *4 n.5 (noting the Supreme Court's "unwillingness to infer causes of action in the ERISA context" (quoting *Mertens*, 508 U.S. at 254)).

In short, plan sponsors Citigroup and Citibank did not serve in a *fiduciary* capacity with regard to Plan-mandated investment in Citigroup stock. Therefore, Count I fails as a matter of law against Citigroup and Citibank.

2. The Administrative Committee And Its Members Did Not Function As ERISA Fiduciaries With Regard To The Plan-Mandated Investment In Citigroup Stock

The administrative committee was a named fiduciary under the Plans, and had administrative responsibility for the general operation of the Plans. However, the committee had

no discretion with regard to investment decisions and thus did not function as a fiduciary with respect to investment in the Plans' assets.

As alleged in the Complaint, the administrative committee had the power to make rules and regulations for the administration of the Plans, to decide questions about eligibility to participate in the Plans, to determine the amount of any benefit payable under the Plans, and to communicate with participants about the Plans. (Cplt. ¶¶ 62–68.) But the administrative committee did not have authority or control with respect to investment decisions. The Plans provide that the administrative committee "shall have no responsibility for or control over the investment or management of Plan assets." (Cplt. Ex. D, § 3.01(a), at p. 13; Ex. E, § 3.01(a), at p. 18.) In addition, the Plans expressly state that the administrative committee shall have no "authority, discretion, responsibility or liability with respect to the Participant's selection of an Investment Fund." (Cplt. Ex. D, § 7.06(a), at p. 31; Ex. E, § 7.06(a), at p. 43.) As the Plans preclude the administrative committee from restricting or eliminating investment in the Citigroup Common Stock Fund or from divesting plan investments in Citigroup stock, its members cannot be held liable for the claimed fiduciary failures. *See Pedraza* v. *Coca-Cola Co.*, 456 F. Supp. 2d 1262, 1273 (N.D. Ga. 2006) (dismissing claims against administrative committee that had "no prerogatives regarding selection of the Plan's investments" because it "was not a fiduciary with respect to investment decisions and cannot be sued for breach of fiduciary duty in that regard"); *Smith* v. *Delta Air Lines, Inc.*, 422 F. Supp. 2d 1310, 1326 (N.D. Ga. 2006) (dismissing claims against administrative committee that had "no discretion to discontinue investment into the [company stock fund] or alter or modify the ESOP"); *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 892 (S.D. Tex. 2004) (dismissing prudence and loyalty claims against committee defendants where plan documents did not confer discretion over plan investments).

Plaintiffs rely on a provision of the Plans that they claim gives the administrative committee "the power and duty to establish rules with respect to the basis by which Plan participants or beneficiaries can direct their investments amongst the various investment funds under the Plans." (*See* Cplt. ¶ 66, citing Cplt. Ex. D, §§ 7.03–.04, at pp. 30–31; Ex. E, §§ 7.03–.04, at p. 42.) But the cited clauses grant no discretion as to the selection of Citigroup stock or other funds, nor does it authorize the administrative committee to divest participants' accounts of Citigroup stock. Rather, the clauses deal with the procedures by which participants direct their investments. For instance, these provisions explain that participants shall "file" their investment selections with the administrative committee "in such form as the Committee shall prescribe" and that such direction may be made "either in written form, computer transmission or through telephonic means or any other means established by the Committee to provide Participants with the opportunity to effect such transactions." (Cplt. Ex. D, § 7.03, at p. 30; Cplt. Ex. E , § 7.03, at p. 42.) These provisions also instruct that the administrative committee shall establish procedures for participants to rebalance Plan assets and to select professional account managers, and for alternate payees or beneficiaries to direct investment contributions. (Cplt. Ex. D, §§ 7.03–.04, at pp. 30–31; Cplt. Ex. E , §§ 7.03–.04, at p. 42.) Thus, these provisions give the administrative committee no power over investments in Citigroup stock or any other funds.

Because the Plans explicitly provide that the administrative committee shall have no control or discretion over investment or management of Plan assets and because Plan provisions that plaintiffs cite do not provide to the contrary, Count I should be dismissed against the administrative committee members.

3. The Trustee Did Not Function As An ERISA Fiduciary With Regard To The Plan-Mandated Investment In Citigroup Stock

Plaintiffs seek to hold Citibank liable as trustee of the Citigroup Plan because it was appointed to "manage, invest, and reinvest" the assets of the Citigroup Plan. (Cplt. ¶ 53). Noticeably absent from that directive is any discretion to eliminate the Citigroup Common Stock Fund as an investment under the Citigroup Plan or to restrict investment in Citigroup stock. To the contrary, the Citigroup Plan provides that, "[i]n 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." (*See* Cplt. Ex. E, § 7.01, at p. 41 (emphasis added)). Courts have held that similar language is sufficient to remove any discretion to eliminate company stock as an investment option. *See Kirschbaum*, 526 F.3d at 250 (where Trust Agreement provided that "the Plan's investment funds shall consist of the Reliant Energy Common Stock Fund and other such Investment Funds selected and approved by the Committee from time to time," the Benefits Committee "had no authority to delete the Common Stock Fund as an investment option").

Moreover, even if the trustee had fiduciary authority to eliminate the Plans' investments in Citigroup stock (which it did not), the scope of that discretion was exceedingly narrow. Pursuant to the Trust Agreement, the trustee's actions were managed and directed by others, and the trustee had "no duty or obligation to review any investment to be acquired, held or disposed of pursuant to such directions nor to make any recommendations with respect to the disposition or continued retention of any such investment." (Cplt. Ex. C, § 4.2(a), at p. 12.) Under ERISA, such "directed trustees" are not required to weigh the merits of an investment in company stock when performing traditional trust duties. *See Beddall*, 137 F.3d at 19–21 (directed trustee had "ministerial" trust duties and "mechanical administrative responsibilities,"

and was not responsible for misvaluation of assets by plan-appointed investment manager); *Maniace* v. *Commerce Bank, N.A.*, 40 F.3d 264, 267–68 (8th Cir. 1994) (directed trustee "not required to weigh the merits of an investment in [company] stock against all other investment options every time it was directed to purchase said stock by the Committee").[2]

While ERISA provides that directed trustees must follow only "proper" investment directions that are "not contrary to" ERISA, *see* ERISA § 403(a)(1), 29 U.S.C. § 1103(a)(1), the Complaint does not plead a single fact alleging that the trustee knew or should have known it had received any improper investment directions, especially considering that investment in the Citigroup Common Stock Fund was expressly mandated by the Plan instrument. *See In re McKesson HBOC, Inc. ERISA Litig.*, No. C00-20030, 2002 WL 31431588, at *12 (N.D. Cal. Sept. 20, 2002) ("[N]o facts are alleged that would give rise to a conclusion that Chase knew the investment directions it received the from the McKesson Plan were imprudent.").

Accordingly, the trustee is not liable to plaintiffs for breach of fiduciary duty under ERISA, and Count I should be dismissed against the trustee.

4. The Investment Committee And Its Members Did Not Function As ERISA Fiduciaries With Regard To The Plan-Mandated Investment In Citigroup Stock

The investment committee was a named fiduciary under the Plans, and was responsible for administering investment of the Plans' assets. However, as a matter of the Plans' design, the investment committee had no discretion to eliminate the Citigroup Common Stock

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2 *See also Grindstaff* v. *Green*, 133 F.3d 416, 425–26 (6th Cir. 1998) (trustee had no "discretion" with respect to company stock, and could "only act at the direction of" the plan committee); *Ershick* v. *United Missouri Bank, N.A.*, 948 F.2d 660, 665 (10th Cir. 1991) (trustee not required to weigh merits of investment in employer stock by taking into account negative financial information known to bank's commercial department).

Fund as an investment alternative and thus did not function as a fiduciary with respect to investments in Citigroup stock.

Plaintiffs allege that "[i]n its capacity to select and monitor investment managers as well as investment options for the Plans, the Investment Committee had the discretion and authority to suspend, eliminate, or reduce any Plan investment, including investments in Citigroup stock." (Cplt. ¶ 69.) Plaintiffs do not provide any citation to Plan documents for that assertion. That is not surprising, given that Plan documents could not be clearer in contradicting plaintiffs' allegation. The Citigroup Plan provides:

> 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.

(Cplt. Ex. E, § 7.01, at p. 41.) Similarly, the Citibuilder Plan provides that the "Trustee *shall maintain*, within the Trust, the Citigroup Common Stock Fund" and that "the Plan mandate[s] the creation and continuation of the Citigroup Common Stock Fund." (Cplt. Ex. D, § 7.01, at p. 29; *id.* § 7.09(d), at p. 32.) Barring a grant of discretionary authority to eliminate Citigroup stock investments under the Plans, the investment committee cannot be held liable to plaintiffs for breach of fiduciary duty. *See Urban* v. *Comcast Corp.*, No. 08-773, 2008 WL 4739519, at *12 (E.D. Pa. Oct. 28, 2008) ("[W]here a plan's settlor mandates investment in employer securities, the plan fiduciaries are 'immune from judicial inquiry' related to such investments, essentially because they are implementing the intent of the settlor."); *Crowley* v. *Corning, Inc.*, No. 02-CV-6172, 2004 WL 763873, at *10 (W.D.N.Y. Jan. 14, 2004) (holding that because "the Plan does not give the [investment committee] any discretion with regard to investment in company stock," the Plan "creates no potential for fiduciary liability with regard to investments in [company] stock"); *Smith*, 422 F. Supp. 2d at 1330 (dismissing claim for breach of fiduciary duty against

investment committee and noting that committee "had no discretion to decide whether or not to use [company] securities in the ESOP or whether to offer the [company] Common Stock Fund"); *see generally Harris Trust & Sav. Bank*, 302 F.3d at 29 ("[A]dherence to [plan] terms by a plan administrator cannot constitute a breach of its fiduciary duties, barring a grant of discretionary authority to the fiduciary.").

Courts that have considered whether a fiduciary might have a duty to override the plain terms of a plan in order to limit or restrict investment in company stock have not imposed any such duty. In *Edgar* v. *Avaya*, 503 F.3d 340 (3d Cir. 2007), the Third Circuit explained that "if the 'trust' requires the trustee to invest in a particular stock, then the trustee is 'immune from judicial inquiry'" for following that requirement. *Id.* at 346 (*quoting Moench* v. *Robertson*, 62 F.3d 553, 571 (3d Cir. 1995)). Applying the Third Circuit's holding, one court observed that plan fiduciaries are "immune from judicial inquiry" concerning investment in employer securities where such investments are mandated by the settlor. *Urban,* 2008 WL 4739519, at *12; *see generally Kirschbaum*, 526 F.3d at 254–55 (noting that defendants had raised a "potent objection" to any degree of judicial review "where the plan utterly compelled investment in company stock").

Finally, as we discuss below, even if the Court disagrees and holds that the investment committee or any of the Prudence Defendants are not absolutely immune from liability, Count I should still be dismissed because Citigroup stock was not an imprudent investment as a matter of law.

B. As A Matter Of Law, Citigroup Stock Was Not An "Imprudent" Investment

Plaintiffs' claims also fail because Citigroup stock – as a matter of law – was not an imprudent investment. Plaintiffs have failed to plead facts sufficient to overcome the

presumption of prudence. Under *Twombly*, plaintiffs must plead "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action;" rather, plaintiffs must provide "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1965, 1974. In the context of an ERISA stock drop claim, *Twombly* requires plaintiffs to plead sufficient facts to overcome the presumption of prudence. *See, e.g.*, *In re Dell, Inc. ERISA Litig.*, 563 F. Supp. 2d 681, 693 (W.D. Tex. 2008) ("The Court must therefore determine at the motion to dismiss stage whether the Plaintiffs have plead facts which, taken as true, could overcome the [presumption of prudence]."). As the Fifth Circuit held in *Kirschbaum*, it is not enough for plaintiffs to plead that plan fiduciaries were aware of "circumstances that may impair the value of company stock;" rather, plaintiffs must plead "persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest." *Kirschbaum*, 526 F.3d at 256. Plaintiffs have not and cannot meet that standard.

1. Plan Investments In Citigroup Stock Are Presumptively Prudent

Under ERISA, fiduciaries who administer an eligible individual account plan ("EIAP") or employee stock ownership plan ("ESOP") are entitled to a presumption that investing in employer stock is prudent.

As the Complaint acknowledges, the Plans are "eligible individual account plan[s]" within the meaning of ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3). (Cplt. ¶ 78.) The Citigroup Plan is described in the Plan document as a "stock bonus plan, a portion of which is designated as an employee stock ownership plan and contains within it a cash or deferred arrangement under Section 401(k)" of the Internal Revenue Code of 1986. (Cplt. Ex. E, § 1.03, at p. 1.) The Citigroup Plan specifically designates as an ESOP "any amount invested in the Citigroup Common Stock Fund" and provides that the ESOP portion of the Plan was "designed to invest primarily in Citigroup Common Stock." (Cplt. Ex. E §§ 15.01–02, at p. 67.)

Accordingly, the Plan qualifies as an "eligible individual account plan." *See* ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3)(A) ("eligible individual account plans" include ESOPs, savings plans, stock bonus plans and other similar plans that invest in employer securities).[3] The Citibuilder Plan is a profit sharing plan (Cplt. Ex. D, § 1.03, at p. 1), and therefore is also an "eligible individual account plan" under the statute's definition. *See* 29 U.S.C. § 1107(d)(3)(A).

Because the Plans are EIAPs or ESOPs, their Plan-mandated investments in Citigroup stock are presumptively prudent. *See, e.g., Moench* v. *Robertson*, 62 F.3d 553, 571–72 (3d Cir. 1995). That presumption arises from Congress's express determination to encourage the formation of such plans to give plan participants an ownership stake in their employers and to provide plan sponsors with a tool of corporate finance. *See Kuper* v. *Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995) (Congress sought to promote "technique[s] of corporate finance that would encourage employee ownership"); *Wright* v. *Or. Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) (citing "strong policy and preference in favor of investment in employer stock" (internal quotation omitted)).[4] Recognizing the need to take account of settlor intent where plan design contemplates investment in employer stock and that one goal of ERISA is to foster employee stock ownership of employer securities, courts have adopted an "abuse of discretion" standard and a "presumption of reasonableness" in evaluating whether a fiduciary has breached its duties by — as plaintiffs allege here — permitting continued investment in, or failing to

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[3] Despite conceding that the Citigroup Plan is an EIAP within the meaning of ERISA (Cplt. ¶ 78), plaintiffs allege "on information and belief" that the Citigroup Plan does not satisfy some unspecified statutory or regulatory mandate regarding either the design or operation of an ESOP or an EIAP (Cplt. ¶ 90). This is exactly the kind of "blanket assertion" that is insufficient under *Twombly*, 127 S. Ct. at 1965 n.3, because it does not include any facts showing how the Citigroup Plan fails to qualify as an ESOP or EIAP, and therefore does not put the defendants on notice of plaintiffs' argument or enable defendants to respond to the allegation.

[4] *See also* S. Res. 313, 99th Cong., 2d Sess. 4075, 132 CONG. REC. 13898-01, Sec. 1271(a) (1986) ("Congressional Policy – the Congress, in a series of applicable laws and in this Act, has made clear its interest in encouraging employee stock ownership plans as a bold and innovative technique of finance for strengthening the free private enterprise system.").

liquidate, company stock. *See Moench*, 62 F.3d at 571. The Third, Fifth, Sixth, Seventh, and Ninth Circuits have applied this presumption of prudence. *See, e.g., Kirschbaum*, 526 F.3d at 254 (5th Cir.); *Pugh* v. *Tribune Co.*, 521 F.3d 686, 701 (7th Cir. 2008); *Avaya*, 503 F.3d at 345–48 (3d Cir.); *Wright*, 360 F.3d at 1098 (9th Cir.); *Kuper*, 66 F.3d at 1459 (6th Cir.).

To rebut the presumption and establish an abuse of discretion, "the plaintiff must show 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 fiduciary would operate." *Moench*, 63 F.3d at 571; *accord In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 793 (W.D.N.C. 2003). Thus, rebutting the presumption requires plaintiffs to show extraordinary circumstances where a company was in dire straits and facing "impending collapse." Only in such extraordinary circumstances can plan fiduciaries appropriately determine that company stock is no longer a viable long-term investment and that terminating employee ownership of company stock is prudent. *See, e.g., Moench*, 62 F.3d at 558, 572 (permitting case to proceed in face of "continual and precipitous drop" in stock price culminating in bankruptcy and where company knew of "impending collapse"); *Polaroid*, 362 F. Supp. 2d at 475–76 (stock underwent "precipitous decline" and defendants were aware of strong likelihood that company could not continue as a going concern).

In view of the important interests it serves, the presumption is a "substantial shield." *Kirschbaum*, 526 F.3d at 256. As the *Kirschbaum* court explained:

> One cannot say that whenever plan fiduciaries are aware of circumstances that may impair the value of company stock, they have a fiduciary duty to depart from ESOP or EIAP plan provisions. Instead, there ought to be persuasive and analytically rigorous facts demonstrating that reasonable fiduciaries would have considered themselves bound to divest. Less than rigorous application of the *Moench* presumption threatens its essential purpose. A fiduciary cannot be placed in the untenable position of

> having to predict the future of the company stock's performance. In such a case, he could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded.

Id. See Pedraza, 456 F. Supp. 2d at 1276 ("A fiduciary who decides to scrap the ESOP is just as apt to be sued as he would be if he enforced the plan provisions.").

The *Kirschbaum* court further noted the serious practical problems that would be caused by a rule that forced fiduciaries to dump employer stock based on non-public information about the company:

> in some cases, requiring a fiduciary to override the terms of a company stock purchase plan could suggest the necessity of trading on insider information. Such a course is prohibited by the securities laws. Fiduciaries may not trade for the benefit of plan participants based on material information to which the general shareholding public has been denied access. Moreover, from a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price.

Kirschbaum, 526 F.3d at 256.

2. Plaintiffs Are Unable To Overcome *Moench*'s Presumption of Prudence

Application of the presumption in this case is straightforward: As a matter of law, plaintiffs do not and cannot make the required specific showing that Citigroup, "the world's largest bank by revenue as of 2008" (Cplt. ¶ 23), faced the dire circumstances, impending collapse, or threat to its viability as a going concern during the class period that would have warranted fiduciaries of the Plans to take the drastic step of selling off the Plans' investment in Citigroup stock or otherwise restricting the ability of the Plans' participants to invest in Citigroup stock.[5]

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[5] Plaintiffs may argue that the *Moench* presumption should not be applied at the motion to dismiss stage. But since the Supreme Court's decision in *Twombly*, nearly all courts facing this issue have considered the

As plaintiffs' own pleadings show, as of the end of the class period, Citigroup "employs approximately 358,000 staff around the world, and holds over 200 million customer accounts in more than 100 countries." (Cplt. ¶ 23). Citigroup's year-end financial statements — approved by an auditor — confirm that Citigroup earned approximately $82 billion in net revenues in 2007. (Pravda Decl., Ex. 1, at pp. 3, 21.) While there were significant and unprecedented losses in certain subprime-related assets, some of the other divisions in Citigroup's diversified business model, including wealth management, transaction services and international businesses, had positive results to offset losses in Citigroup's U.S. mortgage-related activities. (*Id.* at 4.) In December 2007 and January 2008, at the end of the alleged class period, Citigroup raised more than $30 billion of new capital from sophisticated investors. (*Id.*) For the fiscal year ended December 31, 2007, Citigroup's total assets exceeded $2 trillion. (*Id.* at 3.)

Because Citigroup was a viable going concern at all times throughout the class period, plaintiffs cannot overcome the presumption of prudence. *See, e.g., Kirschbaum*, 526 F.3d at 255 (a threat to the company's "viability as a going concern" and a "danger of [the stock] becoming essentially worthless" are needed to establish an abuse of discretion in continuing the ESOP); *Coca-Cola Enters.*, 2007 WL 1810211, at *10 (granting motion to dismiss where company was not "on the verge of financial collapse"); *In re Calpine Corp. ERISA Litig.*, No. C 03-1685, 2005 WL 1431506, at *5 (N.D. Cal. Mar. 31, 2005) (granting motion to dismiss where company's "viability as an ongoing concern" was not called into question); *Duke Energy*, 281 F. Supp. 2d at 793–95 (granting motion to dismiss where company was "solid," "viable" and "far from impending collapse" (internal quotation marks omitted)); *Wright* v. *Or. Metallurgical*

presumption of prudence on a motion to dismiss. *See Avaya*, 503 F.3d at 349; *Pugh*, 521 F.3d at 701; *Urban*, 2008 WL 4739519, at *12; *Graden* v. *Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 462–63 (D.N.J. 2008); *Halaris* v. *Viacom, Inc.*, No. 3:06-CV-1646, 2008 WL 3855044, at *2 (N.D. Tex. Aug. 19, 2008); *Dell*, 563 F. Supp. 2d at 692–93; *In re Radioshack Corp. ERISA Litig.*, 547 F. Supp. 2d 606, 614 (N.D. Tex. 2008).

Corp., 222 F. Supp. 2d 1224, 1234 (D. Or. 2002) (granting motion to dismiss where company was "far from an impending collapse" and "at all times . . . a viable concern"), *aff'd*, 360 F.3d 1090 (9th Cir. 2004); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 833 (N.D. Cal. 2005) (granting motion to dismiss where company's "viability as an ongoing concern" was not at stake (internal quotation marks omitted)).

Plaintiffs do not allege that Citigroup faced impending collapse during the class period, instead focusing only on Citigroup's "operations tied to the subprime securities market" which allegedly exposed the Plans to massive losses. (Cplt. ¶ 219.) While Citigroup's stock price declined during the class period from $55.70 on January 1, 2007 to $26.94 on January 15, 2008, that 52 percent stock drop in a highly volatile market cannot sustain a claim of abuse of discretion. Courts have repeatedly found larger stock drops insufficient to overcome the presumption of prudence. *See Crowley*, 234 F. Supp. 2d at 227 (80% drop in stock price); *Kuper*, 66 F.3d at 1451 (80% drop in stock price); *McKesson*, 391 F. Supp. 2d at 838–39 (75% drop in stock price); *Wright*, 360 F.3d at 1096 (73% drop in stock price); *Duke Energy*, 281 F. Supp. 2d at 795 (55% drop in stock price).

Because Plaintiffs cannot overcome the presumption of prudence, the prudence claim fails as a matter of law.

C. <u>Defendants Did Not Breach Any Duty To Investigate</u>

Plaintiffs allege that the Prudence Defendants "failed to conduct an appropriate investigation of the merits of continued investment in Citigroup stock." (Cplt. ¶ 221.) Plaintiffs contend that the administrative and investment committees were on notice of the need to conduct an investigation by virtue of alleged warning flags, including a series of analyst reports, media articles, and market events concerning companies other than Citigroup. (Cplt. ¶ 189.) These allegations are insufficient to state a claim for relief.

First, plaintiffs have not shown that Citigroup stock was an imprudent investment, for the reasons set forth above. It is black letter law that a plaintiff "must show that an investment actually was imprudent before he can state a claim for failing to investigate." *McKesson*, 391 F. Supp. 2d at 833–34 (citing *Fink* v. *Nat'l. Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985)). That is so because, if the investment is not imprudent, there can be no "*causal link* between the failure to investigate and the harm suffered by the plan." *Wright*, 360 F.3d at 1099 (quoting *Kuper*, 66 F.3d at 1459) (emphasis in original); *see also In re Unisys Sav. Plan Litig.*, No. 91-3067, 1997 WL 732473, at *24 n.24 (E.D. Pa. Nov. 24, 1997) ("Even if a fiduciary fails to make an adequate investigation, that fiduciary is not liable if a hypothetically prudent fiduciary would have made the same decision after making an adequate investigation." (citation omitted)).

Second, the supposed warnings flags plaintiffs allege could not plausibly have triggered any duty to investigate. Plaintiffs cite 25 warning flags. (Cplt. ¶ 189.) Just one of them is specific to Citigroup: A Wall Street Journal article in August 2007 noted that Wall Street banks, including Citigroup, might have losses hidden on their books or in off-balance-sheet vehicles. A single article, coming more than halfway through plaintiffs' class period, could hardly be enough to trigger a duty to investigate.

The remaining warning flags deal primarily with liquidity problems at and bankruptcies by mortgage lenders, and also include various analyst and media reports on housing prices and loan defaults. Plaintiffs do not explain how these supposed warning flags, none of which were specific to Citigroup, should have prompted an investigation by any of the Prudence Defendants. Consumer mortgage lending was just one part of Citigroup's business, and Citigroup took steps prior to the start of the class period to reduce its exposure to subprime

mortgages that its consumer business originated. As the complaint acknowledges, Citigroup in 2005 stopped offering "teaser rate and interest only mortgages to lower FICO score customers." (Cplt. ¶ 132.) To further manage credit and liquidity risk, Citigroup sold most of the mortgage loans that it originated. (Pravda Decl., Ex. 5, at p. 94.) At the end of 2006, Citigroup's first mortgage portfolio held only 34% non-prime mortgages and its second mortgage portfolio held only 4% non-prime mortgages. (*Id.*) Thus, the red flags concerning liquidity problems and bankruptcies at mortgage lending companies are insufficient to trigger any duty to investigate. Finally, plaintiffs do not allege how these supposed warning flags should have triggered any duty to investigate with respect to the super-senior tranches of CDOs.

Even if plaintiffs are complaining that the Prudence Defendants did not investigate Citigroup's *valuation* of its exposure to subprime mortgages, these red flags are insufficient to trigger a duty to investigate. Because Citigroup was being audited by a third party, "there [was] no reason to infer" that ERISA fiduciaries would be on notice of the need to investigate technical matters of accounting or valuation. *Pugh*, 521 F.3d at 700.

In short, it is apparent that plaintiffs' duty to investigate claim is based solely on hindsight. Where plaintiffs offer "nothing but pure speculation" to support their allegations that certain warning flags should have triggered an investigation at the time, the "alleged red flags fail as a matter of law." *Pugh*, 521 F.3d at 700; *cf. Crowley*, 2004 WL 763873, at *13 (finding that plaintiffs failed to allege any facts that would indicate that the fiduciaries should have had any reason to think that the decline in the price of company stock was unusual).

II.

PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF ANY DUTY TO DISCLOSE COMPLETE AND ACCURATE INFORMATION TO PLAN PARTICIPANTS

Count II alleges that Citigroup, the administrative committee, and Prince (the so-called "Communication Defendants") breached fiduciary duties by failing to disclose complete and accurate information to the Plans' participants and beneficiaries. (Cplt. ¶¶ 231–42.) Specifically, plaintiffs contend that these defendants failed to disclose "the true magnitude of the Company's involvement in subprime lending," "the risks these presented for the Company," and that the Company's disclosures were "false and misleading" and thereby "artificially inflated" the value of Citigroup stock. (Cplt. ¶ 237; *see also id.* ¶¶ 132–33, 136–75.)

Count II fails to state a claim because (a) ERISA does not impose a general fiduciary duty to disclose information to plan participants; (b) the communications at issue here were not made pursuant to ERISA nor by ERISA fiduciaries; and (c) the disclosures that plaintiffs claim should have been made would not have prevented plaintiffs' alleged harm. Moreover, plaintiffs' allegations do not satisfy Rule 9(b), which is required because these claims sound in fraud. (*See* pp. 13 to 14, *supra*). *See, e.g.*, *Calpine*, 2005 WL 3288469, at *6–7 (applying Rule 9(b) to claims that a company and its investment committee breached their fiduciary duties by "disseminating misleading and incomplete information to Plan participants[] and failing to inform participants . . . of material information relating to participants' investments in Company stock").

A. ERISA's General Fiduciary Requirements Do Not Include Any Duty To Disclose Information To Plan Participants

ERISA is an "enormously complex and detailed statute," *Mertens*, 508 U.S. at 262, and the Supreme Court has refused to graft additional requirements onto ERISA's statutory

regime, *see Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146–47 (1985) ("Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."). ERISA Sections 101 to 111 impose a "comprehensive set of 'reporting and disclosure' requirements," *Curtiss-Wright Corp.*, 514 U.S. at 83 (citing 29 U.S.C. §§ 1021–31), and ERISA's duty of disclosure is limited to those requirements, *Mellot* v. *Choicepoint, Inc.*, 561 F. Supp. 2d 1305, 1318 (N.D. Ga. 2007) ("ERISA's fiduciary duty standards should not be expanded to include disclosure of information that is not explicitly required under ERISA.").[6] Plaintiffs do not allege a breach of any of these requirements.

Rather, plaintiffs' "disclosure" claim rests on the faulty premise that the general *fiduciary* language of ERISA § 404 creates a vague set of additional duties to disclose information about company operations. (*See*, *e.g.*, Cplt. ¶ 237.) But the Second Circuit has rejected such a premise, holding that it would be "inappropriate to infer an unlimited disclosure obligation on the basis of general [fiduciary] provisions that say nothing about disclosure" given the comprehensive nature of the disclosure requirements expressly set forth in ERISA Sections 101–11. *Bd. of Trs. CWA/ITU Negotiated Pension Plan* v. *Weinstein*, 107 F.3d 139, 146–47 (2d Cir. 1997) (citing *Faircloth* v. *Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996)). Indeed, the "general fiduciary obligations set forth in ERISA § 404" nowhere even mention the "disclosure of information to Plan participants." *Weiss* v. *CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 754 (S.D.N.Y 1997); *see also Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir.

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[6] For instance, ERISA Sections 101–11 require plan fiduciaries to disclose the name and type of administration of the plan; the name and address of the administrator; names, titles, and addresses of any trustee or trustees; a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances that may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; and the plan's year end date and whether the plans' records are kept on a calendar, policy, or fiscal year basis. *See* 29 U.S.C. §§ 1021–31.

1998) ("It would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed."); *Ehlmann* v. *Kaiser Found. Health Plan*, 198 F.3d 552, 555 (5th Cir. 2000) ("It is for Congress to determine whether to impose such a duty to disclose under ERISA and this court will not encroach on that authority by imposing a duty which Congress has not chosen to impose."); *Baker* v. *Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004). Thus, ERISA's general fiduciary language does not create a duty to disclose.

Nor does ERISA impose any duty to keep plan participants informed of a company's financial developments, even where such developments might affect the value of company stock. *See Avaya*, 503 F.3d at 350 (defendants "did not have a duty to 'give investment advice' or 'to opine on' the stock's condition."); *Olson* v. *Chem-Trend Inc.*, No. 94-CV-75201, 1995 WL 866221, at *6 (E.D. Mich. May 30, 1995) (no fiduciary duty to inform plan participants of "material factors affecting the value of [company] stock"); *Sweeney* v. *Kroger Co.*, 773 F. Supp. 1266, 1269 (E.D. Mo. 1991) ("[P]lan administrators are not required to inform . . . participants . . . of every corporate event, especially contingent events, that might impact the value of the company's stock"); *Childers* v. *Nw. Airlines, Inc.*, 688 F. Supp. 1357, 1361–62 (D. Minn. 1988) ("[F]iduciaries should be able to rely upon the detailed and uniform guidance ERISA provides with regard to disclosure requirements rather than bearing the practically impossible burden of anticipating, and comprehensively addressing, the individualized concerns of thousands of employees."). These rulings are consistent with the Department of Labor's longstanding position that fiduciaries have no duty to provide investment advice to participants in EIAPs. *See* Interpretive Bulletin to Participant Investor Education, 29 C.F.R. § 2509.96-1(b); 29 C.F.R. § 2550.404c-1(c)(4).

Thus, plaintiffs' allegations that defendants failed to disclose certain information — such as "the true nature of Citigroup's subprime exposure and the risks such exposure presented to the Company" and "the risks posed by the Company's . . . involvement in the SIV market" (Cplt. ¶¶ 191, 200) — fail to state a claim for relief. These allegations merely allege that defendants failed to disclose information not required to be disclosed under ERISA. Thus, in *Avaya*, the Third Circuit rejected a similar claim, holding that allegations "[t]hat defendants did not inform Plan participants about several adverse corporate developments prior to [the company's] earnings announcement" did not state a claim for breach of ERISA's disclosure obligations because the defendants had no additional obligation to disclose adverse information relevant to the company's performance in advance of the company's earnings announcement. *Avaya*, 503 F.3d at 350–51.

B. **The Communications At Issue Are Not ERISA Communications And Were Not Made By Individuals Or Entities With Fiduciary Duties To Disclose**

Plaintiffs also allege that Citigroup and Prince made affirmative misrepresentations in SEC filings, analyst conference calls, and press releases announcing earnings reports. (*See, e.g.*, Cplt. ¶¶ 132, 148, 154.) These claims fail because (a) neither Citigroup nor Prince acted as ERISA fiduciaries in making these communications, (b) none of the communications were made pursuant to ERISA, and (c) none of the communications were made to the Plans' participants.[7]

Citigroup and Prince were not acting as ERISA fiduciaries when making statements about Citigroup's financial condition in SEC filings, speaking in analyst conference

[7] Plaintiffs also refer generally to other communications disseminated through "newsletters, memos, letters, the Plans' documents, and/or other Plan related materials" (Cplt. ¶ 197), but allege no affirmative misrepresentations in those communications and therefore cannot state a claim based on those communications under *Twombly* or Rule 9(b).

calls, or issuing or making statements in press releases about the Company's earnings announcements. In order to recover under ERISA "for alleged misrepresentations that the company made concerning its financial condition," plaintiffs "must demonstrate that the representations were made in a fiduciary capacity." *Kirschbaum*, 526 F.3d at 256. Here, plaintiffs allege only in general terms that Prince "engaged in acts of Plan administration by communicating extensively with employees regarding the Company and Company Stock" (Cplt. ¶ 30) and that Citigroup exercised *de facto* control over the other fiduciaries (Cplt. ¶ 49). The only statements attributed to Prince in the Complaint are those made publicly to the market about the Company's performance. (*See, e.g.*, Cplt. ¶ 158.) Thus, plaintiffs have not sufficiently alleged that Citigroup and Prince were acting in a fiduciary capacity when making these communications. *See, e.g.*, *Kirschbaum*, 526 F.3d at 257 (dismissing ERISA claim where plaintiff did not show that "defendants were acting in anything other than a corporate capacity in making these statements"); *Crowley*, 234 F. Supp. 2d at 228 (dismissing ERISA claim because the public statements and omissions concerning financial performance, "regardless of truth or falsity, were not made by [the company] in any fiduciary capacity regarding the Plan").

Nor are the allegedly false and misleading communications at issue regulated by ERISA. SEC filings, press releases announcing earnings, and analyst conference calls to discuss financial results are standard corporate communications. The standards and obligations that govern such corporate disclosures are imposed by the federal securities laws, not the rules of ERISA fiduciary conduct. *See Hull* v. *Policy Mgmt. Sys. Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286, at *8 (D.S.C. Feb. 9, 2001) ("[T]he duties of disclosure owed to the Plan by the corporate defendants are not based on the duties owed by an ERISA fiduciary to a Plan and its participants, but the general duties of disclosure owed by a corporation and its officers to the

corporation's shareholders."); *see also WorldCom*, 263 F. Supp. 2d at 760 ("SEC filings are documents that [defendants] must execute to comply with a corporation's obligations under federal securities laws" and cannot be transformed "into a basis for ERISA claims against their signatories."). It is black letter law that such ordinary course business communications are not actionable under ERISA. *See Kirschbaum*, 526 F.3d at 257 (dismissing claim because Form 10-K and 10-Q filings were made in company's corporate capacity and were not fiduciary communications); *Crowley*, 2004 WL 763873, at *9 (holding that corporate SEC filings and press releases are, as a matter of law, directed at the market as a whole and cannot give rise to ERISA liability). Plaintiffs' theory would impose an unprecedented new set of standards governing all public communications made by any issuer that allowed investment in company stock in a 401(k) plan.

Finally, plaintiffs' disclosure claims against Citigroup and Prince fail because none of the communications alleged to be false or misleading were communications with participants in the Plans about benefits or other plan-related details. *See Marks* v. *Newcourt Credit Group*, 342 F.3d 444, 454 n.2 (6th Cir. 2003) (in order to state a claim for relief, misrepresentations must be about a matter of plan administration or benefits); *Calpine*, 2005 WL 3288469, at *9 ("[U]nless Plaintiff can plead and prove that the SEC filings were disseminated to the Plan participants in a way that was meaningfully related to the Plan itself, the mere fact that [the company] filed such documents is not enough to establish ERISA liability."); *see also Varity Corp.* v. *Howe*, 516 U.S. 489, 504–05 (1996) (in order to be actionable under ERISA, statements about company's financial health must be "*intentionally* connected" to statements "about the future of plan benefits" (emphasis in original)).[8]

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[8] The only allegation of a communication with participants of the Plans is the allegation, made "on information and belief," that "Citigroup representatives" held town hall meetings and sent e-mails encouraging employees to

Plaintiffs also claim that the administrative committee is liable for incorporating by reference allegedly false and misleading SEC filings in communications to the Plans' participants. (Cplt. ¶ 197.) But these claims fare no better than those against Citigroup and Prince. Even where false statements made in public filings are incorporated by reference in plan documents or in communications with plan participants, the public filings made in a corporate capacity are not transformed into ERISA communications and do not create fiduciary liability for those disseminating the plan documents. *See, e.g.*, *Kirschbaum*, 526 F.3d at 257 (incorporation of SEC filings into prospectus distributed to plan participants does not make filings ERISA communications); *WorldCom*, 263 F. Supp. 2d at 760 (incorporation of SEC filings in summary plan description "is insufficient to state a claim that [defendants] were ERISA fiduciaries").

C. **<u>Plaintiffs' Desired Disclosure Would Not Have Prevented The Alleged Harm</u>**

Finally, plaintiffs cannot show that their alleged damages were proximately caused by any supposed failure to disclose. Disclosure of the allegedly withheld information about Citigroup's business practices and exposure to subprime mortgages would have immediately depressed the stock price and plaintiffs would have suffered the same alleged loss. In *Avaya*, the Third Circuit recently held, in rejecting a claim for damages based on a failure to disclose, that had the defendants "publicly released any adverse information," such a disclosure "would have resulted in a swift market adjustment" and would have been immediately reflected in the price of employer stock. 503 F.3d at 350 (internal quotation marks omitted); *see also West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) ("[F]ew propositions in economics are better established than the quick adjustment of securities prices to public information."). Thus, the Third Circuit held, "[t]he Plans would not have been able to sell their [employer] stock

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invest in Citigroup stock. (Cplt ¶ 198). This allegation is plainly insufficient because it fails even to allege any misleading communications nor identify which defendant made them.

holdings at the higher, pre-announcement price, and the Plans would have sustained the same losses they incurred when the Company [subsequently made negative disclosures]." *Avaya*, 503 F.3d at 350 (internal quotation marks omitted); *see also Graden* v. *Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 465 (D.N.J. Aug. 27, 2008) (dismissing ERISA nondisclosure claim where plaintiffs alleged that earlier disclosure would have avoided injury, and noting that disclosure would have resulted in "almost immediate market internalization [such that] no loss to plaintiff could be linked to the alleged wrongdoing"); *cf. McKesson*, 391 F. Supp. 2d at 837 ("[A]ny such disclosure would immediately cause the company's stock price to drop" and "would severely harm plan participants."); *Kirschbaum*, 526 F.3d at 256 ("[F]rom a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price."). As in *Avaya*, plaintiffs would have sustained the same losses had the Company made the disclosures sought by plaintiffs.

To the extent plaintiffs argue that the Communication Defendants should have disclosed information to the Plans' participants prior to making disclosures to the broader market (which therefore may not have caused an immediate reaction in the price of Citigroup stock), plaintiffs are seeking to hold the Communication Defendants liable for failing to take actions that would violate the federal securities laws. But "fiduciaries [are] not obligated to violate the securities laws or other [insider trading] laws merely to protect the interests of Plan participants." *McKesson*, 2002 WL 31431588, at *7; *see also Kirschbaum*, 526 F.3d at 256 ("[I]n some cases, requiring a fiduciary to override the terms of a company stock purchase plan could suggest the necessity of trading on insider information. Such a course is prohibited by the securities laws."); *Harzewski* v. *Guidant Corp.*, 489 F.3d 799, 807–08 (7th Cir. 2007) (Posner, J.) ("It probably would have been unlawful . . . for Guidant to sell the Guidant stock held by the pension plan on

the basis of inside knowledge about the company's problems. If so, there are no damages, and indeed no breach of fiduciary duty; for the fiduciary's duty of loyalty does not extend to violating the law."); *Hull*, 2001 WL 1836286, at *8 (rejecting imposition of a duty on a company "to keep the Committee informed of what can only be characterized as 'inside information' for use in the making of its investment decisions");[9]

III.

PLAINTIFFS' ASSORTED REMAINING ALLEGATIONS FAIL TO STATE CLAIMS FOR RELIEF UNDER ERISA

All of plaintiffs' remaining claims are predicated on the viability of Count I. Because Count I fails as a matter of law, the remaining claims should be dismissed. *See, e.g.*, *Coca-Cola Enters.*, 2007 WL 1810211, at *11 (dismissing duty to monitor claim where plaintiffs failed to state a claim that investment in company stock was imprudent as a matter of law); *Calpine*, 2005 WL 1431506, at *8 (dismissing co-fiduciary liability claim where plaintiffs failed to state a claim for breach of fiduciary duty). Nevertheless, the remaining counts fail on their own merits as well.

A. Plaintiffs Fail To State A Claim For Breach Of Any Duty To Monitor

In Count III, plaintiffs allege that Citigroup, Prince, and Rubin – collectively the "Monitoring Defendants" – breached their fiduciary duties by failing to monitor the administrative and investment committees and Citibank. (Cplt. ¶¶ 244–52.) Specifically, plaintiffs allege that the Monitoring Defendants' duty to monitor arises from their power to appoint and that the Monitoring Defendants failed to ensure that their appointees had information

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[9] *See also McKesson*, 391 F. Supp. 2d at 836–37 (divesting plan of company stock prior to disclosure of non-public information would have violated securities laws); *Wright*, 360 F.3d at 1098 n.4 (using inside information for benefit of plan "could potentially run afoul of the federal securities laws"); 17 C.F.R. § 240.10b-5 (SEC Rule 10b-5); 17 C.F.R. § 243.100(a) (SEC Regulation FD) (preventing insiders from sharing material nonpublic information with a select group).

about Citigroup's business, failed to provide their appointees with information about Citigroup's business, and failed to monitor and remove their appointees who allowed the Plans to invest in Citigroup stock. (Cplt. ¶ 250).

As an initial matter, these allegations fail for several reasons already discussed.

- First, these conclusory allegations, with no supporting facts, are insufficient under *Twombly*. (*See* p. 13, *supra.*)
- Second, the claim fails because neither the Monitoring Defendants, nor the monitored fiduciaries, had any discretion to divest Citigroup stock as an investment option under the Plans. (*See* pp. 15 to 26, *supra.*)
- Third, the claim fails because Citigroup stock was not an imprudent investment and therefore there was no breach of fiduciary duty for Citigroup, Prince, and Rubin to monitor. (*See* pp. 26 to 32, *supra.*) *See Pugh*, 521 F.3d at 702 (affirming dismissal of duty to monitor claim because underlying fiduciary breach claim had been rejected); *Avaya*, 503 F.3d at 349 n.15 (same); *Wright*, 360 F.3d at 1103 (same); *Smith*, 422 F. Supp. 2d at 1333 ("Plaintiff cannot maintain a claim of failure to monitor when those to be monitored were acting prudently.").
- Fourth, ERISA imposes no duty on fiduciaries to keep other fiduciaries or plan participants informed of a company's financial developments, even where such developments might affect the value of the company's stock. (*See* pp. 37 to 38, *supra.*) *See Crowley*, 234 F. Supp. 2d at 229 (monitoring claim failed because Board was "not charged under the Plan with the duty of communicating information").

The claim also fails for several other reasons:

The duty to monitor appointed fiduciaries is limited. *See Coyne & Delany Co.* v. *Selman*, 98 F.3d 1457, 1466 n.10 (4th Cir. 1996) ("[C]ourts have properly taken a restrictive view of the scope of this duty and its attendant potential for liability."); *Calpine*, 2005 WL 1431506, at *6 ("The duty of an ERISA fiduciary to review the performance of its appointees is a limited one."). Indeed, the duty to monitor is not mentioned in ERISA, and numerous courts have held that the duty to monitor is congruent with — and does not exceed — the requirement in the regulations that "[a]t reasonable intervals the performance of trustees and other fiduciaries

should be reviewed by the appointing fiduciary." 29 C.F.R. § 2509.75-8. *See Pedraza*, 456 F. Supp. 2d at 1277–78 (citing cases); *Calpine*, 2005 WL 1431506, at *6. Finally, a monitoring fiduciary cannot be liable unless the fiduciary was on notice "of possible misadventure by their appointees." *Coyne & Delany Co.*, 98 F.3d at 1466 n.10 (citation omitted); *see also Pedraza*, 456 F. Supp. 2d at 1278.

Here, plaintiffs allege no improper behavior by the administrative and investment committees beyond permitting the Plans to invest in Citigroup stock. Permitting such a claim would be an end run around well-settled law that the duty to appoint and remove fiduciaries does not grant any responsibility or authority to monitor the Plans' investments. (*See* pp. 18 to 19, *supra*.) If the duty to appoint required the appointing fiduciary to remove its appointee based on the investment options that the appointee selected, then the appointing fiduciary would effectively be required to monitor each investment to judge the actions of its appointees. ERISA does not impose such an obligation. *See, e.g., Beauchem* v. *Rockford Prods. Corp.*, No. 01 C 50134, 2003 WL 1562561, at *1 (N.D. Ill. Mar. 24, 2003) (dismissing failure to monitor claim because "[n]othing requires or allows [the appointing fiduciary to exercise] control over the Plan Committee beyond appointing its members"); *WorldCom*, 263 F. Supp. 2d at 760–61 (dismissing failure to monitor claim against board because plaintiffs' argument "would make any supervisor of an ERISA fiduciary also an ERISA fiduciary"); *Hull*, 2001 WL 1836286, at *7 (dismissing failure to monitor claim against board member who had the power to appoint because that power did not "relate to" investment in company stock).

Finally, plaintiffs do not allege the appropriate causal link between the alleged failure to monitor and plaintiffs' alleged losses. Although plaintiffs plead that "if the Monitoring Defendants had discharged their fiduciary monitoring duties . . . , the losses suffered by the Plans

would have been minimized or avoided" (Cplt. ¶ 251), plaintiffs have not alleged that the Monitoring Defendants would have prevented any alleged breach if they had monitored their appointees to the plaintiffs' liking. Indeed, even had the Monitoring Defendants removed the members of the administrative and investment committee, there is no allegation that the newly named fiduciaries would also have believed that Citigroup stock should not be an investment option for participants in the Plans. Thus, plaintiffs have not adequately alleged that the failure to monitor caused the alleged losses to the plan. *See McKesson*, 2002 WL 31431588, at *16 (dismissing duty to monitor claim for failure to allege the harm "caused by the failure to monitor").

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

Count IV alleges that Citigroup, Prince, and Rubin breached fiduciary duties by failing to disclose material, nonpublic information to the administrative and investment committees, so that the committee members could "protect the interests of the plan." (Cplt. ¶¶ 253–59.) This Count fails on multiple, independent grounds.

First, Citigroup, Prince, and Rubin have no fiduciary discretion or authority with respect to any aspect of the Plans with the possible exception of the duty to appoint and remove members of the administrative and investment committees (and, for Citigroup, the additional responsibilities for being Plan sponsor). As discussed above, such appointment powers do not create any fiduciary role with respect to sharing information about Citigroup's operations with those appointees. (*See* pp. 18 to 19 and 44 to 45, *supra.*) Nor do Citigroup's duties as sponsor of the Citigroup Plan create any such obligation to disclose information to co-fiduciaries. (*See* pp. 38 to 39, *supra.*) Thus, these defendants had no fiduciary obligation to provide any information about Citigroup's operations to the administrative and investment committees.

Second, to the extent plaintiffs allege an intentional failure on the part of Citigroup, Prince, and Rubin to disclose information to the administrative and investment committees about Citigroup's operations, plaintiffs have failed to satisfy Rule 9(b). (*See* pp. 13 to 14, *supra*.)

Third, plaintiffs' theory that Citigroup, Prince, and Rubin should have disclosed *material, non-public information* to the administrative and investment committees so that they could use that information to protect the interests of the Plans' participants would require these defendants to violate the securities laws by "tipping" the committees to adverse information about Citigroup's operations. ERISA does not require that these defendants violate the securities laws. (*See* pp. 42 to 43, *supra*.) *See Thompson* v. *Avondale Indus., Inc.*, No. 99 Civ. 3439, 2003 WL 359932, at *19 (E.D. La. Feb. 14, 2003) (rejecting claim where management defendants withheld material non-public information from committee defendants because "disclosure of inside information would have precluded the Committee from engaging in any sale of [company] stock").

C. Plaintiffs Fail To State A Claim For Breach Of Any Duty Of Loyalty

Count V alleges a breach of the duty of loyalty. Plaintiffs allege that all defendants faced a conflict of interest because their "compensation and tenure" were tied to the performance of Citigroup stock, and that Prince and Rubin profited from their own sales of Citigroup stock prior to or during the class period. (Cplt. ¶ 264.)

It is well settled that such conflict-of-interest allegations do not state a claim. This court has held that an allegation that "[d]efendants' compensation was stock-based . . . fails to state a claim for breach of fiduciary duty." *Polaroid*, 362 F. Supp. 2d at 479; *see also WorldCom*, 263 F. Supp. 2d at 768 (dismissing breach of loyalty claim against defendant who owned company stock and participated in company's compensation program); *McKesson*, 391

F. Supp. 2d at 835 (dismissing breach of loyalty claim against defendant who owned company stock).

The allegations that Prince and Rubin breached a duty of loyalty because they sold shares of their own stock in Citigroup is also insufficient. Prince and Rubin are fiduciaries only to the extent that they are members of Citigroup's Board, with power to appoint and remove fiduciaries. Plaintiffs do not allege how Prince's and Rubin's stock sales demonstrate any conflict with those limited roles. *See Calpine*, 2005 WL 1431506, at *8 ("Plaintiff has not alleged any facts that demonstrate the stock sales identified in the Complaint put the selling directors in conflict with their limited fiduciary duties" to appoint and review the Committee members who managed the plan.); *AOL Time Warner*, 2005 WL 563166, at *8 (dismissing claim for breach of duty of loyalty because fiduciary liability does not attach to the personal stock sales by officers and directors).

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

Count VI alleges that Citigroup, Citibank, Prince and Rubin are liable for breaches by the other fiduciary defendants under a theory of co-fiduciary liability. (Cplt. ¶¶ 269–80.) The claim fails because plaintiffs have not sufficiently alleged co-fiduciary liability here.

Section 405(a) of ERISA provides that a fiduciary can be liable for a co-fiduciary's breach only if the fiduciary (1) "participates knowingly in, or knowingly undertakes to conceal" another fiduciary's breach, "knowing such act or omission is a breach" of fiduciary duty; (2) enables another to commit a fiduciary breach by failing to comply with "the administration of his specific responsibilities which give rise to his status as a fiduciary"; or (3) knows of another's fiduciary breach and fails to make "reasonable efforts under the

circumstances to remedy the breach." 29 U.S.C. § 1105(a). Plaintiffs' allegations do not meet this standard.

First, plaintiffs have not stated a claim for breach of fiduciary duty by any defendant, and the claim for co-fiduciary liability should therefore be dismissed. *See Calpine*, 2005 WL 1431506, at *8; *Maniace*, 40 F.3d at 268–69 (plaintiff must establish primary breach of fiduciary duty to maintain a claim for co-fiduciary liability); *Izzarelli* v. *Rexene Prods. Co.*, 24 F.3d 1506, 1525 n.34 (5th Cir. 1994).

Second, to be charged with co-fiduciary liability, each defendant must have actually been an ERISA fiduciary. As demonstrated above, defendants were fiduciaries only for specific tasks, and did not have fiduciary responsibility that extended to the allegations in this complaint. (*See* pp. 15 to 26 and 38 to 39, *supra*.) *See Kling* v. *Fidelity Mgmt. Trust, Co.*, 323 F. Supp. 2d 132, 145 (D. Mass 2004) ("Kling has failed to plead fiduciary status on the part of the Pension Committee, however, and thus cannot plead co-fiduciary breach against it."); *Haber*, 774 F. Supp. at 879 (dismissing co-fiduciary claim where plaintiff failed to allege facts supporting claim that defendant was a fiduciary).

Third, plaintiffs do not allege, with supporting facts, that each defendant had *knowledge* of any fiduciary breach. A co-fiduciary liability claim requires that the co-fiduciary have "actual knowledge" that the other person is a fiduciary, that the fiduciary participated in a fiduciary act, and that the act was a breach. *Donovan* v. *Cunningham*, 716 F.2d 1455, 1475 (5th Cir. 1983). The two alleged failures — continuing to invest in Citigroup stock and providing inadequate information to Plan participants (Cplt. ¶ 275) — were beyond the defendants' fiduciary authority. The Complaint does not explain how defendants knew their co-fiduciaries failed to perform duties with which the co-fiduciaries were never tasked. Especially after

Twombly, this sort of boilerplate pleading fails to state a claim. *See Lee* v. *Burkhart*, 991 F.2d 1004, 1010–11 (2d Cir. 1993) (dismissing co-fiduciary liability claim for failure to allege knowledge of co-fiduciary's breach); *Stein* v. *Smith*, 270 F. Supp. 2d 157, 175 (D. Mass 2003) (same); *Haber*, 774 F. Supp. at 879 (dismissing co-fiduciary liability claim where "no facts [were] alleged to provide grounds for the claim that [defendant] knowingly participated in [another's] fiduciary breaches").

IV.

PLAINTIFFS' CLAIMS ARE BARRED BY ERISA SECTION 404(c)

ERISA § 404(c) exempts plan fiduciaries from liability for losses to individual accounts that result from participants' own investment decisions. Specifically, Section 404(c) provides that, where a plan "provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account," no fiduciary "shall be liable . . . for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c). In other words, where a participant chooses his own investments within a plan, a plan sponsor or fiduciary "cannot be a guarantor of outcomes for participants." *Langbecker* v. *Elec. Data Sys. Corp.*, 476 F.3d 299, 312 (5th Cir. 2007).

Department of Labor regulations explain that a plan qualifies as a Section 404(c) plan if plan participants (1) are informed that the plan is intended to be a 404(c) plan (29 C.F.R. § 2550.404c-l(b)(2)(B)(l)(i)); (2) have the opportunity to exercise control over their individual accounts (*id.* § 2550.404c-1(b)(2)(ii)); (3) are offered a broad range of investment alternatives (*id.* § 2550.404c-1(b)(3)); and (4) in fact exercise control over their individual accounts (*id.* § 2550.404c-l(c)).

The Plans at issue here meet all of the requirements for Section 404(c) to apply. The Plans inform participants that they are intended to be Section 404(c) plans. (Cplt. Ex. G, at

p. 25; Cplt. Ex. K, at p. 23.) As described above, the Plans offer participants a broad range of investment options, the Plans permit participants to direct the investment choices, and participants actually make those investment choices. Participants could invest in Citigroup stock by affirmatively electing to place their money in the Citigroup Common Stock Fund out of a large menu of investment options. To the extent that any matching contributions by Citigroup were invested in the Common Stock Fund, participants had the ability at all times throughout the class period to immediately transfer those matching contributions out of the Common Stock Fund and into any investment of their choice. (*See* pp. 6 to 8, *supra*.) As a result, any losses allegedly suffered in those investments are attributable to participants' own investment decisions, and the Plans' fiduciaries cannot be held liable for those investment decisions. *See Hecker* v. *Deere & Co.*, 496 F. Supp. 2d 967, 976 (W.D. Wisc. 2007), *appeal pending*, Nos. 07-3605, 08-1224 (7th Cir.) (dismissing on Section 404(c) grounds a claim that investment options were imprudent because the fiduciaries failed to offer investment options with lower fees).

Although plaintiffs acknowledge that Section 404(c) creates an "exception to fiduciary liability for losses that result from participants' exercise of control over investment decisions" (Cplt. ¶ 210), plaintiffs plead that defendants are not entitled to the 404(c) safe harbor for three reasons (*id.* ¶¶ 211–13), all of which are incorrect.[10]

First, plaintiffs plead that Section 404(c) does not apply because it does not immunize fiduciaries for liability from selecting and offering Citigroup stock as an investment option. But courts have applied Section 404(c) to claims for breach of fiduciary duty based on

[10] Section 404(c) can be raised on a motion to dismiss as long as the defense is based on facts appearing on the face of the complaint and the documents incorporated therein. *See Hecker* v. *Deere & Co.*, No. 06-C-719-S, 2007 WL 3270401, at *3 (W.D. Wisc. Oct. 19, 2007) (dismissing a claim on the pleadings because the elements of Section 404(c) were "largely discernable" from the complaint and the plan and related documents); *see also Benzman* v. *Whitman*, 523 F.3d 119, 125 (2d Cir. 2008) (explaining that an affirmative defense may be asserted on a motion to dismiss when it is based on facts appearing on the face of the complaint).

allegedly imprudent selection of an investment option. In *Langbecker*, the Fifth Circuit reversed a district court decision that Section 404(c) could not apply to the allegedly imprudent selection of a company stock fund as part of the 401(k) plan. 476 F.3d at 310–11. The Court held that the district court's holding "would render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary." *Id.* at 311; *see also Hecker* v. *Deere & Co.*, No. 06-C-719-S, 2007 WL 3270401, at *5 (W.D. Wisc. Oct. 19, 2007) (denying a motion to amend its judgment dismissing plaintiffs' claims and agreeing with the *Langbecker* court's view of Section 404(c)).

Second, plaintiffs plead that Section 404(c) does not apply because defendants failed to supply complete and accurate information to plaintiffs to enable them to make an informed decision to invest in Citigroup stock. As discussed in Part II, *supra*, plaintiffs' disclosure claims fail as a matter of law, so their argument that Section 404(c) does not apply fails as well. *See Deere*, 496 F. Supp. 2d at 973–74 (holding that nondisclosure of a fee-sharing arrangement did not run afoul of Section 404(c)'s disclosure requirements). In any event, the regulations require only that the Plans provide "sufficient information" to make an informed decision, not all material information about all investment options, which would be a staggering imposition on Plan fiduciaries. *See* 29 C.F.R. § 2550.404c-l(b)(2)(i)(B).

Third, plaintiffs plead that any portion of the Plans designated as an ESOP does not fall within Section 404(c) because an ESOP does not provide a range of investment choices. Plaintiffs' argument misses the point. The Citigroup Common Stock Fund – the portion of the Plans deemed to be an ESOP – was one investment option within the range of 20 to 40 investment options offered to the Plans' participants during the class period. The decision to

invest in Citigroup stock rather than any of these other options belongs exclusively to the Plans' participants.

Accordingly, plaintiffs' claims are barred by ERISA § 404(c).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

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