No.

In The Supreme Court of the United States

STEPHEN GRAY, ET AL., PETITIONERS

v.

CITIGROUP, INC., ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Employee Retirement Income Security Act (ERISA), 29 U.S.C., 1001 *et seq*., requires that a plan fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). This case concerns the application of that standard to fiduciaries of plans that invest in qualified securities of the employer. The questions presented are:

1. Whether, under Section 1104(a)(1)(B), a fiduciary of a plan that invests in qualified employer securities who knows, or should have known, that it is imprudent to invest in the employer's securities is permitted to take no steps to protect plan participants and beneficiaries unless the employer is in a "dire situation" or near bankruptcy.

2. Whether, under Section 1104(a)(1)(B), a complaint by a plan participant against a fiduciary of such a plan need only plead facts making plausible the conclusion that the fiduciary failed to act with "care, skill, prudence, and diligence," or whether instead the complaint must plead facts making plausible the conclusion that the fiduciary knew, or should have known, that the employer was in a "dire situation" or near bankruptcy.

PARTIES TO THE PROCEEDING

In addition to the parties named on the cover of this Petition, James Bolla, Samier Tadros, Sandra Walsh, Anton K. Rappold, And Alan Stevens were plaintiffs-appellants in the court of appeals. Citibank, N.A., The Plans Administration Committee, The Plans Investment Committee, Charles O. Prince, Robert E. Rubin, Jorge Bermudez, Michael Burke, Steve Calabro, Larry Jones, Faith Massingale, Thomas Santangelo, Alisa Seminara, Richard Tazik, James Costabile, Robert Grogan, Robin Leopold, Glenn Regan, Christine Simpson, Timothy Tucker, Leo Viola, Donald Young, Marcia Young, and John Does 1–20 were defendants-appellees in the court of appeals.

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Stephen Gray, James Bolla, Samier Tadros, Sandra Walsh, Anton K. Rappold, and Alan Stevens respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-76a) is reported at 662 F.3d 128. The opinion of the district court (App., *infra*, 77a-139a) is not reported but is available at 2009 WL 2762708.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2011. A petition for rehearing was denied on February 23, 2012. App., *infra*, 76a-77a. On May 3, 2012, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including June 22, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set out in the appendix to this petition. App., *infra*, 156a-163a.

STATEMENT

Congress required that employee benefit plans under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq*., be controlled and operated by fiduciaries who have duties of "care, skill, prudence, and diligence" to plan participants and beneficiaries. 29 U.S.C. 1104(a)(1)(B). This case presents the question of whether those duties are to be enforced when the plan invests in qualified employer stock. Petitioners' complaint alleges that the fiduciaries of their plans knew and should have known that the employer stock in this case was vastly overpriced and highly risky, due to extraordinary risks that the employer took in the years leading up to the financial crisis of 2008. Prudence in that situation would certainly dictate doing something to protect plan participants: restrict further investment in employer stock, divest it partially or entirely, or at the very least inform plan participants of the high risks to which they were exposed by investing in the employer stock. Instead, according to the court of appeals, respondents were justified in doing nothing, and the participants' ERISA accounts, on which they were relying for their retirement, suffered enormous and continuing losses.

1. Petitioners are or were current and former employees of respondent Citigroup, Inc., who are or were participants in the Citigroup 401(k) Plan and the Citibuilder 401(k) Plan for Puerto Rico ("Plans"). App., *infra*, 79a. The Plans are defined-contribution "eligible individual account plans" (EIAPs) under 29 U.S.C. 1107(d)(3)(A).[1] See *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n.1 (2008). Each Plan is managed by two committees: an "Administration Committee" composed of eight members charged with administering the Plan and an "Investment Committee" composed of ten members charged with selecting fund options offered to Plan participants. Participants are entitled to make contributions to their individual accounts in their Plan, and they may then invest the funds among 20-40 investment options selected by their Investment Committee. App., *infra*, 3a-4a.

Each of the Plans mandates that the Citigroup Common Stock Fund be offered to participants as an investment option. Employer contributions of 2% of salary for many employees are automatically invested in that Fund. The Fund consists primarily of Citigroup stock, though it also may include cash and short-term investments to permit orderly management of the Fund. App., *infra*, 4a; Complaint ¶¶ 84-85, C.A. App. A58-A59.

[1] The court of appeals held that EIAPs are to be treated the same as employee stock ownership plans (ESOPs). App., *infra*, 11a. This petition uses "ESOP" to refer to both.

2. Under ERISA, one or more named fiduciaries must have "authority to control and manage the operation and administration of the plan." 29 U.S.C. 1102(a)(1). Section 1104 of ERISA, entitled "Fiduciary Duties," imposes a duty of loyalty on fiduciaries, who must "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1). It also provides that ERISA fiduciaries must act

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. 1104(a)(1)(B). ERISA fiduciaries must also act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. 1104(a)(1)(D). Insofar as the plan documents would require an action that is *not* consistent with ERISA, the fiduciary must follow the commands of ERISA itself.

Prudence – and, therefore, ERISA's prudence requirement – generally dictates diversification of investments. See *Steinman v. Hicks*, 352 F.3d 1101, 1104-1105 (7th Cir. 2003). ERISA in addition expressly requires fiduciaries to "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." 29 U.S.C. 1104(a)(1)(C). Concentration in the stock of any issuer – including the employer – would likely violate both ERISA's general prudence requirement and its specific diversification requirement. Accordingly, in order to permit plans to hold concentrated investments in qualified employer stock, Congress provided an express exception from both requirements:

> [I]n the case of an eligible individual account plan . . . , the diversification requirement of paragraph (1)(C) and the prudence requirement (*only to the extent that it requires diversification*) of paragraph (1)(B) is not violated by acquisition or holding of . . . qualifying employer securities.

29 U.S.C. 1104(a)(2) (emphasis added).[2] That is an exception from the express diversification requirement and from the prudence requirement "only to the extent that it requires diversification." Insofar as investing in qualified employer stock may be imprudent for reasons *other* than non-diversification, ERISA's "care, skill, prudence, and diligence" requirement remains fully applicable.

3. Petitioners commenced this case as a class action on behalf of participants in the Plans, alleging that respondents were fiduciaries and had violated their duty to act prudently in 2007 and early 2008. The gravamen of the claim is that Citigroup had undertaken vast new and undisclosed risks by over-investing in the subprime mortgage market just as that market was headed for its catastrophic fall; that respondents, who were financially sophisticated officers and employees of Citigroup, knew and should

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[2] Because investment in employer stock would ordinarily be a prohibited transaction under ERISA, Congress also excepted investments in qualified employer stock from that requirement. 29 U.S.C. 1108(e).

have known of those risks; and that respondents did nothing to discharge their duty "solely in the interest of participants" to exercise "care, skill, prudence, and diligence" to address those risks.

a. The Complaint alleges that, beginning in early 2005, and unbeknownst to Plan participants, Citigroup senior management staked the company's future on massive bets in the subprime mortgage market. Complaint ¶¶ 130-135, 174, 181; C.A. App. A72-A74, A88, A91. Indeed, Citigroup increased its exposure to that market, even as the market was failing. Complaint ¶ 116-125, 130-134; C.A. App. A69-A72, A72-A74. Without disclosing the extraordinary liabilities and risks involved, Citigroup became one of the largest participants in off-balance-sheet structured investment vehicles that were heavily exposed to subprime loans and whose losses were ultimately borne by Citigroup. Complaint ¶¶ 174, 176-182; C.A. App. A88-A89, A90-A91. Citigroup consistently made false and misleading statements that hid its exposure from the public. Complaint ¶¶ 137-154, C.A. App. A75-A82.

Respondents knew and should have known not only about the existence of those practices, but also about the risks they posed to Citigroup stock, making it an overpriced and imprudent investment. Numerous published reports noted the laxity of underwriting standards on subprime mortgage loans, the deterioration of the housing credit market, and the undisclosed but likely exposure of many Wall Street firms, such as Citigroup. Complaint ¶¶ 115-129, 133, 136, 189; C.A. App. A69-A72, A73-A74, A75, A93-A97. The connection between the collapse of the subprime mortgage market and subprime-related investments of the sort in which Citigroup had heavily invested was also publicly reported. Complaint ¶ 189(l); C.A. App. A95.

b. Despite these intense and growing risks, respondents took no action to protect plan participants. Complaint ¶¶ 192; C.A. App. A98. They did not investigate the merits of continued investment in Citigroup stock. Complaint ¶ 221; C.A. App. A106. They did not limit investment in or divest Citigroup stock. Complaint ¶¶ 192, 194; C.A. App. A98, A99. They did not inform Plan participants of the new risks faced by their retirement accounts. Complaint ¶ 191, C.A. App. A98. To the contrary, in Plan-related materials and regular "town hall" meetings for employees, various respondents encouraged investment in Citigroup stock and concealed material information about the enormous risks building up. Complaint ¶¶ 197-200, 237; C.A. App. A100-A102, A111.

c. The consequences for participants have been severe. Citigroup stock was the "single largest asset" of the Plans. Complaint ¶ 197; C.A. App. A100. In 2007, it constituted one-fifth of the assets of the Citigroup Plan and one-third of the assets of the Citibuilder Plan. App., *infra*, 85a. Citigroup stock fell from $55.70 to $28.74 during the class period ending in early 2008. App., *infra*, 21a. It hit bottom at $1.02 on March 5, 2009. Since then, and adjusting for a stock split in May 2011, Citigroup stock has never closed higher than $5.23 (on August 28, 2009). On June 19, 2012, it closed at $2.85. See http://www.NASDAQ.com/symbol/c/historical. Respondents' imprudent conduct thus led to continued investment in, and a failure to divest from, Citigroup stock whose value, to the extent it is still held in participants' accounts, has been decimated by at least 90%. As a result of the catastrophic subprime investments, Citigroup's stock suffered massive dilution. See http://ycharts.com/companies/C/shares_outstanding (increase in shares outstanding from about 500 million in June 2008 to 2.8 billion in December 2009). Given that dilution, the lost value is unlikely to be recovered in the foreseeable future.

4. The district court granted respondents' motion to dismiss. App., *infra*, 76a-136a. The court held that, because the Plans required the Citigroup Common Stock Fund to be offered to participants, respondents had no discretion in the matter, and therefore "were not acting as fiduciaries . . . to the extent that they maintained Citigroup stock as an investment option." App., *infra*, 91a.

The court also held that, even if respondents did have discretion to act with respect to Citigroup stock, they were entitled to a "presumption that offering Citigroup stock as an investment option was prudent," derived from the Third Circuit's decision in *Moench v. Robertson,* 62 F.3d 553, 553 (1995), cert. denied, 516 U.S. 1115 (1996). App., *infra*, 108a. The court held that the *Moench* presumption was applicable at the pleading stage of the case. App., *infra*, 111a. The court acknowledged that the Complaint in this case alleged "that Citigroup adopted imprudent and risky business strategies that resulted in substantial losses to the company," App., *infra*, 115a, but held it insufficient to rebut the *Moench* presumption. App., *infra*, 117a.

5. A divided panel of the court of appeals affirmed. App., *infra*, 1a-75a. Addressing the claims that the Investment and Administration Committees had failed to act with the "care, skill, prudence, and diligence" required by ERISA, the court adopted the *Moench* presumption that they acted prudently by investing in qualified employer stock. App., *infra*, 14a. In the court's view, there is a "tension" between what it characterized as "two of ERISA's core goals: (1) the protection of employee retirement savings through the imposition of fiduciary duties and (2) the encouragement of employee ownership through the special status provided to" ESOPs. App., *infra*, 11a. The court held that the *Moench* presumption "provides the best accommodation between th[ose] competing ERISA values." App., *infra*, 14a. The court also held that the *Moench* presumption "is not an evidentiary presumption," but rather "a standard of review applied to a decision made by an ERISA fiduciary" that applies at the pleading stage. App., *infra*, 17a.

According to the court of appeals, adopting the *Moench* presumption did not mean that the fiduciaries are completely "insulated from liability because they had no discretion to divest the Plans of employer stock," as the district court had held. App., *infra*, 17a. But the court held that "only circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms" and take steps to protect participants from imprudent investment in employer stock. App., *infra*, 18a.

In the court's view, the Complaint's allegations "that Citigroup made ill-advised investments in the subprime-mortgage market while hiding the extent of those investments from Plan participants and the public," that "Citigroup became aware of the impending collapse of the subprime market," and that, "ultimately, Citigroup reported losses of about $30 billion due to its subprime exposure" are insufficient to overcome the *Moench* presumption. App., *infra*, 19a. Even if an investigation by respondents would have shown the risk of tens of billions of dollars in losses and a 50% overvaluation of Citigroup stock, respondents "would not have been compelled to find that Citigroup, with a market capitalization of almost $200 billion, was in a dire situation." App., *infra*, 21a. Thus, they would not have been required to act to protect participants by limiting or divesting the Plans' investments in Citigroup stock.

The Complaint also alleges that respondents had failed even to provide participants with "complete and accurate information" in their possession regarding Citigroup stock. App., *infra* 22a. The court held that, because ERISA does not expressly require fiduciaries to report facts they know regarding the overvaluation of stock to participants, ERISA's requirement that they act with prudence and "solely in the interest of the participants," 29 U.S.C. 1104(a)(1), (a)(1)(B), does not impose such a requirement. App., *infra*, 24a-25a. In the court's view, respondents fully satisfied their obligations by providing boilerplate warnings "that the Stock Fund was an undiversified investment subject to volatility and that Plan participants would be well advised to diversify their retirement savings." App., *infra* 25a.

6. Judge Straub dissented in relevant part. App., *infra* 32a-75a. He found "no justification for cloaking fiduciaries' investment decisions in a mantle of presumptive prudence." App., *infra*, 34a. He rejected the *Moench* presumption as an "alarming dilution" of ERISA "and a windfall for fiduciaries, who may now avail themselves of the corporate benefits of employee stock ownership plans . . . without being burdened by the costs of complying with the statutorily mandated obligation of prudence." App., *infra*, 33a. He noted that "ESOP fiduciaries are exempt from certain standards of conduct that apply to other kinds of ERISA plans," including ERISA's requirement of diversification. App., *infra*, 37a. Petitioners' claim, however, is not based on a failure to diversify, but on respondents' failure to take any action to protect participants from (continuing) investment in dramatically overvalued Citigroup stock. App., *infra*, 49a-50a.

In any event, Judge Straub found "indefensible" the specific policies invoked by the majority to defend its dilution of ERISA's prudence requirement. App., *infra*, 50a. Although the majority appealed to the need to encourage the formation of employee stock plans, Judge Straub found "implausible the suggestion that plenary review of fiduciaries' investment decisions would suddenly deter ESOP formation or lead to widespread plan termination." App., *infra* 47a. He noted that employee stock plans "had been in existence for more than twenty years before . . . *Moench*" and that there was "no evidence that plenary review during that time or thereafter resulted in ESOP termination, or deterred ESOP formation." App., *infra*, 45a-46a (footnote omitted).

He also explained that there are numerous other incentives for employers to create employee stock plans, including their utility as a source of corporate funds for working capital or other purposes, the "significant tax advantages" they offer to employers, and their use to "accomplish various business objectives, including management entrenchment (by placing large amounts of stock in friendly hands)." App., *infra*, 46a-47a.

Judge Straub noted that the Complaint's factual allegations "support a reasonable inference that the relatively sophisticated members of the Investment Committee . . . would have had at least some awareness of both Citigroup's massive subprime exposure, and the growing potential for a market-wide crisis." App., *infra*, 54a. Because of overlap with the Administration Committee, "it is plausible that at least one member of that Committee knew about [Citigroup's subprime exposure] as well." App., *infra* 55a. Under those circumstances, the Complaint sufficiently pleaded that "reasonably prudent fiduciaries would have taken 'meaningful steps to protect the Plans' participants from the inevitable losses . . . [that] would ensue as [Citigroup's] non-disclosed material problems . . . became public.'" App., *infra*, 56a (alterations and omissions in original) (quoting Complaint ¶ 228, C.A. App. 109).

Those steps include not only altering the Plans' investments. In Judge Straub's view, ERISA fiduciaries had at least the same duty imposed by the common law of trusts to "disclose material information" about an employer's financial condition or its stock "that plan participants reasonably need to know in order to adequately protect their retirement interests." App., *infra*, 62a.

7. Petitioners filed a petition for rehearing and rehearing en banc. The Department of Labor, which had participated as amicus in support of petitioners before the panel, also filed an amicus brief in support of rehearing, which is reproduced at App., *infra*, 139a-155a. The court of appeals denied the petition.

REASONS FOR GRANTING THE PETITION

ERISA imposes a clear and unqualified obligation on plan fiduciaries: to act "with the care, skill, prudence, and diligence under the circumstances . . . that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Under that standard, a fiduciary who knows, or should have known, that a stock held by the plan is substantially overvalued or otherwise imprudent would take steps to cease purchasing the stock, divest it, or at least warn participants of the known risk. Yet the court of appeals' holding, in conflict with the Sixth Circuit, permits the plan fiduciary to do nothing whatever in that situation – so long as the investment consists of qualified stock of the employer and the employer is not in dire straits or near bankruptcy. That holding, based on the court of appeals' own policy choices, contradicts the text and policies of this "comprehensive and reticulated statute," *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361 (1980), which nowhere suggests that a fiduciary's duty is only to protect participants from total or near-total losses while turning a blind eye to any risk that a court views as just short of "dire."

As the Department of Labor noted in support of the petition for rehearing in this case, "[t]he issues are of exceptional importance . . . because they put hundreds of billions of dollars in pension plan assets at undue risk." App., *infra*, 144a. Relieved of the need to protect plan participants in all but the most extreme cases, plan fiduciaries, who often are, as here, employees of the plan sponsor, can be expected to succumb to the temptation to use employee stock plans to provide a source of capital for the employer, even when they know that the stock is seriously overvalued due to undisclosed but very real and substantial corporate risks. Further review is warranted to resolve the conflicts in the circuits concerning fiduciary obligation in this setting, and to return the protections Congress embodied in ERISA's fiduciary duty provision to plan participants throughout the country.

I. THE CIRCUITS ARE DIVIDED ON WHETHER POLICY REASONS DICTATE A RELAXATION OF ERISA'S PRUDENCE REQUIREMENT IN CASES INVOLVING INVESTMENTS BY ERISA PLANS IN QUALIFIED EMPLOYER STOCK

A conflict in the circuits has developed on the standards governing the obligations of ERISA fiduciaries when they invest in qualified employer stock. The court of appeals in this case and some other courts have held that, despite ERISA's express "care, skill, prudence, and diligence" requirement, such fiduciaries may do absolutely nothing to protect participants from significantly overvalued or otherwise imprudently purchased employer stock, so long as the fiduciaries do not know facts that satisfy some extra-statutory standard such as "dire situation" or "brink of collapse." By contrast, the Sixth and Fourth Circuits require participants to prove just what the statute requires: that the plan fiduciaries knew or should have known that the employer's stock was an imprudent investment under the circumstances. In addition, the court of appeals here held that participants complaining of fiduciary imprudence must not only prove that the fiduciaries knew or should have known that the employer was in a "dire situation" when the evidence is evaluated on the merits, but must include sufficient facts to establish that point in their complaint. The Sixth Circuit, by contrast, does not apply any special rule at the pleading stage, requiring plaintiffs only to plead facts making plausible the inference that the fiduciaries acted imprudently under the circumstances. Further review is warranted to address the conflict on those two points.

A. The Circuits Are Divided On Whether ERISA's Fiduciary Obligation Extends In This Context Only To Cases In Which The Employer Is In A "Dire Situation" Or Near Bankruptcy

1. The Second Circuit held that, if an ERISA plan requires the offering of qualified employer stock, "only circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms." App., *infra* 18a. Even in the face of certain knowledge that the employer's stock is dramatically

overvalued and headed for a serious and sustained fall, fiduciaries may simply do nothing. Only where fiduciaries know or should have known that the employer is in a "dire situation," and only when that situation was "objectively unforeseeable by the settlor," *i.e.*, the employer, need fiduciaries concern themselves with protecting plan participants. In *Edgar v. Avaya, Inc.*, 503 F.3d 340, 348 (2007), the Third Circuit adopted the same rule.

Some other courts of appeals have gone as far – or even farther – in diluting ERISA's fiduciary duty in this setting. The Fifth Circuit in *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256 (2008), held that fiduciaries could be held liable for failing to protect plan participants only if "unforeseen circumstances would defeat or substantially impair the accomplishment of the [Plan's] purposes." Accord *Lanfear v. Home Depot, Inc.*, 2012 WL 1580614, at *10-*11 (11th Cir. 2012). It is unclear what circumstances would satisfy that standard, though *Kirschbaum* appeared to give as an example instances in which the company's "viability as a going concern was . . . threatened" or in which the company's "stock was in danger of becoming essentially worthless." *Id*. at 255.

The Ninth Circuit in *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (2010), has gone furthest down this road. Notwithstanding the apparently clear statutory command to fiduciaries to act prudently, the court held that "[i]t will not be enough for plaintiffs to prove that the company's stock was not a 'prudent' investment." *Id*. at 882. Instead,

> [t]o overcome the presumption of prudent in-

> vestment, plaintiffs must make allegations that clearly implicate the company's viability as an ongoing concern or show a precipitous decline in the employer's stock combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement.

Id. at 882 (internal quotation marks and ellipses in original omitted). In an understatement, the court commented that "the *Moench* presumption would be difficult to rebut" under this standard. *Id*. at 883.

2. The Sixth Circuit has taken a different approach. In *Pfeil v. State Street Bank and Trust Co.*, 671 F.3d 585, 591-592 (2012), the Sixth Circuit noted that in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), it had held that there is a modest evidentiary presumption that a fiduciary acts prudently by investing in employer stock as provided in plan documents. But the Sixth Circuit did not use that presumption to dilute ERISA's prudence requirement. In the Sixth Circuit, the plaintiff's showing is closely tied to the text of Section 1104(a)(1)(B): "[t]he rebuttal standard adopted in this Circuit, and the one which we are bound to follow, requires a plaintiff to prove that 'a prudent fiduciary acting under similar circumstances would have made a different investment decision.'" *Id*. at 595 (quoting *Kuper*, 66 F.3d at 1459). That is essentially the statutory standard, and it is the standard that the Fourth Circuit has also adopted, notwithstanding policy arguments that ERISA's standard should be relaxed for investments in qualified employer stock. See *DiFelice v. U.S. Airways*, 497 F.3d 410, 422 (4th Cir. 2007) (stating that "ERISA itself sets forth the *only* test of a fiduci-

ary's duties" and quoting the "care, skill, prudence, and diligence under the circumstances" standard of Section 1104(a)(1)(B)); see also *Fink v. Nat'l Savings & Trust Co.*, 772 F.2d 951, 955-56 (D.C. Cir. 1985) ("The investment decisions of a[n] [ERISA] fiduciary are subject to the closest scrutiny under the prudent person rule, in spite of the strong policy and preference in favor of investment in employer stock.") (internal quotation marks omitted).

3. The courts of appeals have acknowledged the conflict. The Sixth Circuit in *Pfeil* observed that "*[i]n contrast to our sister circuits*, we have not adopted a specific rebuttal standard that requires proof that the company faced a 'dire situation,' something short of 'the brink of bankruptcy,' or an 'impending collapse.'" 671 F.3d at 595. The Eleventh Circuit also observed that the Sixth Circuit "puts less deference behind the presumption than the Second or Third Circuits do." *Lanfear*, 2012 WL 1580614, at n.16. It rejected the Sixth Circuit's rule and "align[ed]" itself with the Second and Third Circuits instead. *Ibid.*

B. The Circuits Are Divided On Whether The Presumption Of Prudence Applies At The Pleading Stage

Based on some of the same differences regarding the respect to be paid to ERISA's "care, skill, prudence, and diligence" requirement, there is also an acknowledged conflict in the courts of appeals on whether the presumption of prudence applies at the pleading stage of a case. The Second and Eleventh Circuits have held that the *Moench* presumption is applicable at the pleading stage, while the Sixth Circuit has held that it is not.

1. The court of appeals "reject[ed] [the] argument that the *Moench* presumption should not apply at the pleading stage." App., *infra*, 17a. In the court's view, the 'presumption' is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary." *Ibid*. Accordingly, "[w]here plaintiffs do not allege facts sufficient to establish" the "dire situation" standard, "there is no reason not to grant a motion to dismiss." *Ibid.* Accord *Lanfear*, 2012 WL 1580614, at *11 ("The *Moench* standard of review . . . applies at the motion to dismiss stage."); cf. *Edgar*, 503 F.3d at 349 (holding that at least where complaint read in light of *Moench* presumption "effectively preclude[d]" the imprudence claim, complaint may be dismissed).[3]

2. By contrast, the Sixth Circuit in *Pfeil* stated that "we hold that the presumption of reasonableness . . . is not an additional pleading requirement and thus does not apply at the motion to dismiss stage." 671 F.3d at 592. In the Sixth Circuit, "[t]he presumption of reasonableness" is "an evidentiary presumption, and not a pleading requirement." *Id*. at 593. That conclusion "is consistent with the standard of review for motions to dismiss generally," since at that stage "[c]ourts are required to accept

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[3] The application of the presumption at the pleading stage had the effect in this case of preventing petitioners from discovering and developing facts – entirely consistent with and suggested by the Complaint – that would have satisfied even the court's "dire situation" standard. By late 2008, Citigroup was on the brink of failure, and it was rescued only by an extraordinary government intervention and bailout. See, *e.g.*, *The Financial Crisis Inquiry Report: Final Report of the Financial Crisis Inquiry Commission* 379-382 (2011).

the well-pleaded factual allegations of a complaint as true" and "should not make factual determinations of their own or weigh evidence." *Id.* at 593. The court "h[e]ld that while a complaint must plead facts to plausibly allege that a fiduciary has breached its duty to the plan, the pleadings need not overcome the presumption of reasonableness in order to survive a motion to dismiss." *Id.* at 596; see *id.* at 593 ("[A] plaintiff need not plead enough facts to overcome the presumption in order to survive a motion to dismiss."). While plaintiffs must plead sufficient facts "to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), they need not plead around anticipated defenses or satisfy any heightened pleading requirement, *Swierkiewicz v. Sorema*, 534 U.S. 506, 511-513 (2002).

3. This conflict too has been acknowledged by the courts involved. The Sixth Circuit in *Pfeil* recognized that "[t]he Second Circuit [in this case] reached a . . . conclusion that courts should apply the presumption of reasonableness when analyzing the plausibility of the pleadings on a motion to dismiss." 671 F.3d at 594. Similarly, the Eleventh Circuit in *Lanfear* recognized that "[t]he Sixth Circuit has concluded to the contrary" of its holding that the presumption of reasonableness applies at the motion to dismiss stage. 2012 WL 1580614, at n.16.

II. THE COURT OF APPEALS ERRED IN CREATING AN EXCEPTION TO THE STATUTORY PRUDENCE REQUIREMENT

The court of appeals erred in substantially altering the unqualified prudence standard in ERISA's text, based on asserted policy grounds. If, as the court of appeals believed, further encouragement is warranted for employee stock plans – at the cost of weakening protection for employees and their retirement funds – that determination should be left to Congress. "The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted).

A. The Statutory Text Makes Clear That ERISA's Prudence Requirement Is Fully Applicable To Fiduciaries Of Plans That Invest In Employer Stock

ERISA expressly sets forth the standard of conduct applicable to fiduciaries:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. 1104(a)(1)(B). As the Department of Labor noted in its brief supporting rehearing in this case, that definition "neither refers to 'dire situations' nor suggests that the fiduciary duty of prudence is an obligation merely to protect participants from disastrous losses, while ignoring other risks of serious injury." App., *infra*, 143a. To the contrary, the ERISA fiduciary duty standard is uniformly ap-

plicable to ERISA plan fiduciaries. On the rare occasions on which Congress wanted to vary that standard, it did so expressly. See 29 U.S.C. 1104(a)(2) (diversification); *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1192-93 (9th Cir. 2007) (exemption of "top-hat" plans under 29 U.S.C. 1101(a)(1) was "no small matter" and "Congress created a special regime to cover them").

The basic allegation in this case, as in *Moench*, *Pfeil*, *Kirschbaum*, *Lanfear*, and *Quan*, is that plan fiduciaries knew, or with the exercise of reasonable "care, skill, prudence, and diligence" should have known, that the employer's stock was substantially overvalued or otherwise imprudent, such that there was too great a risk that, if and when undisclosed facts eventually became known to the market or outsized risks became real, the stock was bound to fall dramatically. A prudent fiduciary, armed with that knowledge and genuinely acting, as Congress intended, "solely in the interest of the participants and beneficiaries" of the plan, 29 U.S.C. 1104(a)(1), would certainly take steps to protect them.

At the very least, a prudent fiduciary who becomes aware of warning signs that the employer's stock may be overvalued would use reasonable means to investigate the appropriateness of the employer's stock as a plan investment. See *Fink*, 772 F.2d at 957 ("A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard."); *id.* at 962 (Scalia, J., concurring in part and dissenting in part) ("[T]here are two related but distinct duties imposed upon a trustee: to investigate and evaluate investments, and to invest prudently."). If it appeared that the stock was seriously overvalued, a prudent fiduciary would take steps to protect the plan participants. As the Department of Labor noted in its brief supporting rehearing, "[k]nowingly overpaying for an asset is never prudent or in the best interest of plan participants and beneficiaries." App., *infra*, 151a. Thus, the prudent fiduciary would at least cease investing in the employer's stock until the undisclosed facts making the stock overvalued were eliminated or reflected in the stock's price. Depending on the circumstances, an additional step would be to divest at least some of the stock; although such divestiture could pose its own risks, there certainly could be situations in which prudence would call for it. See, *e.g.*, *Pfeil*, 671 F.3d at 598 (holding that claim that plan should have divested employer stock is "plausible" based on pleadings). Finally, the fiduciary could do what the common law has long required fiduciaries to do when they are aware of facts that beneficiaries of the trust should know: disclose those facts to the beneficiaries so that they may protect their own interests. See App., infra, 57a-59a (Straub, J., dissenting); Restatement (Second) of Trusts § 173, cmt. d; see also App., *infra*, 153a & n.5 (citing cases holding that ERISA's duties of loyalty and prudence require disclosure).

B. The Court of Appeals' Rule Is Inconsistent With ERISA And Congress's Own Resolution Of Any Tension Between Its Goals

1. The court of appeals held that a fiduciary who was (or should have been) aware that the employer's

stock is seriously overvalued may do nothing at all unless the stock is so overvalued that the employer is in a "dire situation." App., *infra*, 18a. That standard makes ERISA's fiduciary obligations illusory in all but the most egregious cases. The court attempted to justify its rule on the ground that watering down the statutory fiduciary duty standard was necessary to accommodate what it believed to be "two of ERISA's core goals" that "are in tension": "(1) the protection of employee retirement savings through the imposition of fiduciary duties and (2) the encouragement of employee ownership through the special status provided to employee stock ownership plans." App., *infra*, 11a. While protection of employees was no doubt a "core goal" of ERISA, see 29 U.S.C. 1001(b), it is doubtful that encouraging employee stock ownership plans is central to the ERISA scheme. In any event, Congress itself resolved any tension between the goals identified by the court of appeals, and the court erred in tampering with that resolution.

a. Although prudent investment ordinarily requires diversification, the need to diversify is inherently in tension with employee stock ownership plans, which tend to concentrate the plan's assets in the employer's stock. Congress instructed precisely what to do about that tension:

> In the case of an eligible individual account plan . . ., the diversification requirement of [Section 1104(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [Section 1104(a)(1)(B)] is not violated by acquisi-

> tion or holding of . . . qualifying employer securities.

29 U.S.C. 1104(a)(2).

Section 1104(a)(2) thus makes clear that fiduciaries may invest in qualified employer stock without fearing liability for failing to diversify. But Section 1104(a)(2) also makes clear that Congress intended no *further* diminution of ERISA's fiduciary duties in order to encourage employee stock ownership. ERISA's requirement that fiduciaries act prudently is relaxed "only to the extent that it requires diversification." 29 U.S.C. 1104(a)(2). Insofar as acquiring or holding qualified employer stock is imprudent for any reason *other than the need to diversify* – such as when the employer stock is significantly overvalued – the unqualified "care, skill, prudence, and diligence" provision retains full force; it continues to mandate that the fiduciary take appropriate action to protect participants from imprudent investments. See App., *infra*, 49a-50a (Straub, J., dissenting).

b. Congress thus focused its attention on the exact "tension" identified by the court of appeals between ERISA's prudence requirement and its desire to encourage employee stock ownership, and Congress specified with precision the extent to which the prudence requirement must give way. Under those circumstances, any further weakening of the prudence requirement – such as the court of appeals' drastic limitation of the fiduciary duty to cases in which the employer is in a "dire situation" – is inconsistent with the plain statutory text and subverts Congress's own reconciliation of any tension between its goals. See App., *infra*, 44a-45a (Straub, J., dissenting).

3. The court of appeals also stated that its virtual elimination of the prudence requirement in this context is "based . . . on a recognition of the competing obligations imposed on ERISA fiduciaries" to act with "care, skill, prudence, and diligence" and to follow the terms of plan documents that may purport to require the plan to offer employer stock to participants – even when doing so is imprudent. App., *infra*, 16a. The court of appeals erred here as well, because there are no "competing obligations imposed on ERISA fiduciaries."

a. ERISA requires fiduciaries to act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of [ERISA]*," 29 U.S.C. 1104(a)(1)(D) (emphasis added). But plan terms are *not* "consistent with" ERISA if they require imprudent investment in employer stock. ERISA makes clear (as would be expected) that in such cases the statute governs; the fiduciary must follow ERISA's prudence requirement and disregard the plan terms. As this Court long ago explained, "trust documents cannot excuse trustees from their duties under ERISA." *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985); see 29 U.S.C. 1110 (plan document provisions that "purport to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty [under ERISA] shall be void as against public policy").

b. Indeed, the court of appeals itself recognized that ERISA's prudence requirement *may* trump a plan's purported mandate to make an imprudent investment in employer stock. It was precisely on that basis that the court rejected the district court's holding that fiduciaries had no discretion to depart from the plan. App., *infra*, 17a. The court of appeals erred, however, in attempting to invent an extra-statutory "dire situation" standard to govern when the prudence requirement wins out over the terms of the plan. The statute itself answers that question, by requiring obedience to plan documents only "insofar as such documents . . . are consistent with" ERISA itself, including ERISA's prudence requirement. The court of appeals had no warrant to depart from that rule.

3. By departing from the text of ERISA's prudence requirement, the court of appeals was forced to craft out of whole cloth a new requirement of prudence applicable only in this situation. Without textual mooring, the court of appeals and other courts that have embarked on this adventure have been unable to agree on what that requirement is.

The Fifth and Eleventh Circuits have adopted an "unforeseen circumstances would defeat or substantially impair the accomplishment of the trust's purposes" standard. See *Kirschbaum*, 527 F.3d at 256; *Lanfear*, 2012 WL 158064, at *10. *Kirshbaum* suggests that this standard requires a showing of the employer's near-bankruptcy, see p. 16, *supra*, but it is impossible to discern the precise content of this standard, which has no apparent relation to ERISA's express "care, skill, prudence, and diligence" requirement. Meanwhile, the Ninth Circuit's "brink of collapse" standard in *Quan*, 623 F.3d at 883, also lacks definition (especially for a pleading requirement), although, whatever its precise meaning, it is no doubt extraordinarily hard to satisfy.

The court of appeals here and the Third Circuit in *Edgar* adopted a "dire situation" standard. Under those rulings, plan fiduciaries have no obligation to protect participants from overpriced or imprudent investments unless there were "circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the settlor." App., *infra*, 18a; see *Edgar*, 503 F.3d at 349.[4] Cast adrift from the statutory text, the courts that have gone in this direction have been unable to define the standard with any consistency – other than to be clear that, even in the face of certain knowledge that company stock is dramatically overvalued, it permits fiduciaries to do nothing at all to protect participants.

3. The court of appeals also erred when it rejected the claim that respondents at the very least should have informed plan participants of the serious risks facing Citigroup. According to the majority, the fact that ERISA itself imposes certain reporting and disclosure obligations on plans eliminates any other duty of fiduciaries to inform participants

[4] The "unforeseeable by the settlor" qualification is unjustifiable. An employer (the "settlor") may not create an ERISA plan that pays no heed to the prudence of its investments. While trust law may to some extent permit a settlor to create a private trust that makes imprudent investments, ERISA requires fiduciaries to act "solely in the interest of the participants and beneficiaries" and with "care, skill, prudence, and diligence," 29 U.S.C. 1104(a)(1), 1104(a)(1)(B), regardless of the intent of the employer.

of anything else, including the facts concerning the dramatic overvaluation of Citigroup stock. App., *infra*, 23a-25a.

Trust law is the "starting point" for the "effort to interpret ERISA's fiduciary duties," though the interpretation must then be examined to determine whether "the language of the statute, its structure, or its purposes requiring departing from common-law trust requirements." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Under the common law, a trustee is "under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person." Restatement (Second) of Trusts §173, cmt. d. Numerous courts have held that ERISA fiduciaries retain that duty towards plan participants. See App., *infra*, 155a & n.5 (DOL Reh. Br.) (citing cases).[5]

There is no basis in the statute (or in policy) to excuse ERISA fiduciaries who invest in qualified employer securities from this obligation. It would not "improperly transform fiduciaries into invest-

[5] Justice (then-Judge) Cardozo gave the classic statement of the principle:

> A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word. . . . [A trustee] cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to the practiced eye.

Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 489 (1918).

ment advisors," App., *infra*, 25a (internal quotation marks omitted), because it would require fiduciaries simply to notify plan participants of "complete, factual information such that they can make their own investment decisions on an informed basis." App., *infra*, 63a (Straub, J., dissenting). As the Department of Labor explained in its brief supporting rehearing:

> Particularly where the fiduciaries take no other action to protect plan participants, such as putting a stop to the purchase of stock at inflated prices, public disclosure may be the simplest and most effective way of ensuring that the market price reflects the true value of the companies' stock and that plan participants can protect their interests.

App., *infra*, 154a.

C. The Court of Appeals' Other Policy Justifications Cannot Override the Statutory Text and Are Unpersuasive

The other policy considerations discussed by the court of appeals would be unpersuasive, even if such considerations somehow could otherwise justify departure from the statutory text.

1. The court of appeals defended its adoption of an extra-statutory exception to ERISA's prudence requirement on the ground that "were it otherwise, fiduciaries would be equally vulnerable to suit either for not selling if they adhered to the plan's terms and the company stock decreased in value, or for deviating from the plan by selling if the stock later increased in value." App, *infra*, 15a. That is incorrect,

for at least two reasons.

First, in ordinary cases, there is a wide range of reasonable investment choices that a fiduciary may make without risking litigation. Plaintiffs attacking any such decision have the burden of showing not merely that the fiduciaries could have prudently made some different investment decision; they must carry the heavier burden of showing that the decision the fiduciaries *did* make was *not* prudent, based on available information. That is not an easy standard for plaintiffs to satisfy if fiduciaries are in fact exercising care in their investment decisions, and most such decisions will not be subject to attack, regardless of whether the market turns out to favor particular decisions or not. See, *e.g.*, *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 9-10 (1st Cir. 2009).

Second, as noted above, ERISA makes clear that even plan terms unambiguously directing fiduciaries to invest in employer stock may not excuse fiduciaries from exercising "care, skill, prudence, and diligence" in carrying out their functions. If an investment in employer stock – or any other decision – is inconsistent with that obligation, fiduciaries must follow ERISA and disregard the plan terms. Because ERISA itself requires following plan documents only "insofar as such documents . . . are consistent with [ERISA]" itself, 29 U.S.C. 1104(a)(1)(D), fiduciaries will face no liability for failing to follow plan terms in that situation.

2. The court of appeals also attempted to draw support from what it believed was "Congress's concern that employees' ability to invest in employer stock would be endangered were courts to apply

ERISA to ESOPs and EIAPs in the same way they apply the statute to other retirement plans." App., *infra*, 15a. The court found that concern in an uncodified provision of the Tax Reform Act of 1976, which expresses Congress's desire to "encourag[e] employee stock plans" and then adds that "Congress is deeply concerned that the objectives sought by [ERISA and other laws] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans." Tax Reform Act of 1972, Pub. L. No. 94-455, § 803(h), 90 Stat. 1590; see App., *infra*, 163a.

That statement of congressional "concern" does not purport to – and does not – amend or dilute any provision of ERISA, much less the fiduciary duty provision at issue here that is central to the statutory scheme. When Congress wanted to make exceptions for ESOPs (such as relaxing the prudence requirement "only to the extent that it requires diversification," 29 U.S.C. 1104(a)(1)), Congress did so expressly. In any event, Congress's "concern[]" was directed at "proposed regulations issued by both the Department of the Treasury and the Department of Labor on July 30, 1976" that "may make it virtually impossible for ESOPs, and especially leveraged ESOPs, to be established and function effectively." S. Rep. No. 1236, 94th Cong., 2d Sess. 539 (1976). The conference report itemizes the specific parts of the proposed regulations with which Congress was "concerned," which generally have to do with issues such as loans to ESOPs, options on ESOP stock, voting rights and dividend restrictions applicable to ESOP stock, etc. See *id.* at 540-542. None has anything whatever to do with ERISA's general fiduciary duties or its prudence requirement.

3. The court of appeals implicitly – and some other courts explicitly, see, *e.g.*, *Moench*, 62 F.3d at 570 – have speculated that, without a special rule protecting fiduciaries of plans that invest in qualified employer stock, employee stock ownership programs would be eliminated. Again, that possibility – which is entirely unsupported empirically, see App., *infra*, 45a-47a (Straub, J., dissenting) – could provide no basis to depart from the commands of ERISA.

In any event, as Judge Straub noted, in addition to the built-in advantages of ESOPs for employers, such as their use as a ready source of capital and as support for management from presumably friendly employee-stockholders, Congress provided *other* incentives for qualified employee stock programs in the tax code and elsewhere, App., *infra*, 46a-47a & n.9. The fact that Congress provided such incentives is a reason to construe the *un*qualified employee protections in ERISA as written; it does not provide a basis for supplementing the statute with additional incentives for employers that Congress itself "forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); see App., *infra*, 149a-150a (DOL Reh' Br.).

III. THE ISSUES ARE IMPORTANT AND SQUARELY PRESENTED

The court of appeals' holding threatens substantial harm to Congress's carefully crafted means for protecting ERISA plan participants. Further review is warranted to resolve the circuit conflict and consider whether ERISA permits such dilution of its key fiduciary duty obligation.

1. Congress declared that "the policy of [ERISA]" was "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. 1001(b). A leading ESOP organization recently made the rough estimate that 10,900 plans with 10.3 million participants had $869 billion in assets invested in employer stock. *See* http://www.nceo.org/articles/statistical-profile-employee-ownership. The court of appeals' rule leaves all of those participants unprotected in all but the most egregious cases involving purchases of qualified employer stock.[6]

2. The Department of Labor has viewed the issue in this case as of exceptional importance. It has participated as amicus arguing that ERISA's prudence requirement applies fully to investments in qualified employer stock in *Moench* itself, see 1994 WL 16012393 (DOL brief), and in many other later cases, including *Kirschbaum*, *Lanfear*, *Quan*, *Pfeil*, and both before the panel and on rehearing in this case.[7]

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[6] Indeed, the consequences of the court of appeals' rule are illustrated by the facts of this case. Participants in the Citigroup plan have seen their retirement investments in Citigroup stock, which are a large part of their portfolios, decimated by 90% or more. See p.7-8, *supra*.

[7] The Department also has filed amicus briefs on these issues in *In re: Lehman Brothers ERISA Litigation* in the Second Circuit; *Allen v. Wachovia Corp.* in the Fourth Circuit; *Dudenhoeffer v. Fifth Third Bancorp.*, *Griffin v. Flagstar Bankorp*, and *Taylor v. Keycorp* in the Sixth Circuit; *White v. Marshall & Isley* in the Seventh Circuit; and *Sewright v. ING Groep, N.V.*

3. The issues are squarely presented in this case. The court of appeals could not have been clearer that it "reject[ed] [petitioners'] argument that the *Moench* presumption should not apply at the pleading stage," App., *infra*, 17a. The Sixth Circuit, by contrast, would have reached the opposite result in this case, because in that court "the presumption of reasonableness . . . is not an additional pleading requirement and does not apply at the motion to dismiss stage." *Pfeil*, 671 F.3d at 592.

Moreover, the court of appeals' ultimate holding rested squarely on the failure to allege sufficient facts to show that Citigroup was in a "dire situation." As the court stated its core holding: "To summarize: plaintiffs fail to allege facts sufficient to show that defendants either knew or should have known that Citigroup was in the sort of dire situation that required them to override Plan terms in order to limit participants' investments in Citigroup stock." App., *infra*, 22a. Judge Straub reached the opposite conclusion precisely because in his view "the sufficiency of plaintiffs' Prudence Claim must be evaluated under plenary review," rather than the majority's "dire situation" standard. App., *infra*, 50a; see App., *infra*, 52a-56a (finding adequate allegations that respondents violated prudence obligation). Similarly, the Sixth Circuit would have reversed in this case, not affirmed, because, as *Pfeil* shows, the Sixth Circuit rejects the need to show a "dire situation" or the

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and *Fisch v. Suntrust Banks* in the Eleventh Circuit. With the exception of *Moench*, all of these briefs have been posted by the Department of Labor on its website. See http://www.dol.gov/sol /media/briefs/main.htm.

like. A complaint in the Sixth Circuit must merely allege (as this Complaint does) that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." 671 F.3d at 595 (quoting *Kuper*, 66 F.3d at 1459); see *DiFelice*, 497 F.3d at 422.

Fiduciary protections for millions of participants in ERISA plans should not vary depending on the geographic location of their employer. Indeed, when Congress enacted ERISA, particular concern was expressed that, "[b]ecause of the interstate character of employee benefit plans," it is "essential to provide for a uniform source of law . . . for evaluating fiduciary conduct." S. Rep. No. 127, 93rd Cong. 1st Sess. 35 (1973); see 120 Cong. Rec. 15737 (1974) (Sen. Williams) ("The objectives of these provisions [on fiduciary obligations] are . . . to prohibit exculpatory clauses that have often been used in this field; *to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets*; and to provide effective remedies for breach of trust.") (emphasis added). This case provides a sound vehicle for the Court to resolve the conflicts in the circuits on whether courts must take seriously ERISA's unqualified requirement that fiduciaries of plans that invest in qualified employer stock must act with "care, skill, prudence, and diligence" in the sole interest of plan participants and beneficiaries.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, in light of the Department of Labor's longstanding and consistent interest in this issue, the Court may wish to invite the Solicitor General to express the views of the United States in this case.

Respectfully submitted.

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JUNE 22, 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 09-3804-cv

IN RE: CITIGROUP ERISA LITIGATION

STEPHEN GRAY, JAMES BOLLA, AND SAMIER TADROS, *Lead Plaintiffs–Appellants*,

SANDRA WALSH, ANTON K. RAPPOLD, AND ALAN STEVENS, *Plaintiffs–Appellants*,

v.

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

Argued: Sept. 28, 2010. – Decided: October 19, 2011

Before WALKER, CABRANES, and STRAUB, Circuit Judges

JOHN M. WALKER, JR., Circuit Judge:

Plaintiffs, participants in retirement plans offered by defendants Citigroup Inc. and Citibank, N.A., and covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., appeal from the judgment of the United States District Court for the Southern District of New York (Sidney H. Stein, Judge) dismissing their ERISA class action complaint.[8] Plan documents required that a stock fund consisting primarily of employer stock (the Citigroup Common Stock Fund) be offered among the investment options. Plaintiffs allege that, because Citigroup stock became an imprudent investment, defendants' failure to limit plan participants' ability to invest in the company violated ERISA. We hold that the plan fiduciaries' decision to continue offering participants the opportunity to invest in Citigroup stock should be reviewed for an abuse of discretion, and we find that they did not abuse their discretion here. We also hold that defendants did not have any affirmative duty to disclose to plan participants nonpublic information regarding the expected performance of Citigroup stock, and that the complaint does not sufficiently allege that defendants, in their fiduciary capacities, made any knowing misstatements to plan participants regarding Citigroup stock. We therefore AFFIRM the district court's dismissal of plaintiffs' complaint.

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[8] This case was argued in tandem with *Gearren v. McGraw-Hil Cos.*, Nos. 10-0792, 10-0934, which we resolve in a separate opinion filed today.

BACKGROUND

I. FACTUAL BACKGROUND

Plaintiffs are participants in the Citigroup 401(k) Plan (the "Citigroup Plan") or the Citibuilder 401(k) Plan for Puerto Rico (the "Citibuilder Plan") (collectively, the "Plans"). These employee pension benefit plans are governed by ERISA, which characterizes them as "eligible individual account plans."2 29 U.S.C. § 1107(d)(3); *see also* 29 U.S.C. § 1002(2)(A) (defining "employee pension benefit plan"). Defendant Citigroup Inc. ("Citigroup"), a Delaware corporation and financial services company, is the sponsor of the Citigroup Plan. Defendant Citibank, N .A. ("Citibank"), a subsidiary of Citigroup, is the sponsor of the Citibuilder Plan and the trustee of the Citigroup Plan. The Citibuilder Plan's trustee—not a defendant in this action—is Banco Popular de Puerto Rico. Each Plan is managed by the same two committees: the "Administration Committee," consisting of eight members, charged with administering the Plans and construing the Plans' terms, and the "Investment Committee," consisting of ten members, responsible for selecting the investment fund options offered to Plan participants.

The Citigroup Plan is offered to Citigroup employees, and the Citibuilder Plan is offered to Puerto Rico employees of Citibank. In all material respects, the Plans are the same. Participants in each Plan may make pre-tax contributions, up to a certain percentage of their salary, to individual retirement accounts. The participants are then free to allocate the funds within their accounts among approximately 20 to 40 investment options selected by the Investment Committee. Both Plans state that participants' accounts are to be invested in these investment options "in the proportions directed by the Participant."

The Citigroup Common Stock Fund (the "Stock Fund" or the "Fund") is an investment option offered by both Plans, which define the Fund as "an Investment Fund comprised of shares of Citigroup Common Stock." By offering the Stock Fund, the Plans provide a vehicle that enables Plan participants to invest in the stock of their employer. The Plans also authorize the Fund to "hold cash and short-term investments in addition to shares of Citigroup Common Stock," "[s]olely in order to permit the orderly purchase of Citigroup Common Stock in a volume that does not disrupt the stock market and in order to pay benefits hereunder."

Both Plans mandate that the Fund be included as an investment option. Section 7.01 of each provides that the Plan trustee "shall maintain, within the Trust, the Citigroup Common Stock Fund and other Investment Funds," and section 7.01 of the Citigroup Plan adds that "the Citigroup Common Stock Fund shall be permanently maintained as an Investment Fund under the Plan." Section 7.09(e) of each Plan states that "provisions in the Plan mandate the creation and continuation of the Citigroup Common Stock Fund." Further, section 15.06(b) of the Citigroup Plan requires that the Trustee "maintain at least 3 Investment Funds in addition to the Citigroup Common Stock Fund."

II. PROCEDURAL HISTORY

Plaintiffs filed their Consolidated Class Action Complaint on September 15, 2008, following a sharp drop in the price of Citigroup stock that began in late 2007 and continued into 2008. Citigroup, Citibank, and the Administration and Investment Committees are all defendants, as are Charles Prince ("Prince"), Citigroup's CEO from 2003 through November 2007, and each member of Citigroup's Board of Directors (with Prince, the "Director Defendants"). Plaintiffs challenge defendants' management of the Plans and, in particular, the Stock Fund. Plaintiffs represent a putative class of participants in or beneficiaries of the Plans who invested in Citigroup stock from January 1, 2007 through January 15, 2008 (the "Class Period"), during which Citigroup's share price fell from $55.70 to $26.94.

Plaintiffs allege that Citigroup's participation in the ill-fated subprime-mortgage market caused the price drop during the Class Period. Citigroup, according to plaintiffs, consistently downplayed its exposure to that market, even as it recognized the need to start reducing its subprime-mortgage exposure in late 2006. At the end of 2007, Citigroup publicly reported a subprime-related loss of $18.1 billion for the fourth quarter, and further substantial losses continued through 2008.

Count I of the Complaint (the "Prudence Claim") alleges that the Investment Committee, the Administration Committee, Citigroup, and Citibank breached their fiduciary duties of prudence and loyalty by refusing to divest the Plans of Citigroup stock even though Citigroup's "perilous operations tied to the subprime securities market" made it an imprudent investment option. Plaintiffs argue that a prudent fiduciary would have foreseen a drop in the price of Citigroup stock and either suspended participants' ability to invest in the Stock Fund or diversified the Fund so that it held less Citigroup stock. Count II (the "Communications Claim") alleges that Citigroup, the Administration Committee, and Prince breached their fiduciary duties by failing to provide complete and accurate information to Plan participants regarding the Fund and its exposure to the risks associated with the subprime market.

Counts III–VI, in substance, are derivative of the violations alleged in Counts I and II. Count III alleges that Citigroup and the Director Defendants failed to properly monitor the fiduciaries that they appointed; Count IV alleges that the same defendants, who had some authority to appoint members of the Administration and Investment Committees, failed to disclose necessary information about Citigroup's financial status to these members; Count V alleges that all defendants breached their fiduciary duty of loyalty by putting the interests of Citigroup and themselves above the interests of Plan participants; and Count VI alleges that Citigroup, Citibank, and the Director Defendants are liable as co-fiduciaries for the actions of their co-defendants.

On August 31, 2009, the district court granted in full defendants' motion to dismiss. *In re Citigroup ERISA Litig.*, No. 07–cv–9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009). The district court held that plaintiffs failed to state a claim against defendants related to the Plans' continued investment in Citigroup stock because "defendants had no discretion whatsoever to eliminate Citigroup stock as an investment option, and defendants were not acting as fiduciaries to the extent that they maintained Citigroup stock as an investment option." *Id.* at *8 (internal citation omitted). The district court found, alternatively, that even if defendants did have discretion to eliminate Citigroup stock, they were entitled to a presumption that investment in the stock, in accordance with the Plans' terms, was prudent and that the facts alleged by plaintiffs, even if proven, were insufficient to overcome this presumption. *Id.* at *15–19. As for the Communications Claim, the district court held that defendants had no duty to disclose information about Citigroup's financial condition and that any alleged misstatements made by defendants were either not knowingly false or not made by defendants acting in their fiduciary capacities. *Id*. at *20–25. The district court also dismissed plaintiffs' claims regarding defendants' failure to monitor Plan fiduciaries, failure to disclose information to co-fiduciaries, and breach of the duty of loyalty. *Id*. at *25–27.

Plaintiffs now appeal from the district court's judgment dismissing the complaint.

DISCUSSION

We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *See, e.g., Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 74 (2d Cir. 2008). We accept as true the facts alleged in the complaint, and may consider documents incorporated by reference in the complaint and documents upon which the complaint "relies heavily." *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010) (internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ERISA's central purpose is "to protect beneficiaries of employee benefit plans." *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 47 (2d Cir. 2009). The statute does so by imposing fiduciary duties of prudence and loyalty on plan fiduciaries. The duty of prudence requires that fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). The duty of loyalty requires fiduciaries to act "solely in the interest" of plan participants and beneficiaries. Id. § 1104(a)(1).

A person is only subject to these fiduciary duties "to the extent" that the person, among other things, "exercises any discretionary authority or discretionary control respecting management of such plan" or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). As a result, "a person 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) (quoting *F.H. Krear & Co. v. Nineteen Named*

Trustees, 810 F.2d 1250, 1259 (2d Cir. 1987)). Therefore, in suits alleging breach of fiduciary duty, the "threshold question" is whether the defendants were acting as fiduciaries "when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

In their Prudence Claim, plaintiffs allege that the Investment Committee, the Administration Committee, Citigroup, and Citibank violated their duties of prudence and loyalty by continuing to offer the Stock Fund as an investment option and by refusing to divest the Fund of Citigroup stock. Plaintiffs' Communications Claim alleges that Citigroup, Prince, and the Administration Committee violated their duties of prudence and loyalty by failing to provide participants with complete and accurate information about Citigroup's financial status. For the reasons that follow, we agree with the district court that plaintiffs have failed to state a claim for relief as to any defendant.

I. PRUDENCE CLAIM

While plaintiffs bring the Prudence Claim against the Investment Committee, the Administration Committee, Citigroup, and Citibank, only the Investment Committee and Administration Committee were fiduciaries with respect to plaintiffs' ability to invest through the Plan in Citigroup stock. The Plans delegated to the Investment Committee the authority to add or eliminate investment funds, and the Plans delegated to the Administration Committee the authority to impose timing and frequency restrictions on participants' investment selections.

Citigroup and Citibank, by contrast, lacked the authority to veto the Investment Committee's investment selections. Plaintiffs nevertheless allege that Citigroup and Citibank acted as "de facto fiduciaries" with respect to investment selection. Plaintiffs allege that Citigroup had "effective control over the activities of its officers and employees" on the Investment and Administration Committees, but do not provide any example of this "effective control," nor do they suggest what actions Citigroup took as a de facto fiduciary. Similarly, plaintiffs do not provide any description whatsoever of how Citibank "retained" certain duties delegated under the Citibuilder Plan to the Investment and Administration Committees.

However, even if we assume that each of the defendants—and not just the Investment Committee—was a fiduciary for investment-selection purposes, plaintiffs' claims are still met with two obstacles: (1) the Plan language mandating that the Stock Fund be included as an investment option and (2) the "favored status Congress has granted to employee stock investments in their own companies." *Langbecker v. Elec. Data Sys. Corp.,* 476 F.3d 299, 308 (5th Cir. 2007). These obstacles lead us to conclude that the Investment and Administration Committees' decisions not to divest the Plans of Citigroup stock or impose restrictions on participants' investment in that stock are entitled to a presumption of prudence and should be reviewed for an abuse of discretion, as opposed to a stricter standard. We hold that plaintiffs have not alleged facts that would establish such an abuse.

A. *A Presumption of ERISA Compliance in Employee Stock Ownership Plans and Eligible Individual Account Plans*

Plaintiffs' claims place in tension two of ERISA's core goals: (1) the protection of employee retirement savings through the imposition of fiduciary duties and (2) the encouragement of employee ownership through the special status provided to employee stock ownership plans ("ESOPs") and eligible individual account plans ("EIAPs").[9] Congress enacted ERISA to "protect[ ] employee pensions and other benefits." *Varity Corp. v. Howe,* 516 U.S. 489, 496, (1996). As many courts have recognized, however, ESOPs, by definition, are "designed to invest primarily in qualifying employee securities," 29 U.S.C. § 1107(d)(6)(A), and therefore "place[ ] employee retirement assets at much greater risk than does the typical diversified ERISA plan," *Martin v. Feilen,* 965 F.2d 660, 664 (8th Cir. 1992); *see also Quan v. Computer Scis. Corp.,* 623 F.3d 870, 879 (9th Cir. 2010) (citing the "tension" between the duty of prudence and Congress's preference for employees' investment in employer stock). Due to the risk inherent in employees' placing their retirement assets in a single, undiversified stock fund, Congress has expressed concern that its goal of encouraging employ-

[9] An ESOP is a type of EIAP. 29 U.S.C. § 1107(d)(3)(A). Because EIAPs, like ESOPs, "promote investment in employer securities, they are subject to many of the same exceptions that apply to ESOPs." *Edgar v. Avaya, Inc.,* 503 F.3d 340, 347 (3rd Cir. 2007). We therefore agree with the district court that "nearly all of the points made about [ESOPs' encouragement of employer-stock ownership] apply equally to EIAPs." *In re Citigroup ERISA Litig.,* 2009 WL 2762708, at *11 n. 5.

ee ownership of the company's stock could "be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans." Tax Reform Act of 1976, Pub.L. No. 94–455, § 803(h), 90 Stat. 1520, 1590. Accordingly, Congress has encouraged ESOP creation by, for example, exempting ESOPs from ERISA's "prudence requirement (only to the extent that it requires diversification)" and from the statute's "strict prohibitions against dealing with a party in interest, and against self-dealing." *Moench v. Robertson,* 62 F.3d 553, 568 (3d Cir. 1995).

ERISA requires that fiduciaries act "in accordance with the documents ... governing the plan insofar as such documents ... are consistent with the provisions of [ERISA]." 29 U.S.C. § 1104(a)(1)(D). The Act does not, however, explain when, if ever, plan language requiring investment in employer stock might become inconsistent with the statute's fiduciary obligations such that fiduciaries would be required to disobey the requirements of the ESOP and halt the purchase of, or perhaps even require the sale of, the employer's stock.

The Third, Fifth, Sixth, and Ninth Circuits have addressed this question, and we find their decisions helpful. The Third Circuit, in *Moench v. Robertson,* 62 F.3d 553, adopted a presumption of compliance with ERISA when an ESOP fiduciary invests assets in the employer's stock. There, a participant in an ESOP challenged the ESOP's continued investment in employer stock after the stock's share price dropped from $18.25 per share to $0.25 per share over a two-year period. *Id.* at 557. The court noted that while "ESOPs, unlike pension plans, are not intended to guarantee retirement benefits," *id.* at 568, "ESOPs are covered by ERISA's stringent requirements, and [except for in enumerated circumstances not directly applicable here] ESOP fiduciaries must act in accordance with the duties of loyalty and care," *id.* at 569. The court proceeded to describe the standard by which it would judge an ESOP fiduciary's refusal to divest an ESOP of employer stock:

> [A]n ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities.

Id. at 571. The court remanded the case to the district court for a summary judgment determination under this new standard. *Id.* at 572. More recently, the Third Circuit expanded this rule to include situations where, as here, an employer stock fund is one of many investment options in an EIAP. *See Edgar v. Avaya, Inc.,* 503 F.3d 340, 347–48 (3d Cir. 2007) ("[W]e conclude that the District Court correctly determined that *Moench*'s abuse of discretion standard governs judicial review of defendants' decision to offer the Avaya Stock Fund as an investment option.").

The Sixth, Fifth, and Ninth Circuits have all adopted the *Moench* presumption. In *Kuper v. Iovenko,* 66 F.3d 1447 (6th Cir. 1995), the employer's stock price had dropped from more than $50 per share to just over $10 per share. *Id.* at 1451. The court "agree[d] with and adopt[ed] the Third Circuit's holding that a proper balance between the purpose of ERISA and the nature of ESOPs requires that we review an ESOP fiduciary's decision to invest in employer securities for an abuse of discretion." *Id.* at 1459. A failure to properly investigate the prudence of continued investment in employer stock could not alone overcome the presumption; rather, plaintiffs were required to demonstrate that conducting such an investigation "would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Id.* at 1460. The Fifth and Ninth Circuits have also applied the presumption to situations in which employer stock funds were offered as investment options within EIAPs. *See Kirschbaum v. Reliant Energy, Inc.,* 526 F.3d 243, 254 (5th Cir. 2008) ("The *Moench* presumption ... applies to any allegations of fiduciary duty breach for failure to divest an EIAP or ESOP of company stock."); *Quan v. Computer Scis. Corp.,* 623 F.3d 870, 881 (9th Cir. 2010) (adopting the presumption because it "is consistent with the statutory language of ERISA and the trust principles by which ERISA is interpreted"). No court of appeals has rejected the presumption of prudence.

We now join our sister circuits in adopting the *Moench* presumption—and do so with respect to both EIAPs and ESOPs—because, as those courts have recognized, it provides the best accommodation between the competing ERISA values of protecting retirement assets and encouraging investment in employer stock. An ESOP or EIAP fiduciary's decision to continue to offer plan participants the opportunity to invest in employer stock should therefore be reviewed for an abuse of discretion. This presumption may be rebutted if an EIAP or ESOP fiduciary abuses his discretion in continuing to offer plan participants the opportunity to invest in employer stock. We endorse the "guiding principle" recognized in *Quan* that judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest. *See Quan,* 623 F.3d at 883 (citing *Kirschbaum,* 526 F.3d at 255 & n. 9). Thus a fiduciary's failure to divest from company stock is less likely to constitute an abuse of discretion if the plan's terms require—rather than merely permit—investment in company stock.

We reject plaintiffs' argument—endorsed by the dissent—that we should analyze the decision to offer the Stock Fund as we would a fiduciary's decision to offer any other investment option. We agree with the Sixth and Ninth Circuits that were it otherwise, fiduciaries would be equally vulnerable to suit either for not selling if they adhered to the plan's terms and the company stock decreased in value, or for deviating from the plan by selling if the stock later increased in value. *See Kirschbaum,* 526 F.3d at 256 n. 13; *Quan,* 623 F.3d at 881. Such a result would be particularly troublesome in light of the "long-term horizon of retirement investing," which "requires protecting fiduciaries from pressure to divest when the company's stock drops." *Quan,* 623 F.3d at 882 (quoting *Kirschbaum,* 526 F.3d at 254). Also, as a general matter, plaintiffs' proposal fails to adequately account for Congress's concern that employees' ability to invest in employer stock would be endangered were courts to apply ERISA to ESOPs and EIAPs in the same way they apply the statute to other retirement plans. *See, e.g.,* Tax Reform Act of 1976, Pub.L. No. 94–455, § 803(h), 90 Stat. 1583, 1590 (expressing the concern that treating ESOP plans as conventional retirement plans will "block the establishment and success of these plans").

The dissent argues that, rather than providing an "accommodation" between competing interests, our adoption of the *Moench* presumption allows the policies favoring ESOPs to "override the policies of ERISA." Dissent at [44a-45a]. The "policy concerns" we cite today do not, in Judge Straub's view, justify the adoption of a standard of review that "renders moot ERISA's 'prudent man' standard of conduct." *Id.* at 148, 151. We emphasize in response that, more than simply accommodating competing policy considerations, the *Moench* presumption balances the duty of prudence against a fiduciary's explicit obligation to act in accordance with plan provisions to the extent they are consistent with ERISA. *See* 29 U.S.C. § 1104(a)(1)(D). When, as here, plan documents define an EIAP as "comprised of shares of" employer stock, and authorize the holding of "cash and short-term investments" only to facilitate the "orderly purchase" of more company stock, the fiduciary is given little discretion to alter the composition of investments. If we were to judge that fiduciary's conduct using the same standard of review applied to fiduciaries of typical retirement plans, we would ignore not only the policy considerations articulated by Congress but also the very terms of the plan itself. Our endorsement of *Moench* is therefore based not on "indefensible policy concerns," Dissent at [50a], but on a recognition of the competing obligations imposed on ERISA fiduciaries.

The district court also ruled that defendants were insulated from liability because they had no discretion to divest the Plans of employer stock. *In re Citigroup ERISA Litig.,* 2009 WL 2762708, at *13. We take issue with this holding because such a rule would leave employees' retirement savings that are invested in ESOPs or EIAPs without any protection at all—a result that Congress sought to avoid in enacting ERISA. *See Kuper,* 66 F.3d at 1457 ("[T]he purpose of ESOPs cannot override ERISA's goal of ensuring the proper management and soundness of employee benefit plans."). Especially in light of ERISA's requirement that fiduciaries follow plan terms only to the extent that they are consistent with ERISA, 29 U.S.C. § 1104(a)(1)(D), we decline to hold that defendants' decision to continue to offer the Stock Fund is beyond our power to review.

Finally, we reject plaintiffs' argument that the *Moench* presumption should not apply at the pleading stage. The "presumption" is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary. Where plaintiffs do not allege facts sufficient to establish that a plan fiduciary has abused his discretion, there is no reason not to grant a motion to dismiss. *See Edgar,* 503 F.3d at 349 (applying *Moench* to grant a motion to dismiss because there was "no reason to allow [the] case to proceed to discovery when, even if the allegations [were] proven true, [the plaintiff could not] establish that defendants abused their discretion"); *Gearren v. The McGraw–Hill Cos., Inc.,* 690 F.Supp.2d 254, 269 (S.D.N.Y. 2010).

B. *Applying the* Moench *Presumption*

We turn now to whether plaintiffs have pled facts sufficient to overcome the presumption of prudence and successfully alleged that the Investment and Administration Committees abused their discretion by allowing participants to continue to invest in Citigroup stock. The *Moench* court, relying on trust law, explained that fiduciaries should override Plan terms requiring or strongly favoring investment in employer stock only when "owing to circumstances not known to the [plan] settlor and not anticipated by him," maintaining the investment in company stock "would defeat or substantially impair the accomplishment of the purposes of the [Plan]." 62 F.3d at 571 (quoting *Restatement (Second) of Trusts* § 227 cmt. g). We agree with this formulation and cannot imagine that an ESOP or EIAP settlor, mindful of the long-term horizon of retirement savings, would intend that fiduciaries divest from employer stock at the sign of any impending price decline. Rather, we believe that only circumstances placing the employer in a "dire situation" that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms. *Edgar,* 503 F.3d at 348. The presumption is to serve as a "substantial shield," *Kirschbaum,* 526 F.3d at 256, that should protect fiduciaries from liability where "there is room for reasonable fiduciaries to disagree as to whether they are bound to divest from company stock," *Quan,* 623 F.3d at 882. The test of prudence is, as the dissent points out, one of conduct rather than results, and the abuse of discretion standard ensures that a fiduciary's conduct cannot be second-guessed so long as it is reasonable.

Although proof of the employer's impending collapse may not be required to establish liability, "[m]ere stock fluctuations, even those that trend downhill significantly, are insufficient to establish the requisite imprudence to rebut the *Moench* presumption." *Wright v. Or. Metallurgical Corp.,* 360 F.3d 1090, 1099 (9th Cir. 2004). We judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not "from the vantage point of hindsight." 29 U.S.C. § 1104(a)(1)(B) (establishing that the prudence of an ERISA fiduciary is to be measured in light of "the circumstances then prevailing"); *Chao v. Merino,* 452 F.3d 174, 182 (2d Cir. 2006) (quoting *Katsaros v. Cody,* 744 F.2d 270, 279 (2d Cir. 1984)). We cannot rely, after the fact, on the magnitude of the decrease in the employer's stock price; rather, we must consider the extent to which plan fiduciaries at a given point in time reasonably could have predicted the outcome that followed.

Here, plaintiffs allege that Citigroup made ill-advised investments in the subprime-mortgage market while hiding the extent of those investments from Plan participants and the public. They also allege that, just prior to the start of the Class Period, Citigroup became aware of the impending collapse of the subprime market and that, ultimately, Citigroup reported losses of about $30 billion due to its subprime exposure. As a result, plaintiffs argue, Citigroup's stock price was "inflated" during the Class Period because the price did not reflect the company's true underlying value. Of course, as plaintiffs acknowledge, these facts alone cannot sufficiently plead a fiduciary breach: that Citigroup made bad business decisions is insufficient to show that the company was in a "dire situation," much less that the Investment Committee or the Administration Committee knew or should have known that the situation was dire. Like the Fifth Circuit in *Kirschbaum,* we "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." *See Kirschbaum,* 526 F.3d at 256.

In an attempt to suggest the Investment and Administration Committees' knowledge of Citigroup's situation, plaintiffs allege in conclusory fashion that the Committee "knew or should have known about Citigroup's massive subprime exposure as a result of their responsibilities as fiduciaries of the Plans." Compl. ¶ 188. Plaintiffs add that, even if defendants were unaware of Citigroup's subprime exposure, they only lacked such knowledge because they "failed to conduct an appropriate investigation into whether Citigroup stock was a prudent investment for the Plans." Compl. ¶ 189.

Plaintiffs' allegations are insufficient to state a claim against the Investment and Administration Committees for breach of the duty of prudence. As an initial matter, plaintiffs' bald assertion, without any supporting allegations, that the Investment and Administration Committees knew about Citigroup's subprime activities cannot support their claims. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions...."). Moreover, that the fiduciaries allegedly failed to investigate the continued prudence of investing in Citigroup stock cannot alone rescue plaintiffs' claim; plaintiffs have not pled facts that, if proved, would show that such an investigation during the Class Period would have led defendants to conclude that Citigroup was no longer a prudent investment. As we noted above, plaintiffs must allege facts that, if proved, would show that an "adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Kuper,* 66 F.3d at 1460. This they have not done.

Additionally, even if we assume that an investigation would have revealed all of the facts that plaintiffs have alleged, the Investment and Administration Committees would not have been compelled to conclude that Citigroup was in a dire situation. While the Committee may have been able to uncover Citigroup's subprime investments, the facts alleged by plaintiffs, if proved, are not sufficient to support a conclusion that the Investment and Administration Committees could have foreseen that Citigroup would eventually lose tens of billions of dollars. And even if the Committee could have done so, it would not have been compelled to find that Citigroup, with a market capitalization of almost $200 billion, was in a dire situation. While fiduciaries' decisions are not to be judged in hindsight, we note for the record that during the Class Period, Citigroup's share price fell from $55.70 to $28.74, a drop of just over 50%. Other courts have found plaintiffs unable to overcome the *Moench* presumption in the face of similar stock declines. *See Kirschbaum,* 526 F.3d at 247 (40% drop); *Edgar,* 503 F.3d at 344 (25% drop); *Kuper,* 66 F.3d at

1451 (80% drop).

To summarize: plaintiffs fail to allege facts sufficient to show that defendants either knew or should have known that Citigroup was in the sort of dire situation that required them to override Plan terms in order to limit participants' investments in Citigroup stock. Plaintiffs are therefore unable to state a claim for breach of ERISA's duty of prudence based on the inclusion of the Common Stock Fund in the Plans.

II. COMMUNICATIONS CLAIM

Plaintiffs allege in Count II of their complaint that the "Communications Defendants" (Citigroup, the Administration Committee, and Prince) breached their fiduciary duty of loyalty by (1) "failing to provide complete and accurate information regarding ... Citigroup" and (2) "conveying through statements and omissions inaccurate material information regarding the soundness of Citigroup stock." Compl. ¶ 237. We reject the first theory of liability because fiduciaries have no duty to provide Plan participants with non-public information that could pertain to the expected performance of Plan investment options. And we reject the second theory because there are no facts alleged that would, if proved, support a conclusion that defendants made statements, while acting in a fiduciary capacity, that they knew to be false.

A. *Duty to Provide Information*

ERISA contains a "comprehensive set of 'reporting and disclosure' requirements." *Curtiss–Wright Corp. v. Schoonejongen,* 514 U.S. 73, 83 (1995) (citing 29 U.S.C. §§ 1021–1031). The statute, for example, requires plan administrators to "describ[e] the importance of diversifying the investment of retirement account assets," 29 U.S.C. § 1021(m)(2), and to inform participants "of the risk that holding more than 20 percent of a portfolio in the security of one entity (*such as employer securities*) may not be adequately diversified," *id.* § 1025(a)(2)(B)(ii)(II) (emphasis added). Additionally, regulations in place during the Class Period required plan administrators, in certain circumstances, to provide plan participants with a "description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative." 29 C.F.R. § 2550.404c–1(b)(2)(B)(1)(ii) (2009).

Plaintiffs do not allege any violations of these requirements. Nor could they support such a claim; the Plan documents informed plaintiffs that the Stock Fund invested only in Citigroup stock, which would be "retained in this fund regardless of market fluctuations," and that the Fund may "undergo large price declines in adverse markets," the risk of which "may be offset by owning other investments that follow different investment strategies."

Plaintiffs instead argue that defendants violated ERISA's more general duty of loyalty, 29 U.S.C. § 1104(a)(1), by failing to provide participants with information regarding the expected future performance of Citigroup stock. They rely on cases stating, in broad terms, that fiduciaries must disclose to participants information related to the participants' benefits. *See, e.g., Dobson v. Hartford Fin. Servs. Grp., Inc.,* 389 F.3d 386, 401 (2d Cir. 2004) ("A number of authorities assert a plan fiduciary's obligation to disclose information that is material to beneficiaries' rights under a plan....").

The cases cited by plaintiffs are inapposite for two reasons. First, in many of them, the court imposed a duty to inform at least in part because further information was necessary to correct a previous misstatement or to avoid misleading participants. *See, e.g., Estate of Becker v. Eastman Kodak Co.,* 120 F.3d 5, 10 (2d Cir. 1997) (relying in part on the "materially misleading information" provided by a "benefits counselor" to conclude "that Kodak breached its fiduciary duty to provide Becker with complete and accurate information about her retirement options"). Second, all of the cases cited by plaintiffs relate to administrative, not investment, matters such as participants' eligibility for defined benefits or the calculation of such benefits; none require plan fiduciaries to disclose nonpublic information regarding the expected performance of a plan investment option. *See, e.g., Devlin v. Empire Blue Cross & Blue Shield,* 274 F.3d 76, 88–89 (2d Cir. 2001) (holding that an employer may be liable for misstatements or omissions about the availability of lifetime life insurance benefits); *Estate of Becker,* 120 F.3d at 9–10 (imposing liability based on an employer's providing misleading information about participants' eligibility for lump-sum retirement benefits).

We decline to broaden the application of these cases to create a duty to provide participants with nonpublic information pertaining to specific investment options.[10] ESOP fiduciaries do "not have a duty to give investment advice or to opine on the stock's condition." *Edgar,* 503 F.3d at 350 (internal quotation marks omitted). We agree with the district court that such a requirement would improperly "transform fiduciaries into investment advisors." *In re Citigroup ERISA Litig.,* 2009 WL 2762708, at *22. Here, the Administration Committee provided adequate warning that the Stock Fund was an undiversified investment subject to volatility and that Plan participants would be well advised to diversify their retirement savings. Even assuming that they had the ability to do so, defendants had no duty to communicate a forecast as to when this volatility would manifest itself in a sharp decline in stock price.

B. *Misrepresentations*

Plaintiffs next argue that, even if defendants had no affirmative duty to provide information regarding Plan investments, they nevertheless breached their duty of loyalty by making misrepresentations as to the expected performance of Citigroup stock. ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." *Varity Corp. v. Howe,* 516 U.S. 489, 506 (1996) (quoting 29 U.S.C. § 1104(a)(1)). Because "lying is inconsistent with the duty of loyalty," ERISA fiduciaries violate this duty when they "participate knowingly and significantly in deceiving a plan's beneficiaries." *Id.; see also Bouboulis v.*

[10] Although the dissent would hold that ERISA fiduciaries have an affirmative duty to disclose material information to plan participants, Judge Straub acknowledges that ERISA does not explicitly impose such a duty.

Transp. Workers Union of Am., 442 F.3d 55, 66 (2d Cir. 2006).

Plaintiffs assert misrepresentation claims against Citigroup, Prince, and the Administration Committee. We hold that Citigroup and Prince were not acting in a fiduciary capacity when making the statements alleged in the complaint, and that the complaint does not adequately allege that the Administration Committee knew that it was making false or misleading statements.

1. *Citigroup and Prince*

Plaintiffs allege that Citigroup and Prince "regularly communicated" with Plan participants about Citigroup's expected performance. They argue that Citigroup and Prince may be held liable, under ERISA, for these communications because they "intentionally connected" their statements to Plan benefits. This argument fails because neither Citigroup nor Prince was a Plan administrator responsible for communicating with Plan participants. Therefore, neither acted as a Plan fiduciary when making the statements at issue.

Plaintiffs rely on the Supreme Court's decision in *Varity Corp. v. Howe,* 516 U.S. 489 (1996), in which the Court found an employer liable for misstatements made to plan participants in part because the employer "intentionally connected" its statements to "the future of [plan] benefits." *Id.* at 505. Plaintiffs, however, overlook that the employer in *Varity* was *also* the plan administrator, *id.* at 491, and that only the plan administrator is responsible for meeting ERISA's disclosure requirements and therefore for communicating with Plan participants. 29 U.S.C. § 1132(c). That the employer in *Varity* "intentionally connected" its statements to plan benefits highlighted that it acted as a plan administrator and fiduciary—and not merely an employer—when making the statements in question. *Cf. Amato v. W. Union Int'l,* 773 F.2d 1402, 1416–17 (2d Cir. 1985) (stating that an employer is only liable under ERISA for actions it takes while acting as an ERISA fiduciary), *abrogated on other grounds by Mead Corp. v. Tilley,* 490 U.S. 714, 721 (1989). Here, Citigroup and Prince were not Plan administrators and were not responsible for communicating with Plan participants.[11] Citigroup and Prince therefore spoke to Plan participants as employers and not as Plan fiduciaries. They cannot be held liable, at least under ERISA, for any alleged

[11] The dissent contends that Citigroup and Prince acted as fiduciaries because they "intentionally connected" their statements about Citigroup's financial health and stock performance to the likely future of Plan benefits. Dissent at [69a] (quoting *Varity,* 516 U.S. at 505). We disagree with the dissent's characterization of the facts alleged here. The employer in *Varity* transferred all of its money-losing divisions into a newly created subsidiary that was destined to fail, and induced its employees to switch employers to the subsidiary by falsely assuring them that their benefits would remain secure. 516 U.S. at 492–94. The parent corporation therefore "*intentionally* connected its statements about [the subsidiary's] financial health to statements it made about the future of benefits," which "in that context [was] an act of plan administration." *Id.* at 505 (emphasis in original). Plaintiffs, by contrast, allege only that Citigroup generally encouraged its employees—"and thus Plan participants"—to invest in Citigroup stock. Compl. ¶ 198. These allegations do not suggest the kind of intentional connection the Supreme Court relied on to find a fiduciary relationship in *Varity*.

misstatements made to Citigroup employees.

2. *Administration Committee*

Plaintiffs also do not state a claim for relief based on alleged misstatements made by the Administration Committee because they have not adequately alleged that defendants made statements they *knew* to be false. Plaintiffs allege that both Plans' Summary Plan Descriptions (SPDs), distributed by the Administration Committee, "directed the Plans' participants to rely on Citigroup's filings with the SEC ..., many of which ... were materially false and misleading." Compl. ¶ 197. Plaintiffs state that the SEC filings all "failed to adequately inform participants of the true magnitude of the Company's involvement in subprime lending and other improper business practices ..., and the risks these presented to the Company." Compl. ¶ 237.

A fiduciary, however, may only be held liable for misstatements when "the fiduciary knows those statements are false or lack a reasonable basis in fact." *See Flanigan v. Gen. Elec. Co.,* 242 F.3d 78, 84 (2d Cir. 2001). Here, while plaintiffs conclude that the Committee members "knew or should have known about Citigroup's massive subprime exposure as a result of their responsibilities as fiduciaries of the Plans," Compl. ¶ 188, they have provided no specific allegations beyond this "naked assertion," *Twombly,* 550 U.S. at 557.

Plaintiffs are also unable to support their argument that the Administration Committee members should have known of the misstatements because they should have performed an independent investigation of the accuracy of Citigroup's SEC filings. While we cannot rule out that such an investigation may be warranted in some cases, plaintiffs have not alleged facts that, without the benefit of hindsight, show that it was warranted here. Plaintiffs have not alleged that there were any "warning flags," specific to Citigroup, that triggered the need for an investigation. Rather, plaintiffs provide a list of publicly available articles and news reports that signaled potential trouble in the subprime market as a whole.

We are also mindful that requiring Plan fiduciaries to perform an independent investigation of SEC filings would increase the already-substantial burden borne by ERISA fiduciaries and would arguably contravene Congress's intent "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert,* 130 S.Ct. 1640, 1649 (2010) (quoting *Varity,* 516 U.S. at 497 (alterations in original)). Furthermore, we are hesitant to "run the risk of disturbing the carefully delineated corporate disclosure laws." *Baker v. Kingsley,* 387 F.3d 649, 662 (7th Cir. 2004). While we have the authority to create a "common law of rights and obligations" under ERISA, "the scope of permissible judicial innovation is narrower in areas where other federal actors are engaged." *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 831–32 (2003) (internal quotation marks and citation omitted). Accordingly, while we intimate no view as to the possible investigatory responsibilities of other fiduciaries who are privy to additional "warning" signs or who are operating under substantially different circumstances, in the situation presented here we decline to hold that the Plan fiduciaries were required to perform an independent investigation of SEC filings before incorporating them into the SPDs.

III. PLAINTIFFS' REMAINING CLAIMS

Plaintiffs also assert claims that (1) Citigroup and the Director Defendants failed to properly monitor their fiduciary co-defendants (Count III); (2) the same defendants failed to share information with their co-fiduciaries (Count IV); (3) all defendants breached their duty to avoid conflicts of interest (Count V); and (4) Citigroup, Citibank, and the Director Defendants are liable as co-fiduciaries (Count VI). Plaintiffs do not contest that Counts III, IV, and VI cannot stand if plaintiffs fail to state a claim for relief on Counts I or II. Accordingly, we affirm the district court's dismissal of these counts.

Count V appears to be based entirely on the fact that the compensation of some of the fiduciaries was tied to the performance of Citigroup stock and that Prince and Robert Rubin, another Director Defendant, sold some of their Citigroup stock during the Class Period. Plaintiffs do not allege any specific facts suggesting that defendants' investments in Citigroup stock prompted them to act against the interests of Plan participants. Under plaintiffs' reasoning, almost no corporate manager could ever serve as a fiduciary of his company's Plan. There simply is no evidence that Congress intended such a severe interpretation of the duty of loyalty. We agree with the many courts that have refused to hold that a conflict of interest claim can be based solely on the fact that an ERISA fiduciary's compensation was linked to the company's stock. *See, e.g., In re Polaroid ERISA Litig.,* 362 F.Supp. 2d 461, 477 (S.D.N.Y. 2005); *In re WorldCom, Inc. ERISA Litig.,* 263 F.Supp.2d 745, 768 (S.D.N.Y. 2003). Accordingly, we affirm the judgment of the district court insofar as it held that plaintiffs failed to state a claim for relief on Count V.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of plaintiffs' complaint.

STRAUB, Circuit Judge, concurring in part and dissenting in part:

The August 2007 collapse of the $2 trillion subprime[1] mortgage market unleashed "a global contagion,"[2] the virulence of which is well demonstrated by plaintiffs' allegations in this case.

Plaintiffs are current and former employees of Citigroup who invested years of savings in their employer's retirement Plans. They did so at the cajoling of Citigroup and the other named defendants, who, according to plaintiffs, repeatedly and materially misrepresented Citigroup's dismal financial outlook and its massive subprime exposure. Defendants allegedly knew or should have known that Citigroup

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[1] To oversimplify, the subprime crisis may be summarized as follows. Beginning in approximately 2001, many mortgage lenders approved loans for borrowers who did not qualify for prime interest rates; many of these loans were "hybrid adjustable rate mortgages," which provided a fixed rate of interest for an introductory period, after which the rate would "balloon." Financial institutions packaged these mortgages into mortgage-backed securities, which were then sold to investors. By 2006, home prices began to drop while interest rates rose. As a result, many borrowers could neither pay their existing mortgages nor refinance at favorable rates. Delinquencies and foreclosures thus increased, and the value of mortgage-backed securities dropped precipitously. Banks and other investors that were overly exposed to such investments faced the threat of collapse. *See generally* Compl. ¶¶ 108–34, 189; Majority Staff of the Joint Economic Comm. of the U.S. Cong., The Subprime Lending Crisis (2007), *available at* http://jec.senate.gov/archive/Documents/Reports/10.25.07OctoberSubprimeReport.pdf. *See also Litwin v. Blackstone Group, L.P.,* 634 F.3d 706, 710 (2d Cir. 2011).

[2] Andrew Ross Sorkin, *Too Big to Fail* 5 (2010).

stock was an imprudent investment, but nonetheless permitted and encouraged the Plans to hold and to acquire billions of dollars in Citigroup stock. As Citigroup's "dire financial condition was revealed," its price per share declined by over 74% in a little over one year—a loss in market value of over $200 billion. Compl. ¶ 175. According to plaintiffs, their retirement Plans suffered enormous losses during the relevant time period.

Today's majority opinion ensures that such losses will go remediless. It thus represents both an alarming dilution of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.,* and a windfall for fiduciaries, who may now avail themselves of the corporate benefits of employee stock ownership plans ("ESOPs") without being burdened by the costs of complying with the statutorily mandated obligation of prudence.

In affirming the District Court's dismissal of plaintiffs' Prudence Claim, the majority holds that defendants' decisions to invest in employer stock are entitled to a presumption of prudence. According to the majority, plaintiffs can overcome the presumption only through allegations, accepted as true, that would establish that the employer was in a "dire situation." Maj. Op. at [18a] (internal quotations omitted). Such arbitrary line-drawing leaves employees wholly unprotected from fiduciaries' careless decisions to invest in employer securities so long as the employer's "situation" is just shy of "dire"—a standard that the majority neglects to define in any meaningful way. But the duty of prudence does not wax and wane depending on circumstance; ERISA fiduciaries must act prudently at all times, and those who are derelict must be subject to accountability. Because I find no justification for cloaking fiduciaries' investment decisions in a mantle of presumptive prudence, I must respectfully dissent.

The majority next affirms the District Court's dismissal of plaintiffs' Communication Claim. Because I find the Communication Claim to be adequately stated, I dissent from this holding as well.

The majority also affirms the dismissal of Counts III (failure to monitor), IV (failure to disclose information to co-fiduciaries), and VI (co-fiduciary liability) for the same reasons it affirmed the dismissal of the Prudence and Communication Claims. Because I conclude that dismissal of the Prudence and Communication Claims was improper, I also dissent with respect to Counts III, IV, and VI.

Finally, the majority affirms the dismissal of Count V, in which plaintiffs allege that all defendants breached their duty to avoid conflicts of interest by receiving compensation tied to the performance of Citigroup stock. I agree that this claim was properly dismissed. I thus join the majority for this part of the opinion only.

IV. EVIDENCE CLAIM

The majority affirms the District Court's dismissal of plaintiffs' Prudence Claim, in which plaintiffs allege (a) that the Investment Committee, the Administration Committee, Citigroup, and Citibank knew or should have known that Citigroup stock was an imprudent investment; and (b) that the foregoing defendants thus breached their fiduciary duties by, among other things, continuing to offer as an investment option the Citigroup Common Stock Fund (the "Fund"), which consisted mostly of Citigroup common stock.

I conclude that plaintiffs' allegations are sufficient to state a claim against the Investment and Administration Committees for breach of the duty of prudence. I thus respectfully dissent.

A. **Moench**–***Type Deference Should Not Apply***

The District Court concluded that defendants, in offering the Fund to Plan participants as an investment option, were entitled to a presumption that they did so prudently. *In re Citigroup ERISA Litig.,* No. 07 Civ. 9790, 2009 WL 2762708, at *1, 15–19 (S.D.N.Y. Aug. 31, 2009). By upholding this ruling, the majority aligns our Court with those that have embraced the doctrine articulated in *Moench v. Robertson,* 62 F.3d 553, 571 (3d Cir. 1995), *cert. denied,* 516 U.S. 1115 (1996). *See, e.g., Quan v. Computer Scis. Corp.,* 623 F.3d 870, 881 (9th Cir. 2010); *Kirschbaum v. Reliant Energy, Inc.,* 526 F.3d 243, 254 (5th Cir. 2008); *Kuper v. Iovenko,* 66 F.3d 1447, 1459 (6th Cir. 1995).

Because I find the underpinnings of the *Moench* presumption to be fundamentally unsound, I decline the invitation to adopt it as a rule of law in our Circuit. As a practical matter, *Moench*-type deference to the investment decisions of an ESOP fiduciary renders moot ERISA's "prudent man" standard of conduct, 29 U.S.C. § 1104(a)(1). Of course, policy concerns sometimes justify divergence between standards of conduct—in other words, how actors should conduct themselves—and standards of review—in other words, the manner in which courts evaluate whether challenged conduct gives rise to liability. But in my view, the policy concerns underlying the *Moench* decision warrant no such divergence. I would preserve the statutorily mandated standard of prudence by calling for plenary, rather than deferential, review of an ESOP fiduciary's investment decisions.

1. ERISA's Prudent Man Standard of Conduct

ERISA was designed to ensure "the continued well-being and security of millions of employees and their dependents" through the regulation of employee benefit plans. *See* 29 U.S.C. § 1001(a). *See also Varity Corp. v. Howe,* 516 U.S. 489, 496 (1996). The statute thus imposes stringent standards of conduct upon fiduciaries who oversee such plans. *See* 29 U.S.C. § 1001(b). Indeed, we have said that ERISA's fiduciary standards of conduct are "'the highest known to the law.'" *LaScala v. Scrufari,* 479 F.3d 213, 219 (2d Cir. 2007) (quoting *Donovan v. Bierwirth,* 680 F.2d 263, 272 n. 8 (2d Cir.), *cert. denied,* 459 U.S. 1069 (1982)). Of particular relevance here is the ERISA fiduciary's duty to act in accordance with the "prudent man" standard of conduct—that is, "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Although this standard is rooted in the common law of trusts, ERISA's standard is "more exacting." *Donovan v. Mazzola,* 716 F.2d 1226, 1231 (9th Cir. 1983).

ERISA allows for the creation of ESOPs, which are "designed to invest primarily in qualifying employer securities." 29 U.S.C. § 1107(d)(6)(A). To fulfill this purpose, ESOP fiduciaries are exempt from certain standards of conduct that apply to other kinds of ERISA plans. For example, although fiduciaries of pension benefit plans generally must diversify investments so as to minimize risk, *see id.* § 1104(a)(1)(C), ESOP fiduciaries need not do so. Specifically, section 404(a)(2) of ERISA provides that "the diversification requirement ... and the prudence requirement (only to the extent that it requires diversification) ... is not violated by acquisition or holding of ... qualifying employer securities." *Id.* § 1104(a)(2). ESOP fiduciaries are also exempted from ERISA's prohibition against dealing with a party in interest. *Id.* § 1106(b)(1). But they are not otherwise excused from the stringent "prudent man" standard that governs fiduciary conduct under typical ERISA plans. *See, e.g., Quan,* 623 F.3d at 878; *Moench,* 62 F.3d at 569; *Fink v. Nat'l Sav. & Trust Co.,* 772 F.2d 951, 955 (D.C.Cir. 1985).

2. Policy Justifications for Deferential Standards of Review

Whether a standard of *conduct*—such as ERISA's "prudent man" standard—is judicially enforced turns on the standard of *review* used to test the legality of the conduct at issue. In many contexts, the two standards are aligned. For instance, "the standard of conduct that governs automobile drivers is that they should drive carefully, and the standard of review in a liability claim against a driver is whether he drove carefully." Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law,* 62 Fordham L. Rev. 437, 437 (1993) (internal footnote omitted). In such instances, the governing standard of conduct retains its bite.

In other areas of the law, however, "prudential judgment" counsels in favor of adopting a standard of review that is more lenient than the applicable standard of conduct. *See id.* Corporate law provides a useful example. As a normative matter, directors of a corporation are generally expected to perform their functions in good faith, and with the degree of care that an ordinarily prudent person in a like position would use under similar circumstances. *See, e.g.,* N.Y. Bus. Corp. Law § 717(a). This standard of conduct is "fairly demanding," but the standard of review used to test whether directors are liable for violating the duty of due care is "less stringent." *See* Eisenberg, *supra,* at 441. Under the business judgment rule, directors are entitled to a presumption that, in making a business decision, they acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. *See, e.g., Dist. Lodge 26, Int'l Ass'n of Machinists & Aerospace Workers, AFL–CIO v. United Techs. Corp.,* 610 F.3d 44, 52 (2d Cir. 2010).

Considerations of "fairness and policy" led to the adoption of this deferential standard. Eisenberg, *supra,* at 443. Business judgments are often "made on the basis of incomplete information and in the face of obvious risks." *Id.* at 444. A reasonableness standard of review could thus discourage directors from making "bold but desirable decisions," and might even deter directors from serving at all. *Id.* In addition, "courts are ill-equipped to determine after the fact whether a particular business decision was reasonable" under the circumstances. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem,* 96 N.W. U. L. Rev. 449, 452 (2002). Examining directors' decisions under a standard of review that is more lenient than the relevant standard of conduct thus "furthers important public policy values." *Id.* at 449.

3. Policy Considerations Do Not Warrant Deferential Review of ESOP Fiduciaries' Investment Decisions

I am not persuaded that considerations of public policy require *Moench*-type deference to the investment decisions of ESOP fiduciaries, which results in an emasculation of ERISA's "prudent man" standard of conduct.

a. The Moench *Court's Policy Considerations*

The named plaintiff in *Moench* alleged that the fiduciaries of his ESOP breached ERISA standards of conduct by continuing to invest in employer stock despite the deterioration of the employer's financial condition. *See Moench,* 62 F.3d at 558–59. For our purposes, the issue in *Moench* was what standard of review is appropriate to test the fiduciaries' liability for their investment decisions. *See id.* at 568. *See also Edgar v. Avaya, Inc.,* 503 F.3d 340, 346 (3d Cir. 2007).

To answer this question, the *Moench* court first considered the special status of ESOPs under ERISA. *Moench,* 62 F.3d at 568. Specifically, the court noted that ESOP fiduciaries are exempt from ERISA's duty to diversify, and from the statute's prohibition against dealing with a party in interest. *Id.* (discussing the exemptions under 29 U.S.C. §§ 1104(a)(2) and 1108(b)(1).) The court explained that these exemptions "arise [ ] out of the nature and purpose of ESOPs themselves," *id.,* which is "to 'invest primarily in qualifying employer securities,'" *Edgar,* 503 F.3d at 346 (quoting 29 U.S.C. § 1107(d)(6)(A)). That ESOPs are undiversified means that they place participants' retirement assets "at much greater risk" than other ERISA plans. *Moench,* 62 F.3d at 568 (internal quotations omitted). But Congress did not intend ESOPs to *guarantee* retirement benefits. *Id.* Rather, Congress intended that ESOPs would function as both employee retirement benefit plans and as a "technique of corporate finance that would encourage employee ownership." *Id.* at 569 (internal quotations omitted). Notwithstanding ESOPs' unique status, the *Moench* court emphasized that ESOP fiduciaries are still required to act in accordance with ERISA's standards of prudence and loyalty. *See Moench,* 62 F.3d at 569; *see also Edgar,* 503 F.3d at 346.

According to the *Moench* court, the appropriate standard of review was thus one that would preserve a balance between, on the one hand, the goals of ESOPs, and on the other, ERISA's stringent fiduciary duties. In short, the appropriate standard of review would ensure that "competent fiduciaries" would not be deterred from service, and "unscrupulous ones" would not be given "license to steal." *Moench,* 62 F.3d at 569 (internal quotations omitted).

The court rejected plenary review as destructive of such balancing. *See id.* at 570. The court reasoned that "strict judicial scrutiny" of fiduciaries' investment decisions "would render meaningless the ERISA provision excepting ESOPs from the duty to diversify." *Id.* In addition, the court feared that plenary review "would risk transforming ESOPs into ordinary pension benefit plans," which would frustrate Congress's desire to facilitate employee ownership. *Id.* "After all," the court asked, "why would an employer establish an ESOP if its compliance with the purpose and terms of the plan could subject it to strict judicial second-guessing?" *Id.* Finally, the court looked to the common law of trusts, which requires that interpretation of trust terms be controlled by the settlor's intent. *Moench v. Robertson,* 62 F.3d 553, 570 (3d Cir. 1995). "That principle is not well served in the long run by ignoring the general intent behind such plans in favor of giving beneficiaries the maximum opportunities to recover their losses." *Id.*

To fashion the appropriate standard of review, the court again found guidance in the common law of trusts. *See id.* at 571. According to *Moench,* where a trust instrument "requires" the trustee to invest in a particular stock, the trustee is generally "immune from judicial inquiry," *id., see also Edgar,* 503 F.3d at 346, but where the instrument merely "permits" a particular investment, trust law calls for plenary review of the investment decision, *id.* The fiduciaries in *Moench* were not "required" to invest in employer securities, but they were "more than simply permitted to make such investments." *Moench,* 62 F.3d at 571. The court therefore determined that an "intermediate abuse of discretion standard would strike the appropriate balance between immunity from judicial review, at one extreme, and de novo review, at the other." *Edgar,* 503 F.3d at 347; *see also Moench,* 62 F.3d at 571 ("[T]he most logical result is that the fiduciary's decision to continue investing in employer securities should be reviewed for an abuse of discretion.").

Pursuant to this deferential review, an ESOP fiduciary who invests plan assets in employer stock "is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities." *Moench,* 62 F.3d at 571. To do so, plaintiffs must show that the fiduciaries "could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate." *Id.* Thus, plaintiffs may introduce evidence to the effect that, "owing to circumstances not known to the settlor and not anticipated by him," investing in employer securities "would defeat or substantially impair the accomplishment of the purposes of the trust."[3] *Id.* (internal quotations

[3] The majority here states that "only circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms." Maj. Op. at [18a] (quoting *Edgar*, 503 F.3d at 348).

omitted).

b. The Moench *Court's Policy Considerations Are Insufficient to Justify Adopting Deferential Review*

The question remains whether the policy concerns articulated in *Moench*—and reiterated by the majority here—warrant our adoption of a standard of review that is more lenient than ERISA's "prudent man" standard of conduct. I answer that question in the negative.

i. Moench *Deference Does Not Appropriately Balance ERISA's Competing Values*

In my view, the *Moench* presumption strikes no acceptable "accommodation," (Maj. Op. at [14a]), between the competing ERISA values of protecting employees' retirement assets and encouraging investment in employer stock. The majority favorably cites to decisions that note that the *Moench* presumption "would be difficult to rebut,"[4] and that refer to the presumption as a "substantial shield"[5] to fiduciary liability. As these authorities implicitly acknowledge, the *Moench* presumption precludes, in the ordinary course, judicial enforcement of the prudent man standard of conduct. In a case that was argued in tandem with the instant matter,[6] the Secre-

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[4] *Quan v. Computer Scis. Corp.,* 623 F.3d 870, 883 (9th Cir. 2010).

[5] *Kirschbaum v. Reliant Energy, Inc*., 526 F.3d 243, 256 (5th Cir. 2008).

[6] The Court decided the *Gearren* matter in a separate, per curiam opinion filed today. *See Gearren v. McGraw–Hill Cos.*, 660 F.3d 605 (2d Cir. 2011) (per curiam).

tary of Labor noted that the *Moench* presumption relegates the duty of prudence to protecting employees only "from the complete loss of their assets in the wake of a company's collapse," thereby "leaving them otherwise unprotected from the careless management of plan assets." Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs–Appellants, *Gearren v. McGraw–Hill Cos.,* (2d Cir. June 4, 2010) (No. 10–792–cv), 2010 WL 2601687, at *20. This cannot be what Congress envisioned when it enacted ERISA. *Cf. ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.,* 846 F.2d 879, 885 (2d Cir. 1988) (citing *IUE AFL–CIO Pension Fund v. Barker & Williamson, Inc.,* 788 F.2d 118, 127 (3d Cir. 1986) for the proposition that ERISA, as a remedial statute, "should be liberally construed in favor of protecting the participants in employee benefits plans" (internal quotations omitted)). "ERISA is paternalistic," *Van Boxel v. Journal Co. Emps.' Pension Trust,* 836 F.2d 1048, 1052 (7th Cir. 1987), and it is thus incongruous to deny participants meaningful judicial review on the theory that investment in employer stock should be encouraged.

The statutory structure further demonstrates the impropriety of *Moench*'s "accommodation." ESOPs are merely one type of benefit plan under the broader ERISA framework. That they are exempt from certain of ERISA's standards of conduct does not mean that the policies favoring ESOPs should override the policies of ERISA. Indeed, when a general statutory policy is qualified by an exception, courts generally read " 'the exception narrowly in order to preserve the primary operation of the [policy].' " *John Hancock Mut. Life Ins. Co. v. Harris Trust &*

Sav. Bank, 510 U.S. 86, 97 (1993) (parenthetically quoting *Comm'r of Internal Revenue v. Clark,* 489 U.S. 726, 739–40 (1989)). Accordingly, the investment decisions of ESOP fiduciaries must be "subject to the closest scrutiny under the prudent person rule, in spite of the strong policy and preference in favor of investment in employer stock." *Fink v. Nat'l Sav. & Trust Co.,* 772 F.2d 951, 955–56 (D.C.Cir. 1985) (internal quotations omitted); *see also Eaves v. Penn,* 587 F.2d 453, 460 (10th Cir. 1978) ("ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments.").

Had Congress intended to accommodate ERISA's competing values by requiring deferential review of ESOP fiduciaries' decisions, it could have provided for that result. *See, e.g.,* 5 U.S.C. § 706(2)(A) (Administrative Procedure Act) (establishing a deferential standard of review over agency determinations).

ii. Plenary Review Would Not Deter ESOP Formation

I further reject the *Moench* court's assertion, echoed by the majority here, that plenary review of a fiduciary's investment decisions would spell doomsday for the ESOP institution. *See Moench,* 62 F.3d at 570; Maj. Op. at [15a-16a]**.** ESOPs (under ERISA) had been in existence for more than twenty years before the Court of Appeals for the Third Circuit issued its decision in *Moench.* I have seen no evidence that plenary review during that time or thereafter[7] re-

[7] See, e.g., *Howard v. Shay*, 100 F.3d 1484, 1488–89 (9th Cir. 1996) (undertaking plenary review of ESOP fiduciary's

sulted in ESOP termination, or deterred ESOP formation. ESOP growth apparently slowed in the early 1990s. But commentators (including the ESOP Association, an amicus here) attribute the subsidence to legislative and market factors—not to fiduciaries' fears of being subjected to a particular brand of judicial review.[8]

The *Moench* court questioned why an employer would "establish an ESOP if its compliance with the purpose and terms of the plan could subject it to strict judicial second-guessing[.]" *Moench,* 62 F.3d at 570. But the incentives for ESOP creation are well documented. First, corporations often establish ESOPs to help raise funds, which can then be used, for example, to provide working capital or to buy out large shareholders. *See* Michael E. Murphy, *The ESOP at Thirty: A Democratic Perspective,* 41 Willamette L.Rev. 655, 664 (2005). Second, ESOPs confer significant tax advantages on employers.[9]

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conduct); *Eyler v. Comm'r of Internal Revenue*, 88 F.3d 445, 454–56 (7th Cir. 1996) (same); Donovan v. Cunningham, 716 F.2d 1455, 1473–74 (5th Cir. 1983) (same); *Burud v. Acme Elec. Co., Inc.*, 591 F.Supp. 238, 248 (D.Alaska 1984) ("There are no statutory or federal common law presumptions cloaking the fiduciary's act in prudence. To the contrary, ERISA invites the closest scrutiny of a trustee's action.").

[8] *See, e.g., ESOP Statistics,* ESOP ASSOCIATION, http://www.esopassociation.org/media/media_statistics.asp (last visited Aug. 11, 2011) (noting that the "rapid increase in new ESOPs in the late 1980s subsided after Congress removed certain tax incentives in 1989"); *see also* Michael E. Murphy, *The ESOP at Thirty: A Democratic Perspective,* 41 WILLAMETTE L.REV. 655, 661 n. 42 (2005).

[9] As the ESOP Association notes, "[t]he amounts which may be contributed to an ESOP on a tax-deductible basis are higher

Third, employers use ESOPs to accomplish various business objectives, including management entrenchment (by placing large amounts of stock in friendly hands), and avoiding hostile takeovers (by purchasing publicly held shares of employer stock as a defensive measure). *See* Aditi Bagchi, *Varieties of Employee Ownership: Some Unintended Consequences of Corporate Law and Labor Law,* 10 U. Pa. J. Bus. & Emp. L.. 305, 317 (2008).

In light of these, and other incentives, some commentators note that ESOPs have "been used more to the advantage of the firm than its employees." *Id.* at 316 (internal quotations omitted). I thus find implausible the suggestion that plenary review of fiduciaries' investment decisions would suddenly deter ESOP formation or lead to widespread plan termination.

iii. Plenary Review Would Not Render ESOP Fiduciaries "Guarantors"

I also disagree with the contention that plenary review of the prudence of fiduciaries' investment decisions would transform fiduciaries into "virtual guarantors of the financial success of the [ESOP]," *Moench,* 62 F.3d at 570 (alteration in original) (internal quotations omitted); *see also* Maj. Op. at [15a]

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than the amounts which may be contributed to other kinds of defined contribution plans." Brief for the ESOP Association as Amicus Curiae Supporting Defendants–Appellees, at 8–9 n. 5 (citing I.R.C. § 404(a)(9)). In addition, corporations that use ESOPs to obtain loans may take tax deductions with respect to both the interest *and* the principal payments on the loan. *Id.* (citing I.R.C. § 404(a)(3), (9)). Employers may also deduct certain dividends paid on ESOP stock. *See* I.R.C. § 404(k).

(stating that absent deferential review, "fiduciaries would be equally vulnerable to suit either for not selling if they adhered to the plan's terms and the company stock decreased in value, or for deviating from the plan by selling if the stock later increased in value").

The foregoing arguments misperceive the nature of the prudence inquiry, and the effect of plenary review. The test of prudence is one of *conduct,* not *results. See Bunch v. W.R. Grace & Co.,* 555 F.3d 1, 7–8 (1st Cir. 2009). Accordingly, whether a fiduciary acted prudently at the time he engaged in a challenged transaction turns on whether he "employed the appropriate methods to investigate the merits of the investment." *Flanigan v. Gen. Elec. Co.,* 242 F.3d 78, 86 (2d Cir. 2001) (internal quotations omitted). A fiduciary who discharges his duty of prudence will not be liable merely because the investment ultimately fails, *see DiFelice v. U.S. Airways Inc.,* 497 F.3d 410, 424 (4th Cir. 2007), just as a surgeon who abides by the applicable standard of care will not be liable in negligence merely because his patient expires on the operating table. In short, the duty of prudence—which is concerned with conduct—does not require a fiduciary to become a guarantor—who is concerned with results. *See DeBruyne v. Equitable Life Assurance Soc'y of the U.S.,* 920 F.2d 457, 465 (7th Cir. 1990). Plenary review could not possibly alter that dichotomy, because the basis for liability is a breach of the duty of prudence, which is not a "guarantee but a standard of conduct that Congress imposed and that the fiduciary can satisfy by acting reasonably." *Roth v. Sawyer–Cleator Lumber Co.,* 16 F.3d 915, 920 (8th Cir. 1994).

iv. Plenary Review Would Not Render Meaningless ESOPs' Exemption From The Duty To Diversify

I further disagree with the contention that plenary review of fiduciaries' investment decisions would read the diversification exemption out of ERISA. *See Moench v. Robertson*, 62 F.3d 553, 570 (3d Cir. 1995). As previously noted, ERISA provides that "the diversification requirement ... and the prudence requirement (*only to the extent that it requires diversification*) ... is not violated by acquisition or holding of ... qualifying employer securities." 29 U.S.C. § 1104(a)(2) (emphasis added). The exemption thus allows ESOP fiduciaries to be "released from certain *per se* violations on investments in employer securities." *Eaves,* 587 F.2d at 459.

Of course, the absence of a general diversification duty from the ESOP setting does not eliminate fiduciaries' duty of prudence. *See* 29 U.S.C. § 1104(a)(2); *Armstrong v. LaSalle Bank Nat'l Ass'n,* 446 F.3d 728, 732 (7th Cir. 2006). An ESOP fiduciary may invest plan assets in employer securities so long as it remains prudent to do so. *See id.* And plenary review of that question—*i.e.,* of the *prudence* of a fiduciary's investment decisions—simply has no impact on the continued viability of ESOPs' statutory exemption from *per se* liability for the failure to diversify. The Secretary of Labor, in her amicus brief, explains the distinction well:

> The plaintiffs here ... do not base their claims on the failure to diversify holdings of an otherwise prudent investment. Instead, they assert that the market was being misled to overvalue the stock, and that the plan's fidu-

> ciaries continued to purchase and hold the stock anyway. Diversification is not the issue; it was imprudent for the fiduciaries to knowingly buy even a single share at an inflated price.

Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs–Appellants, *In re Citigroup ERISA Litig.,* (2d Cir. Dec. 28, 2009) (No. 09–3804–cv), 2009 WL 7768350, at *15 n. 2.

In other words, although in the ESOP context there is no duty to diversify *as such,* there is still a duty of prudence. "And in particular cases," the duty of prudence "might ... become a duty to diversify, even though failure to diversify an ESOP's assets *is not imprudence per se.*" *Steinman v. Hicks,* 352 F.3d 1101, 1106 (7th Cir. 2003) (emphasis added). Accordingly, whether courts evaluate the *prudence* of fiduciaries' conduct under plenary review does not endanger ESOPs' statutory exemption from *per se* liability for the failure to diversify.

4. Summary

In sum, I cannot join in the majority's adoption of the *Moench* presumption, which is premised on indefensible policy concerns, and which, contrary to the congressionally enacted purposes of the Employee Retirement Income Security Act, greatly imperils the security of employees' retirement incomes.

Because I decline to adopt the presumption, I need not opine on its application to this case. Instead, I would hold that the sufficiency of plaintiffs' Prudence Claim must be evaluated under plenary review. I now undertake that evaluation.

B. The District Court Erred In Dismissing Plaintiffs' Prudence Claim

1. Applicable Law

To state a claim for breach of fiduciary duty under ERISA, plaintiffs must adequately allege that defendants were plan fiduciaries who, while acting in that capacity, engaged in conduct constituting a breach of fiduciary duty under ERISA. *See* 29 U.S.C. § 1109; *Pegram v. Herdrich,* 530 U.S. 211, 222–24 (2000). I agree with the majority that plaintiffs sufficiently alleged that the Investment Committee and the Administration Committee were ERISA fiduciaries with respect to plaintiffs' ability to invest through the Plans in Citigroup stock. Accordingly, I turn now to whether plaintiffs' allegations, accepted as true, would render it plausible that these defendants, acting in their fiduciary capacities, breached any ERISA-imposed responsibilities, obligations or duties.

As previously noted, an ERISA fiduciary must discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

The court's task in evaluating fiduciary compliance with the prudent man standard is to inquire "whether the individual [fiduciary], at the time [he] engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment."

Flanigan, 242 F.3d at 86 (internal quotations omitted). The question is thus whether the fiduciary acted "reasonably" in light of the facts of which he knew or should have known at the time he engaged in the challenged transaction. *See Roth,* 16 F.3d at 920. "A [fiduciary] who simply ignores changed circumstances that have increased the risk of loss to the trust's beneficiaries is imprudent." *Armstrong,* 446 F.3d at 734.

2. Application of Law to Facts

I would hold that plaintiffs have stated a claim against the Investment and Administration Committees for breach of the duty of prudence.

Plaintiffs' allegations, if true, render it plausible that the Investment and Administration Committees knew about Citigroup's massive subprime exposure. To see why this is so, we must briefly examine (a) plaintiffs' allegations regarding the responsibilities (and membership) of the Investment and Administration Committees, and (b) the broader context of the subprime crisis, as well as Citigroup's prominent role in it.

Pursuant to Plan documents, the Administration Committee was charged with managing the operation and administration of the Plans. The Plans also delegated to the Administration Committee the authority to impose certain restrictions on participants' investment selections. Meanwhile, the Plan documents charged the Investment Committee with, among other things, selecting and monitoring investment options for the Plans; it "had the discretion and authority to suspend, eliminate, or reduce any

Plan investment, including investments in Citigroup stock." Compl. ¶ 69. Plaintiffs explicitly allege that the Investment Committee "regularly exercised its authority to suspend, eliminate, reduce, or restructure Plan investments." *Id.* Given plaintiffs' allegation that, as of 2008, Citigroup was the largest bank in the world in terms of revenue, we may reasonably infer (a) that Citigroup appointed relatively sophisticated businesspersons to staff the Investment Committee (as well as the Administration Committee); and (b) that such relatively sophisticated Investment Committee members would have had at least a basic knowledge of current events and market trends, especially insofar as they related to the selection and monitoring of Plan investments.

Plaintiffs' Complaint contains detailed allegations regarding the growth of subprime lending and Citigroup's ill-fated entry into the subprime marketplace. By 2006 and 2007, reports of an incipient subprime meltdown began to appear in the *Wall Street Journal,* the *New York Times,* the *Financial Times, Bloomberg News,* and *Reuters. Id.* ¶ 189(a)-(y). Plaintiffs allege that the crisis was "foreseeable by at least the end of 2006, given the steady decline in the housing market, ... the plethora of published reports by governmental agencies, real estate and mortgage industries, [and] the media at large." *Id.* ¶ 136.

Citigroup allegedly increased its activity in the subprime and securitization market in early 2005. By November 2007, its subprime exposure "amounted to a staggering $55 billion in at least one of its banking units—almost 30% of what the entire Company was worth at the time." *Id.* ¶ 134. According to plaintiffs, Citigroup reported subprime-related losses of $18.1 billion for the fourth quarter of 2007, and $7.5 billion for the first quarter of 2008. Plaintiffs allege that, as a result of Citigroup's "dire financial condition," its share price declined by over 74% between June 2007 and July 2008—a loss of over $200 billion in market value in a little over one year. *Id.* ¶ 175. The losses sustained during the Class Period of January 1, 2007 through January 15, 2008 allegedly "had an enormous impact on the value of participants' retirement assets," *id.* ¶ 238.

Such allegations support a reasonable inference that the relatively sophisticated members of the Investment Committee—by virtue of their responsibilities as fiduciaries of the Plans—would have had at least some awareness of both Citigroup's massive subprime exposure, and the growing potential for a market-wide crisis. That is, members of the Investment Committee were charged with selecting and monitoring Plan investment options, including Citigroup stock, which was the Plans' single largest asset.[10] It is thus reasonable to infer that in discharging their investment-related duties, Investment Committee members would have informed themselves of material information concerning

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[10] As of December 31, 2007—the day before the commencement of the Class Period—the Citigroup Plan held Citigroup common stock with a fair market value of approximately $2.14 billion; this represented approximately 19% of the total invested assets of the Citigroup Plan for Plan year 2007. As of the same date, the Citibuilder Plan held Citigroup common stock with a fair market value of approximately $4.3 million; this represented approximately 32% of the total invested assets of the Citibuilder Plan for Plan year 2007.

Citigroup's business and operations that was relevant to the appropriateness of investing Plan assets in Citigroup stock. *See In re Coca–Cola Enters. Inc., ERISA Litig.,* No. 06 Civ. 0953, 2007 WL 1810211, at *14 (N.D. Ga. June 20, 2007) (ruling that complaint withstood dismissal where plaintiffs alleged that defendants were "senior" employees "who knew or should have known all material public and nonpublic information concerning [the employer's] business and operations that were relevant to the appropriateness of [the employer's] common stock as a Plan investment" (internal quotations omitted)); *In re Westar Energy, Inc., ERISA Litig.,* No. 03–4032, 2005 WL 2403832, at *25 (D. Kan. Sept. 29, 2005) (ruling that complaint withstood dismissal where plaintiffs alleged that "at least some of the Committee members knew or should have known [of alleged misrepresentations] *based on their status as officers in the Company,* and based on their own conduct" (emphasis added)).

The Complaint's well-pleaded allegations also support a reasonable inference that the Administration Committee knew of Citigroup's "dire financial condition," Compl. ¶ 175. At least one individual, Richard Tazik, apparently served on both the Investment Committee and the Administration Committee during the relevant time period. On the above analysis, it is at least plausible that Mr. Tazik, by virtue of his service on the Investment Committee, knew about Citigroup's subprime exposure. And because Mr. Tazik also allegedly served on the Administration Committee, it is plausible that at least one member of that Committee knew about it as well.

If, in light of this knowledge, reasonably prudent fiduciaries would have taken "meaningful steps to protect the Plans' participants from the inevitable losses ... [that] would ensue as [Citigroup's] non-disclosed material problems ... became public," *id.* ¶ 228, then defendants may have acted imprudently.[11] That, however, is a fact-intensive inquiry ill-suited for resolution at the pleading stage. I would thus vacate the District Court's dismissal and remand for further proceedings.

V. COMMUNICATIONS CLAIM

The majority also affirms the dismissal of plaintiffs' Communications Claim, in which plaintiffs allege that Citigroup, Prince and the Administration Committee breached their fiduciary duty of loyalty (a) by failing to provide complete and accurate information to Plan participants regarding Citigroup's financial condition, and (b) by conveying inaccurate, material information to Plan participants regarding the soundness of Citigroup stock.

For the reasons stated below, I conclude that the District Court should not have dismissed plaintiffs' Communications Claim. I thus respectfully dissent.

A. Duty to Disclose

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[11] *See* 29 C.F.R. § 2550.404a–1(b)(1) (noting that the duty of prudence is satisfied if the fiduciary (i) "[h]as given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment ... and (ii) [h]as acted accordingly.").

In affirming the dismissal of plaintiffs' Communication Claim, the majority holds that ERISA fiduciaries have no duty to provide Plan participants with material information regarding the expected performance of Plan investment options. I find this conclusion to be contrary to the dictates of ERISA.

It is true that ERISA does not explicitly command fiduciaries to disclose such information, and the Supreme Court has not yet opined on whether the statute contemplates a duty to do so, *see Varity Corp. v. Howe,* 516 U.S. 489, 506 (1996) (declining to reach the question). But in enacting ERISA, Congress did not attempt to " 'explicitly enumerat[e] *all* of the powers and duties of [ERISA] fiduciaries.' " *Id.* at 496 (parenthetically quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,* 472 U.S. 559, 570 (1985)). Rather, Congress " 'invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility.' " *Id.* Trust law is thus the "starting point" for our "effort to interpret ERISA's fiduciary duties," after which we "must go on to ask whether ... the language of the statute, its structure, or its purposes require departing from common-law trust requirements." *Varity Corp.,* 516 U.S. at 497.

Pursuant to this approach, I conclude that ERISA fiduciaries "have an affirmative duty to disclose material information that plan participants need to know to adequately protect their interests," Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs–Appellants, *In re Citigroup ERISA Litig.,* (2d Cir. Dec. 28, 2009) (No. 09–3804–cv), 2009 WL 7768350, at *24.

Such a duty is firmly rooted in the common law of trusts. *See Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.,* 93 F.3d 1171, 1180 (3d Cir. 1996). Indeed, the "duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA." *Eddy v. Colonial Life Ins. Co. of Am.,* 919 F.2d 747, 750 (D.C.Cir. 1990). According to the Restatement of Trusts, the trustee "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person."[12] Rest. (Second) of Trusts § 173, cmt. d. *See also, e.g., Globe Woolen Co. v. Utica Gas & Elec. Co.,* 224 N.Y. 483, 489, 121 N.E. 378 (1918) (Cardozo, *J.*) ("A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word.... [A trustee] cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practised eye...."). The duty to disclose thus entails "an affirmative duty to inform when the [fiduciary] knows that silence might be harmful." *Bixler v. Cent. Pa. Teamsters Health–Welfare Fund,* 12 F.3d 1292, 1300 (3d Cir. 1993). It compensates for "the disparity of training and knowledge that potentially exists be-

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[12] And if a fiduciary is required to arm beneficiaries with sufficient information to deal with a "third person," the fiduciary is plainly required to provide sufficient information to allow the beneficiary to deal with the fiduciary himself. *See Glaziers & Glassworkers,* 93 F.3d at 1181 n. 6.

tween a lay beneficiary and a trained fiduciary." *See id.*

Nothing in ERISA warrants a dilution of the common law requirements. In order to comport with the statutory duty of loyalty, an ERISA fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), and for the "exclusive purpose" of "providing benefits to participants and their beneficiaries," *id.* § 1104(a)(1)(A). These provisions incorporate the fiduciary standards of the common law of trusts. *See, e.g., Pegram v. Herdrich,* 530 U.S. 211, 224 (2000); *Bixler,* 12 F.3d at 1300 (citing *Eddy,* 919 F.2d at 750). Yet, ERISA makes the common law requirements even "more exacting." *Donovan v. Mazzola,* 716 F.2d 1226, 1231 (9th Cir. 1983); *see also Varity Corp.,* 516 U.S. at 497 ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."). Indeed, ERISA's legislative history indicates that Congress recognized the importance of disclosure, which it viewed as "a device to impart to employees sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended. It was expected that the information disclosed would enable employees to police their plans." S.Rep. No. 93–127, at 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863. I thus find no basis in ERISA for adopting a disclosure rule that affords beneficiaries *less* protection than they enjoyed at common law. *See Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 113–14 (1989).

In light of the stringent statutory duty of loyalty, our sister courts of appeals have recognized a duty to advise participants of circumstances that severely threaten plan assets, when fiduciaries have reason to know that their silence may be harmful. In *McDonald v. Provident Indemnity Life Insurance Co.,* for example, the Fifth Circuit held that the duty to disclose material information under such circumstances is an "obvious component" of ERISA's fiduciary duty provision. 60 F.3d 234, 237 (5th Cir. 1995). There, a trustee of a group health insurance plan failed to inform the plan sponsor—a small business owner—of a replacement insurer's new rate schedule, which set "prohibitive" premiums following the occurrence of a "single catastrophic claim." *Id.* at 237. When the business owner's dependent suffered a near-fatal accident, the insurer, over the course of one year, increased the company's premiums from $2000 per month to over $15,000 per month. *Id.* Unable to afford continued coverage, the company was forced to let the policy lapse. *Id.* The *McDonald* court concluded that information regarding the rate schedule was material due to the "impact" the schedule would have had on any small employer. *Id.* The trustee thus had a duty to disclose. *Id.* According to a subsequent panel of the Court of Appeals for the Fifth Circuit, *McDonald* adopted a "case by case" approach in which the duty to disclose is triggered under "special circumstance[s]," such as when concealed information could cause an "extreme impact" to plan participants and beneficiaries. *Ehlmann v. Kaiser Found. Health Plan of Tex.,* 198 F.3d 552, 556 (5th Cir. 2000).

Other courts have recognized that a disclosure duty may arise under similar circumstances.[13] *See, e.g., Watson v. Deaconess Waltham Hosp.,* 298 F.3d 102, 114–15 (1st Cir. 2002) (explaining that an affirmative duty to inform beneficiaries of material facts about the plan arises where "there was some particular reason that the fiduciary should have known that his failure to convey the information would be harmful" (citing *Griggs v. E.I. DuPont de Nemours & Co.,* 237 F.3d 371, 381–82 (4th Cir. 2001); *Barker v. Am. Mobil Power Corp.,* 64 F.3d 1397, 1403 (9th Cir. 1995); *Eddy,* 919 F.2d at 749)). *See also Pegram,* 530 U.S. at 227 n. 8 (noting, in dictum, that "it could be argued that [an HMO] is a fiduciary insofar as it has discretionary authority to administer the plan, and so it is obligated to disclose characteristics of the plan and of those who provide services to the plan, *if that information affects beneficiaries' material interests*" (emphasis added)); *Kalda v. Sioux Valley Physician Partners, Inc.,* 481 F.3d

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[13] According to the majority, certain of these authorities are inapposite because they "relate to administrative, not investment, matters such as participants' eligibility for defined benefits or the calculation of such benefits." Maj. Op. at [24a].

I am not persuaded. The "benefit" in a defined contribution plan is "just whatever is in the retirement account when the employee retires." *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804–05 (7th Cir. 2007). The precise "benefit" at issue here may differ from those at issue in the above-mentioned authorities, but it is a "benefit" nonetheless. That is why a breach of fiduciary duty that diminishes the value of the retirement account "gives rise to a claim for *benefits* measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty." *Id.* at 807 (emphasis added).

639, 644 (8th Cir. 2007); *Devlin v. Empire Blue Cross & Blue Shield,* 274 F.3d 76, 87 (2d Cir. 2001); *Bixler,* 12 F.3d at 1300 (ruling that an affirmative disclosure duty arises "where the trustee knows that silence might be harmful"); *Glaziers & Glassworkers,* 93 F.3d at 1182 ("[A] fiduciary has a legal duty to disclose to the beneficiary only those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection.... The well established obligations endemic in the law of trusts requires nothing less."); *Acosta v. Pac. Enters.,* 950 F.2d 611, 618–19 (9th Cir. 1991) ("[A]n ERISA fiduciary has an affirmative duty to inform beneficiaries of circumstances that threaten the funding of benefits.").

These authorities lead me to conclude that ERISA fiduciaries must disclose material information that plan participants reasonably need to know in order to adequately protect their retirement interests. I thus agree with those district courts that have found in ERISA's fiduciary provisions a duty to disclose material, adverse information regarding an employer's financial condition or its stock, where such information could materially and negatively affect the expected performance of plan investment options. *See, e.g., In re Polaroid ERISA Litig.,* 362 F.Supp.2d 461, 478–79 (S.D.N.Y. 2005) (holding that plaintiffs stated a claim based on defendants' alleged failure "to keep Plan participants informed of material adverse developments" regarding the employer's deteriorating financial situation); *In re Enron Corp. Sec., Derivative & ERISA Litig.,* 284 F.Supp.2d 511, 562 (S.D. Tex. 2003) (holding that plaintiffs stated a claim based on defendants' alleged failure to disclose information about Enron's "dangerous financial condition" of which the defendants knew or should have known); *In re Dynegy, Inc. ERISA Litig.,* 309 F.Supp.2d 861, 888 (S.D. Tex. 2004) ("[W]hen the ... defendants distributed [materials] that encouraged plan participants to carefully review Dynegy's SEC filings, they also triggered an affirmative duty to disclose material adverse information that the ... defendants knew or should have known regarding the risks and appropriateness of investing in company stock." (citing *McDonald,* 60 F.3d at 237)).

The majority believes that such a duty would "improperly transform fiduciaries into investment advisors" by forcing them "to give investment advice or to opine on the stock's condition." Maj. Op. at [25a] (quotations omitted). I disagree. Plaintiffs do not seek, and the duty to disclose would not compel, the provision of "investment advice" or "opinions" regarding corporate stock. Rather, the duty to disclose would merely ensure that, where retirement plan assets are severely threatened, employees receive complete, factual information such that they can make their own investment decisions on an informed basis. *See, e.g., In re CMS Energy ERISA Litig.,* 312 F.Supp.2d 898, 916 (E.D. Mich. 2004) (finding that plaintiffs had "not alleged that defendants had any duty to provide the participants with investment advice"; rather, plaintiffs' allegations "concern[ed] the fiduciary duties surrounding disclosure found in ERISA; i.e. that [defendants] could not mislead or fail to disclose information that they knew or should have known would be needed by participants to prevent losses").

I also take issue with the majority's conclusion that "the Administration Committee provided adequate warning that the Stock Fund was an undiversified investment subject to volatility and that Plan participants would be well advised to diversify their retirement savings," Maj. Op. at [25a]. As a preliminary matter, whether information provided to participants was adequate to inform them of the risks of investing in employer stock is generally a "fact-intensive inquiry that must await a full factual record." *In re Morgan Stanley ERISA Litig.,* 696 F.Supp.2d 345, 363 (S.D.N.Y. 2009) (quotations omitted). In any event, I fail to see how generalized warnings concerning the inherent risks of undiversified investments could, as a matter of law, place lay beneficiaries on notice of the specific fiduciary misconduct alleged here. *See, e.g., In re SunTrust Banks, Inc. ERISA Litig.,* 749 F.Supp. 2d 1365, 1377 (N.D. Ga. 2010) (ruling that boilerplate warning "cannot satisfy Defendants' duty to disclose material negative information to Plan Participants, particularly when, as Plaintiffs allege, Defendants were aware of the deteriorating nature of the Company and its Stock"); *Brieger v. Tellabs, Inc.,* 629 F.Supp.2d 848, 865 (N.D. Ill. 2009) (explaining that fiduciaries do not discharge their duty by merely warning that a particular investment was the "riskiest" option; "the important question is whether [the fiduciaries] ... withheld material information that plaintiffs needed to make an informed decision about their investment selections").

Where, as here, diversification is not "in the picture to buffer the risk to the beneficiaries should the company encounter adversity," fiduciaries must "be especially careful to do nothing to increase the risk faced by the participants still further." *See Armstrong v. LaSalle Bank Nat'l Ass'n,* 446 F.3d 728, 732 (7th Cir. 2006).

B. Misrepresentations

The majority also concludes that plaintiffs failed to state a claim for breach of the statutory duty of loyalty based on certain alleged misrepresentations made by Citigroup, Prince, and the Administration Committee. Specifically, the majority holds (1) that neither Citigroup nor Prince "acted as a Plan fiduciary when making the statements at issue," Maj. Op. at [26a]**;** and (2) that plaintiffs alleged insufficient facts to demonstrate that the Administration Committee knew or should have known that its statements were false, Maj. Op. at [28a-29a]**.** I disagree with both holdings.

1. Plaintiffs Sufficiently Alleged that Citigroup and Prince Acted as ERISA Fiduciaries

"In every case charging breach of ERISA fiduciary duty," the threshold question is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich,* 530 U.S. 211, 226 (2000); *see also Bell v. Pfizer, Inc.,* 626 F.3d 66, 73 (2d Cir. 2010) (citing *Pegram*). In pertinent part, section 3(21)(A) of ERISA states that a defendant "is a fiduciary with respect to a plan to the extent ... he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). This test is a functional one[14] that expands "the universe of persons subject to fiduciary duties." *See Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993). As we have emphasized, Congress intended "that ERISA's definition of fiduciary be broadly construed." *Frommert v. Conkright,* 433 F.3d 254, 271 (2d Cir. 2006) (citing *LoPresti v. Terwilliger,* 126 F.3d 34, 40 (2d Cir. 1997)).

In accordance with the foregoing, the Supreme Court has held that a person may acquire status as an ERISA fiduciary by communicating to beneficiaries about the likely future of their plan benefits. *See Varity Corp. v. Howe,* 516 U.S. 489, 502 (1996). The employer/plan administrator in *Varity* misrepresented the security of plaintiffs' non-pension benefits to induce them to transfer to a new subsidiary, which the employer had created for the purpose of placing its "money-losing eggs in one financially rickety basket." *Id.* at 493–94. The plaintiffs lost their benefits when the subsidiary went into receivership. *Id.* at 494. Their suit alleged that the employer's deception violated ERISA-imposed fiduciary obligations. *See id.* at 504.

For our purposes, the issue in *Varity* was whether the employer was "acting in its capacity as an ERISA 'fiduciary' when it significantly and deliberately misled the [plaintiffs]." *Id.* at 491. The Court answered that question in the affirmative. Drawing on the common law of trusts, the Court concluded

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[14] *See* 29 C.F.R. § 2509.75–8 (FR–16) ("The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan.").

that "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation," constitutes a discretionary act of plan "administration" within the meaning of section 3(21)(A). *Id.* at 502–03. The employer thus "was acting as a fiduciary (that is, was performing a fiduciary function)," *Pegram,* 530 U.S. at 226, when it misled the plaintiffs. The Court did not base its holding on the mere fact that the employer made statements about the subsidiary's expected financial condition, or on the mere fact that the employer's business decision turned out to have an adverse impact on the plan. *Varity,* 516 U.S. at 505. Rather, the determinative factor was that the employer "*intentionally* connected its statements about [the subsidiary's] financial health to statements it made about the future of benefits, so that its intended communication about the security of benefits was rendered materially misleading." *Id.* The Court emphasized that "making intentional representations about the future of plan benefits in that context *is an act of plan administration* " under section 3(21)(A). *Id.* (emphasis added).

In light of *Varity,* I conclude that plaintiffs have sufficiently alleged that Citigroup and Prince were acting as fiduciaries within the meaning of section 3(21)(A) when they made the misrepresentations here at issue. Plaintiffs allege that Citigroup and Prince were fiduciaries to the extent they exercised authority or responsibility over the "administration" of the Plans. Compl. ¶¶ 52, 61. This conclusion is supported with factual allegations which, if true, would establish that Citigroup and Prince conveyed information—albeit misleading information—about the "likely" future of Plan benefits. *See Varity,* 516 U.S. at 504.

Specifically, plaintiffs allege that Citigroup and Prince "regularly communicated with ... the Plans' participants[ ] about Citigroup's performance, future financial and business prospects, *and Citigroup stock, the single largest asset of [the] Plans*." Compl. ¶ 197 (emphasis added); *see also id.* ¶¶ 30, 48. These communications, which were directed to Plan participants in various writings and at mandatory town hall meetings, allegedly encouraged employees to invest in Citigroup stock through the Plans. According to plaintiffs, the communications fostered "an inaccurately rosy picture of the soundness of Citigroup stock as a Plan investment" by, among other things, failing to disclose "the significance and the risks posed by the Company's subprime exposure." *Id.* ¶¶ 199–200; *see also id.* ¶¶ 60 ("Prince made numerous statements, many of which were incomplete and inaccurate, to employees, and thus Plan participants, regarding the Company, and the future prospects of the Company specifically with regard to the risk, or purported lack thereof, faced by the Company as a result of its subprime exposure."), 133, 136, 191, 237. As a result, Citigroup and Prince allegedly "prevented the Plans' participants from appreciating the true risks presented by invest[ing] in Citigroup stock," and thus deprived participants of the opportunity to make informed investment decisions. *Id.* ¶ 199.

Accepting these allegations as true, and drawing all reasonable inferences in the plaintiffs' favor, I would hold that plaintiffs sufficiently alleged that

Citigroup and Prince acted as fiduciaries within the meaning of section 3(21)(A) of ERISA. This is because plaintiffs' allegations, if true, would demonstrate that Citigroup and Prince "intentionally connected" their statements about the financial health of Citigroup and the performance of its stock to the likely future of Plan benefits, such that their "intended communication about the security of benefits was materially misleading," *Varity,* 516 U.S. at 505. That is, plaintiffs sufficiently allege that Citigroup and Prince acted as fiduciaries because, under the circumstances, the making of intentional representations about the future of plan benefits "is an act of plan administration" within the meaning of ERISA. *See id.*

In holding that neither Citigroup nor Prince acted as a Plan fiduciary, the majority finds inapplicable the rule articulated in *Varity*. The majority observes that the employer in *Varity*—unlike Citigroup and Prince—*also* served as the designated plan administrator. According to the majority, then, *Varity* stands for the proposition that an employer may qualify as a fiduciary under the circumstances alleged here only if it is also the designated plan administrator.

I do not understand *Varity* or ERISA to impose such a formalistic limitation. As the Supreme Court has emphasized, ERISA provides that a person is a "fiduciary" not only if he is so named by a benefit plan, but also if he exercises discretionary authority over the plan's administration. *See Mertens,* 508 U.S. at 251 (citing 29 U.S.C. §§ 1102(a), 1002(21)(A)). In other words, ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of ... authority over the plan." *Id.* at 262. As a result, persons other than designated plan administrators may, by performing an administrator-type function, acquire fiduciary status. The majority may be correct that Citigroup and Prince were not the *official* Plan administrators, and thus "were not [officially] *responsible* for communicating with Plan participants," Maj. Op. at [27a] (emphasis added). But actors cannot take refuge from fiduciary status in official titles or responsibilities where their "*ultra vires*" conduct is fiduciary in nature. A rule to the contrary would create perverse incentives anathema to ERISA.

As I see it, the point in *Varity* is not that the designation of "plan administrator" is a prerequisite to fiduciary status. Instead, I view *Varity* as standing for the proposition that a person may act *as a fiduciary*—regardless of his official title—when he makes intentional representations about the future of plan benefits, because such conduct amounts to an act of plan "administration" within the meaning of section 3(21)(A). *See Varity,* 516 U.S. at 502–05. In short, the alleged misrepresentations at issue in *Varity* were actionable because they constituted *fiduciary acts* under ERISA's functional definition of "fiduciary"; whether the employer was also the designated plan administrator simply was not dispositive.

I am not alone in this view. *See, e.g., Marks v. Newcourt Credit Group, Inc.,* 342 F.3d 444, 454 n. 2 (6th Cir. 2003) (citing *Varity,* and noting that "we have only recognized [fiduciary duty] claims when a plan administrator, *or an employer exercising discretionary authority in connection with the plan's man-*

agement or administration misrepresents a material fact" (internal quotations omitted) (emphasis added)); *Luckasevic v. World Kitchen, Inc.,* No. 06 Civ. 1629, 2007 WL 2683995, at *4 (W.D.Pa. Sept. 7, 2007) (rejecting defendants' claim that *Varity* is inapposite based on the "plan administrator" distinction, and noting that "the employer need not be the administrator to be deemed a fiduciary"); *Adamczyk v. Lever Bros. Co., Div. of Conopco,* 991 F.Supp. 931, 937–938, 938 (N.D. Ill. 1997) ("To the extent to which [communications] are related to plan administration, [they] trigger fiduciary duties on the part of the communicator, *regardless of his or her identity.* Even where an independent plan administrator has been appointed, it is entirely possible that it will be the employer that engages in such communications with the employees. Neither the statute nor the Supreme Court's holding in *Varity* precludes the possibility that the employer acts as a fiduciary in such a case." (emphasis added)).

2. Plaintiffs Sufficiently Alleged That The Administration Committee Knowingly Made False Statements

The majority also concludes that plaintiffs failed to adequately allege that the Administration Committee made statements it knew to be false. According to the majority, the Complaint contains only one, conclusory allegation on this front: that the Administration Committee members " 'knew or should have known about Citigroup's massive subprime exposure as a result of their responsibilities as fiduciaries of the Plans,' " Maj. Op. at [20a] (quoting Compl. ¶ 188). The majority holds that this "'naked assertion'" does not satisfy the plausibility standard mandated by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), Maj. Op. at [20a] (quoting *Twombly,* 550 U.S. at 557).

I disagree. I find in the Complaint numerous and specific factual allegations which, if true, would support a reasonable inference that the Administration Committee knowingly made false statements to Plan participants.

Plaintiffs allege that the Administration Committee "regularly" provided "materially false and misleading" information to Plan participants about Citigroup's performance, future financial and business prospects, and its stock. Compl. ¶ 197. The Administration Committee allegedly conveyed such false information through newsletters, memos, Plan documents, and other related materials, as well as through the Plans' Summary Plan Descriptions, which incorporated by reference Citigroup's misleading filings with the Securities and Exchange Commission. *Id.* ¶¶ 67, 143 ("Citigroup did not disclose any subprime-related problems or the amount of its subprime-related loan loss exposure in its 2006 Form 10–K."), 197. According to plaintiffs, these communications "fostered an inaccurately rosy picture of the soundness of Citigroup stock as a Plan investment," *id.* ¶ 199, because they failed to disclose the magnitude of Citigroup's "involvement in subprime lending and other improper business practices," *id.* ¶ 237.

As I discussed in the context of the Prudence Claim, plaintiffs' factual allegations support a reasonable inference that the members of the Investment Committee, by virtue of their fiduciary responsibilities, would have had at least some awareness of both Citigroup's massive subprime exposure, and the growing potential for a market-wide crisis. I also noted that, because one individual—Mr. Tazik—allegedly served on both the Investment and Administration Committees, it was plausible that at least one member of the Administration Committee was also aware of Citigroup's precarious financial position.

In the context of the instant claim, plaintiffs' allegations support a similar inference. Because, on the above analysis, it is plausible that at least some members of the Investment Committee knew of Citigroup's subprime exposure, we may reasonably infer that they would have known the falsity of SEC filings which misrepresented the extent of that exposure. And because Mr. Tazik allegedly served on both the Investment and the Administration Committees, it is reasonable to infer that he would thus have known of the falsity of the Summary Plan Descriptions, which incorporated Citigroup's misleading SEC filings. *See, e.g., In re Dynegy, Inc. ERISA Litig.,* 309 F.Supp.2d 861, 880–82 (S.D. Tex. 2004) (ruling that complaint withstood dismissal where defendants allegedly "knew or should have known by virtue of their positions in the [c]ompany and access to contradictory information ... that the [Summary Plan Documents] contained affirmative, material misrepresentations" (internal quotations omitted)).

In light of the foregoing, I would hold that plaintiffs plausibly alleged that the misstatements here at issue were knowingly made by at least one member of the Administration Committee. Of course, the extent of that member's knowledge, or any other member's knowledge, is an evidentiary matter that cannot be resolved here. Accordingly, I would vacate the District Court's decision and remand for further proceedings.

C. Summary

For the reasons stated above, I would vacate the District Court's dismissal with respect to both components of the Communication Claim, and remand for further proceedings.

VI. REMAINING CLAIMS

The majority affirms the dismissal of Counts III (failure to monitor), IV (failure to disclose information to co-fiduciaries), and VI (co-fiduciary liability) for the same reasons it affirmed the dismissal of Counts I and II. Because I conclude that dismissal of Counts I and II was improper, I would also vacate the dismissal of Counts II, IV and VI, and remand for further proceedings.

Finally, the majority affirms the dismissal of Count V, in which plaintiffs allege that all defendants breached their duty to avoid conflicts of interest by receiving stock-based compensation. I agree that this claim was properly dismissed. I thus join the majority for this part of the opinion only.

CONCLUSION

In sum, I would not adopt the *Moench* presumption of prudence, but would instead evaluate the prudence of ESOP fiduciaries' investment decisions under plenary review. Pursuant to such a review, I would hold that plaintiffs' Prudence Claim withstands scrutiny under Rule 12(b)(6) of the Federal Rules of Civil Procedure. I would also hold that the District Court erred in dismissing plaintiffs' Communication Claim. Accordingly, I would vacate the District Court's dismissal of the foregoing claims, as well as its dismissal of the secondary claims (Counts II, IV, and VI), and would remand for further proceedings.

Because I conclude that the majority properly affirmed the dismissal of Count V of plaintiffs' Complaint, I join that part of the majority's opinion.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NO. 07 CIV. 9790

In re CITIGROUP ERISA LITIGATION

[Filed: Aug. 31, 2009]

OPINION AND ORDER

SIDNEY H. STEIN, District Judge.

This is a putative class action brought pursuant to the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(2)-(3). Plaintiffs are participants in two Plans covered by ERISA: the Citigroup 401(k) Plan and the Citibuilder 401(k) Plan for Puerto Rico. Plaintiffs allege that defendants were fiduciaries of the Plans and that defendants breached their fiduciary duties in several ways. Principally, plaintiffs claim that defendants breached their fiduciary duties by offering Citigroup stock as an investment option to Plan participants even though defendants knew, or should have known, that Citigroup stock was an imprudent investment (Count I). Plaintiffs also claim that defendants breached their fiduciary duties by failing to provide complete and accurate information about Citigroup's financial condition to Plan participants (Count II). Finally, plaintiffs claim that certain defendants breached their fiduciary duties by neglecting to monitor appointed fiduciaries (Count III), by failing to disclose necessary information to their co-fiduciaries (Count IV), by performing their duties while they had conflicts of interest (Count V), and by participating in the fiduciary breaches of others (Count VI).

Defendants have moved to dismiss each of plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). That motion is granted for the following reasons:

First, plaintiffs have failed to state a claim that defendants breached their fiduciary duties by offering Citigroup stock as an investment option. The Plans unequivocally required that Citigroup stock be offered as an investment option, and thus defendants had no discretion—and could not have been "acting as fiduciaries"—with respect to the Plans' investment in Citigroup stock. Even if defendants did have discretion to eliminate Citigroup stock as an investment option, investment in Citigroup stock was presumptively prudent, and plaintiffs have failed to allege facts in support of a plausible claim to overcome that presumption.

Second, plaintiffs have failed to state a claim that defendants breached their fiduciary duties by failing to provide "complete and accurate" information to

Plan participants. Defendants did not have an affirmative duty to disclose financial information about Citigroup because ERISA fiduciaries are not required to provide investment advice. To the extent that some defendants made statements to Plan participants regarding Citigroup's financial situation, those defendants were not acting as fiduciaries when making those statements or, alternatively, plaintiffs have failed to allege facts showing that defendants knew the statements were misleading.

Third, plaintiffs have failed to state a claim that Citigroup and its directors breached their fiduciary duties by failing to monitor Plan fiduciaries. Because plaintiffs' allegations against the appointed fiduciaries fail, plaintiffs cannot identify an instance of misconduct that Citigroup and its directors failed to detect.

Fourth, plaintiffs have failed to state a claim that Citigroup and its directors breached any duty to disclose information to Plan fiduciaries. The limited fiduciary responsibilities of Citigroup and its directors did not include a duty to disclose material, nonpublic information about Citigroup's financial situation to Plan fiduciaries.

Fifth, plaintiffs have failed to state a claim that defendants breached their fiduciary duties by performing their Plan duties while they had conflicts of interest. Plaintiffs allege only that defendants' compensation was tied to the performance of Citigroup stock and that certain defendants sold Citigroup stock during the class period. Those allegations are insufficient to set forth an actionable conflict of interest on defendants' part.

Sixth, and finally, plaintiffs have failed to state a claim based on the theory of co-fiduciary liability. All of plaintiffs' other allegations fail, and thus plaintiffs have not identified a fiduciary breach on which to base a claim of co-fiduciary liability.

VII. BACKGROUND

The following facts are taken from the complaint[1] or from documents attached to the complaint and referred to repeatedly in the complaint. *See, e.g., ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir. 2007) (a court "may consider any written instrument attached to the complaint," as well as "statements or documents incorporated into the complaint by reference," in deciding a motion to dismiss).

A. The Parties

Plaintiffs are "current or former employees of Citigroup" and participants in the Citigroup 401(k) Plan and Citibuilder 401(k) Plan for Puerto Rico. (Compl. ¶¶ 2, 16–21.) Plaintiffs purport to represent all "persons who were participants in or beneficiaries of the Plans at any time between January 1, 2007 and January 15, 2008 ... and whose Plan accounts included investments in Citigroup." (*Id.* ¶ 289.) At the end of 2006, the Citigroup Plan had 151,201 participants and the Citibuilder Plan had 2,225 participants. (*Id.* ¶ 290.)

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[1] All references to the "complaint" in this Opinion are references to the "Consolidated Class Action Complaint for Violations of the Employee Retirement Income Security Act" dated September 15, 2008.

Defendants are various individuals and entities associated with the Plans. The "Administration Committee" is a group of eight individuals who are charged with administrating the Plans, construing the Plans' terms, deciding participants' eligibility for benefits, and communicating with participants. (*Id.* ¶¶ 32, 62–68.) The Administration Committee manages both the Citigroup Plan and the Citibuilder Plan. (*Id.* ¶ 45.)

The "Investment Committee" is a group of ten individuals who are responsible for selecting the investment options offered to Plan participants. (*Id.* ¶¶ 33, 69–70.) Like the Administration Committee, the Investment Committee carries out its duties for both the Citigroup Plan and the Citibuilder Plan. (*Id.* ¶ 45.)

Citibank, N.A., "a subsidiary of Citigroup," is Citigroup's "consumer and corporate banking arm." (*Id.* ¶ 25.) Citibank is the "sponsor"—that is, the creator—of the Citibuilder Plan. (*Id.* ¶ 26.) Citibank also serves as the appointed "trustee" of the Citigroup Plan. (*Id.* ¶ 53.)

Citigroup, Inc., was "the world's largest bank by revenue as of 2008," employing "approximately 358,000 staff around the world" and holding "over 200 million customer accounts in more than 100 countries." (*Id.* ¶ 23.) Citigroup is the sponsor of the Citigroup Plan. (*Id.* ¶ 24.) It has authority under the Plans to appoint the trustee of the Citigroup Plan, to appoint the members of Administration and Investment Committees, and to "direct the trustee ... to receive company stock in lieu of cash dividends" in conjunction with a dividend reinvestment plan. (*Id.* ¶¶

46–48.) Plaintiffs also claim that Citigroup has "exercised *de facto* authority" over the members of the Administration and Investment Committees because Citigroup has had "authority and discretion to hire and terminate" the Committees' members. (*Id.* ¶¶ 49–50.)

Charles O. Prince and Robert E. Rubin were members of Citigroup's board of directors during the class period. Prince served as Citigroup's chief executive officer from 2003 to 2007 and as chairman of the board from 2006 to 2007. (*Id.* ¶ 28.) Rubin served briefly as chairman of the board in 2007. (*Id.* ¶ 29.) Plaintiffs allege that the Prince and Rubin were Plan fiduciaries insofar as Prince and Rubin, as members of Citigroup's board, had authority to appoint Plan fiduciaries. (*Id.* ¶¶ 58–59.) Plaintiffs also allege that Prince was a fiduciary because he "made numerous statements ... to ... Plan participants ... regarding the Company ... and the future prospects of the Company." (*Id.* ¶ 60.)

B. The Plans

The Citigroup and Citibuilder Plans each qualified as an "employee pension benefit plan" as defined by 29 U.S.C. § 1002(2)(A). (*Id.* ¶ 78.) In addition, each Plan was an "eligible individual account plan" ("EIAP") as defined by 29 U.S.C. § 1107(d)(3), and each Plan qualified for preferential tax treatment pursuant to I.R.C. § 401(k). (*Id.*)

Plan participants could contribute to the Plans "on a pre-tax basis through payroll deductions," and Citigroup made "matching contributions" in certain circumstances. (*Id.* ¶¶ 81–82.) Participants could invest their contributions in a number of "investment funds." The Citigroup Plan Agreement provided:

> *Investment Funds.* In order to allow each Participant to determine the manner in which his Accounts will be invested, the Trustee shall maintain, within the Trust, the Citigroup Common Stock Fund and other Investment Funds. Each Participant's Accounts shall be invested in such Investment Funds in the proportions directed by the Participant in accordance with the rules and procedures established by the [Administration] Committee, including but not limited to any timing and frequency limitations approved by the Investment Committee. Pending investment or for other purposes of the Plan, including the payment of benefits hereunder, the Investment Funds may hold cash and short-term investments in accordance with guidelines prescribed by the Investment Committee. Any one or more of such Investment Funds may be eliminated, or new Investment Funds may be made available, at any time by the Investment Committee without consent by any Participant or Employer; *provided,* the Citigroup Common Stock Fund shall be permanently maintained as an Investment Fund under the Plan. Different Investment Funds may be made available to different groups of Participants, determined on an Employer–by–Employer basis, in the discretion of the Investment Committee.

(Citigroup 401(k) Plan ("Citigroup Plan") § 7.01, Compl. Ex. E) The Citibuilder Plan Agreement contained similar—though not identical—language. (*See* Citibuilder 401(k) Plan for Puerto Rico ("Citibuilder Plan") § 7.01, Compl. Ex. D)

The Plans contained special provisions for the investment fund called the "Citigroup Common Stock Fund." The Plans defined the Fund as follows:

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

(Citigroup Plan § 2.01; Citibuilder Plan § 2.01.) Further, in explaining the Investment Committee's responsibilities, the Plans provided:

> The duties of the Investment Committee shall extend to the promulgation of any guidelines with respect to the amount of cash or any short-term investments that may be held by the Citigroup Common Stock Fund. In addition, notwithstanding the fact that provisions in the Plan mandate the creation and continuation of the Citigroup Common Stock Fund and provide that certain contributions to the Citigroup Common Stock Fund must remain invested in the Common Stock Fund for cer-

> tain periods of time, if it is determined that there exists a duty on the part of any person (appointed under this Plan or otherwise) to determine whether such provisions should be modified, such duty shall be that of the Investment Committee.

(Citigroup Plan § 7.09(e); Citibuilder Plan § 7.09(e).) Finally, the Citigroup Plan designated the Citigroup Common Stock Fund as an "employee stock ownership plan" ("ESOP") under ERISA:

> *ESOP Designation.* The Plan shall consist of a component that is designated as an ESOP within the meaning of Section 4975(e) (7) of the Code, and a component that is not designated as an ESOP. The component designated as an ESOP shall consist of any amount invested in the Citigroup Common Stock Fund under the Plan. The component that is not designated as an ESOP shall consist of the remaining portion of the Plan.
>
> *Designed to Invest in Employer Securities.* The component designated as an ESOP under the Plan is designed to invest primarily in Citigroup Common Stock, a qualifying employer security within the meaning of Section 409(l) of the Code.

(Citigroup Plan §§ 15.01–.02.) While the Citibuilder Plan was an EIAP, the Citibuilder Plan did not designate the Citigroup Common Stock Fund as an ESOP.

C. This Action

According to plaintiffs, Citigroup investing extensively in subprime mortgages and securities related to subprime mortgages in the mid–2000s. (Compl.¶ 7.)[2] Plaintiffs claim that, following the collapse of the subprime mortgage market (*id.* ¶¶ 114–129), Citigroup lost tens of billions of dollars in its subprime-mortgage-related investments (*id.* ¶ 134). As a result, the price of Citigroup stock allegedly fell fifty-two percent during the class period, from a high of $55.70 per share on January 1, 2007 to a low of $26.94 per share on January 15, 2008. (*Id.* ¶ 172.)

Plaintiffs claim that Citigroup knew of "the heavy losses which the Company would inevitably sustain from subprime loans" (*id.* ¶ 133) and used various methods to mislead investors regarding Citigroup's "subprime loan loss exposure" (*id.* ¶¶ 7, 136–183). Those methods, plaintiffs claim, included the use of "structured investment vehicles," which were allegedly designed to keep Citigroup's subprime mortgage exposure "off the Company's balance sheet." (*Id.* ¶¶ 176–182.)

In 2007, the Citigroup Plan held approximately $2.14 billion worth of Citigroup stock—one fifth of the Plan's total investments. (Compl. ¶ 88.) During the same period, the Citibuilder Plan held approxi-

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[2] The complaint describes "subprime" mortgages as home loans given to borrowers who do not qualify for prime interest rates because they have "'weakened credit histories typically characterized by payment delinquencies, previous charge-offs, judgments, or bankruptcies; low credit scores; high debt-burden ratios; or high loan-to-value ratios.'" (Compl. ¶ 111 (quoting the congressional testimony of Sandra F. Braunstein, Director of the Division of Consumer and Community Affairs of the Federal Reserve Board).)

mately $4.3 million of Citigroup stock—about one third of the Plan's total investments. (*Id.* ¶ 103.) Plaintiffs claim that, as a result of the Plans' investment in Citigroup stock, the Plans suffered substantial losses when the price of Citigroup stock fell during the class period. (*Id.* ¶ 281.)

Plaintiffs bring this action against defendants on the ground that defendants knew, or should have known, that Citigroup stock was an imprudent investment during the class period. Plaintiffs claim that ERISA required defendants to take steps to eliminate Citigroup stock as an investment option for Plan participants. Plaintiffs also claim that defendants should have informed Plan participants of Citigroup's financial condition and that defendants should have taken other steps—including monitoring Plan fiduciaries and disclosing necessary information to Plan fiduciaries—in an effort to limit the Plans' financial losses. The failure to take each of those actions, plaintiffs claim, was a breach of defendants' fiduciary duties pursuant to ERISA. (*See id.* ¶ 4.)

After thirteen ERISA actions were filed by Plan participants in this district, the thirteen actions were consolidated and interim lead plaintiffs and interim lead counsel were appointed. (Order, Jan. 22, 2008.) Plaintiffs filed a Consolidated Class Action Complaint on September 15, 2008, and as noted above, defendants have now moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

VIII. DISCUSSION

In evaluating a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), a court accepts the truth of the facts alleged in the complaint and draws all reasonable inferences in the plaintiff's favor. *Ashcroft v. Iqbal,* ––– U.S. ––––, –––––, 129 S.Ct. 1937, 1949 (2009); *Global Network Commc'ns, Inc. v. City of New York,* 458 F.3d 150, 154 (2d Cir. 2006). Nonetheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal,* 129 S.Ct. at 1949. Thus, a complaint that "offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)).

A complaint should be dismissed if it fails to set forth "enough facts to state a claim for relief that is plausible on its face." *Twombly,* 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949 (quoting *Twombly,* 550 U.S. at 556).

A. Count I: Defendants Allegedly Offered Citigroup Stock as an Investment Option Even Though Defendants Knew that Citigroup Stock Was an Imprudent Investment

Count I alleges that defendants breached their ERISA fiduciary duties by offering Citigroup stock as an investment option to Plan participants during the class period even though defendants knew that Citigroup stock was an imprudent investment. (Compl.¶¶ 219, 227.) Analyzing that claim requires a brief overview of the scope of the duties ERISA imposes on fiduciaries.

An employer creates an ERISA plan with a written instrument called a "plan agreement." The plan agreement describes the plan and nominates fiduciaries to make discretionary decisions on behalf of the plan. *See* 29 U.S.C. § 1102. When employers " 'adopt, modify, or terminate' " ERISA plans, " 'they do not act as fiduciaries, but are analogous to the settlors of a trust.' " *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 443 (1999) (quoting *Lockheed Corp. v. Spink,* 517 U.S. 882, 890 (1996)). Just as settlors may design trusts as they see fit, employers, acting as plan sponsors, have wide latitude in designing ERISA plans. *Cf. Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits ...."). Plan sponsors, therefore, have no fiduciary duties—and thus face no liability for breach of fiduciary duty—when they "adopt, modify, or terminate" ERISA plans. *Hughes Aircraft,* 525 U.S. at 443.

ERISA does impose fiduciary duties on those who have "discretionary authority" to administer or manage ERISA plans. 29 U.S.C. § 1002(21)(A). That includes, of course, individuals named as fiduciaries in the plan agreement. Such "named fiduciaries" are given specific responsibilities and must carry out those responsibilities in accordance with the fiduciary duties that ERISA imposes. Named fiduciaries are not, however, the only individuals who are considered fiduciaries under ERISA. Anyone is an ERISA fiduciary "to the extent" that he or she exercises discretion in controlling a plan, even if he or she is not named as a fiduciary in the plan agreement. Thus, ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan." *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993). "Congress intended ERISA's definition of fiduciary to be broadly construed." *LoPresti v. Terwilliger,* 126 F.3d 34, 40 (2d Cir. 1997) (quotation omitted).

ERISA fiduciaries have a number of fiduciary duties. An ERISA fiduciary has a duty of loyalty, which means that he must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). An ERISA fiduciary has a duty of prudence, which means that he must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B). And an ERISA fiduciary must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" certain ERISA provisions. *Id.* § 1104(a)(1)(D).

ERISA also requires fiduciaries to manage fund assets "by diversifying the investments of the plan so as to minimize the risk of large losses," *id.* § 1104(a)(1)(C), although the diversification requirement does not apply to a plan that qualifies as an "eligible individual account plan" ("EIAP"), *id.* §§ 1104(a)(2), 1107(d)(3)(A). For EIAPs—such as the Plans here—"the diversification requirement ... and the prudence requirement (only to the extent that it requires diversification) ... is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities." *Id.* § 1104(a)(2).

Here, Count I alleges that defendants breached their duties of prudence and loyalty by offering Citigroup stock as an investment option to Plan participants during the class period. (Compl. ¶¶ 219, 227.) It was disloyal and imprudent, plaintiffs maintain, for defendants to continue to offer Citigroup stock when defendants knew, or should have known, that Citigroup stock was an extremely risky investment. (*Id.*) Plaintiffs' allegations in Count I fail to state a claim upon which relief can be granted for several reasons. Those reasons are as follows:

1. Defendants Had No Discretion to Eliminate Citigroup Stock as an Investment Option

The "threshold question" in "every case charging breach of ERISA fiduciary duty" is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich,* 530 U.S.

211, 226 (2000). Whether an individual was "acting as a fiduciary" depends on whether the individual had discretion over the plan function in question. *See* 29 U.S.C. § 1002(21)(A); *Pegram,* 530 U.S. at 225–26; *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.,* 302 F.3d 18, 28 (2d Cir. 2002).

Here, the plain language of the Plan Agreements establishes that no defendant had discretion to eliminate Citigroup stock from among the investment options offered to Plan participants. The Citigroup Plan unambiguously mandates that "the Citigroup Common Stock Fund *shall be permanently maintained* as an Investment Fund under the Plan." (Citigroup Plan § 7.01 (emphasis added).) The Citibuilder Plan, similarly, provides that "the Trustee shall maintain ... the Citigroup Common Stock Fund." (Citibuilder Plan § 7.01; *see also id.* § 7.09(e) (observing that the Citibuilder Plan's provisions "mandate the creation and continuation of the Citigroup Common Stock Fund")). Each Plan also stipulates that the Citigroup Common Stock Fund must hold Citigroup stock, as each Plan Agreement defines the "Citigroup Common Stock Fund" as "an Investment Fund comprised of shares of Citigroup Common Stock." (Citigroup Plan § 2 .01; Citibuilder Plan § 2.01.)

Therefore, defendants had no discretion whatsoever to eliminate Citigroup stock as an investment option, and defendants were not acting as fiduciaries, *Pegram,* 530 U.S. at 226, to the extent that they maintained Citigroup stock as an investment option. Plaintiffs' breach of fiduciary duty claims in Count I accordingly fail to state a claim upon which relief can be granted.

2. The Investment Committee Had No Discretion to Liquidate the Citigroup Common Stock Fund for the Purpose of Limiting Financial Losses

Even in the face of explicit Plan language requiring that Citigroup stock had to be offered as an investment option, plaintiffs argue that there were steps that the Plans' Investment Committee could have taken—but did not take—to limit the Plans' investment in Citigroup stock. The failure to take those steps, plaintiffs contend, constituted a breach of the Investment Committee's fiduciary duties.

First, plaintiffs claim that the Investment Committee could have converted the assets of the Citigroup Common Stock Fund to cash or short-term instruments. Plaintiffs note that section 2.01 of the Plans provides that the Citigroup Common Stock Fund "may hold cash and short-term investments in addition to shares of Citigroup Common Stock." Plaintiffs note further that, under section 15.02, the Citigroup Common Stock Fund was designed to invest *"primarily"* in Citigroup stock. In plaintiffs' view, the word "primarily," as opposed to "exclusively," gave Plan fiduciaries discretion to hold assets other than Citigroup stock in the Citigroup Common Stock Fund. Read in conjunction with section 2.01, plaintiffs contend that the word "primarily" in section 15.02 gave the Investment Committee discretion to convert a substantial portion of the Citigroup Common Stock Fund to cash or short-term assets.

However, plaintiffs' reading of the Plans is untenable in light of the pellucid language in the Plans requiring that the Citigroup Common Stock Fund be "comprised of shares of Citigroup Common Stock ." (Citigroup Plan § 2.01; Citibuilder Plan § 2.01.) Although section 2.01 permits the Citigroup Common Stock Fund to "hold cash and short-term investments ... in accordance with guidelines prescribed by the Investment Committee," the section establishes two—and only two—purposes for which the Fund may "hold cash and short-term assets": (1) "to permit the orderly purchase of Citigroup Common Stock in a volume that does not disrupt the stock market" and (2) "to pay benefits hereunder." (*Id.*) Neither is implicated here.

Furthermore, the language of section 15.02—explaining that the Citigroup Common Stock Fund was "designed to invest *primarily* in Citigroup Common Stock"—did not provide any discretion to the Investment Committee (or to any other Plan fiduciary) to liquidate the Citigroup Common Stock Fund. Some courts have found that the phrase "designed to invest *primarily* in [employer stock]" gives an ERISA fiduciary discretion to invest an ESOP in assets other than employer stock. *See In re Ferro Corp. ERISA Litig.,* 422 F.Supp.2d 850, 859 (N.D. Ohio 2006); *In re Sprint Corp. ERISA Litig.,* 388 F.Supp.2d 1207, 1220–21 (D. Kan. 2004); *In re Enron Corp. Sec., Derivative & ERISA Litig.,* 284 F.Supp.2d 511, 670 (S.D. Tex. 2003). Plaintiffs have cited no case, however, that has made such a finding in the face of the unambiguous Plan language here. As noted above, section 2.01 unmistakably mandates that the Citigroup Common Stock Fund be "comprised of shares of Citigroup Common Stock," and section 2.01 permits deviations from that mandate "[s]olely in order" to achieve two limited purposes. Plaintiffs' reading of the word "primarily" in section 15.02 is inconsistent with section 2.01 because plaintiffs' reading would allow divestment of Citigroup stock for a third, unauthorized purpose: an attempt to limit the impact of a declining stock price.

There is, instead, only one reading of the word "primarily" in section 15.02 that can be reconciled with the clear language of section 2.01: the Fund was required to hold Citigroup stock and no other assets but was permitted to hold cash and short-term assets *only* for the purpose of paying Plan benefits or permitting Citigroup stock to be purchased in a volume that did not disrupt the market. Under that, the only plausible reading of section 15.02, the Investment Committee had no discretion to liquidate the Citigroup Common Stock Fund for the purpose of limiting the Plan's financial losses due to a potential decline in the price of Citigroup stock. The Investment Committee was not, therefore, acting as a fiduciary when it did not liquidate the Citigroup Common Stock Fund, and plaintiffs' allegations regarding the Investment Committee's failure to liquidate do not state a claim upon which relief can be granted.

3. The Investment and Administration Committees Had No Discretion to Use "Timing and Frequency" Limitations to Discourage Investment in Citigroup Stock

Plaintiffs also contend that, even if the Citigroup Common Stock Fund was a required investment option, the Investment Committee "had the power to determine the proportions of each participant's accounts that could be invested in the Citigroup Common Stock Fund, including the timing and frequency of the investments (based on recommendations from the Administration Committee)." (Pls.' Mem. in Opp'n 25.) In support of that argument, plaintiffs cite section 7.01, which provides in part:

> Each Participant's Accounts shall be invested in such Investment Funds in the proportions directed by the Participant in accordance with the rules and procedures established by the [Administration] Committee, including but not limited to any timing or frequency limitations approved by the Investment Committee.

(Citigroup Plan § 7.01; Citibuilder Plan § 7.01.) It appears that plaintiffs believe that the Investment and Administration Committees could have approved "timing or frequency limitations" that discouraged investment in Citigroup stock, thereby limiting the Funds' exposure to the stock's declining price. Failure to approve such "timing and frequency" limitations, plaintiffs argue, was a breach of the Investment Committee's fiduciary duties.

That claim is meritless. Given the Plans' edict requiring Citigroup stock as an investment option (*see* Citigroup Plan §§ 2.01, 7.01; Citibuilder Plan §§ 2.01, 7.01), it is nonsensical to suggest that the Plans also gave the Investment Committee or the Administration Committee discretion to discourage investment in Citigroup stock by means of "timing or frequency limitations." Those "limitations" were meant to ensure the smooth administration of the Plans; there is no indication that the limitations were intended to be used to discourage investment in

Citigroup stock. Thus, the language of the Plans shows that neither Committee was "acting as a fiduciary" when it declined to use timing and frequency limitations to discourage investment in Citigroup Stock. Plaintiffs' allegations regarding such limitations, therefore, fail to state a claim upon which relief can be granted.

4. Defendants Had No Duty to Override the Plans' Terms

In addition, plaintiffs claim that, even if the terms of the Plan Agreements required that Citigroup stock be offered as an investment option, defendants had a fiduciary duty to override those terms in order to protect Plan participants from an impending collapse in the price of Citigroup shares.

The Second Circuit has not determined whether there are circumstances in which ERISA requires a fiduciary to override plan terms, and there is a split of authority on that issue in other courts. Some district courts have written that "ERISA casts upon fiduciaries an affirmative, overriding obligation to reject plan terms where those terms would require ... imprudent actions in contravention of the fiduciary duties imposed under ERISA." *Agway, Inc. Employees' 401(k) Thrift Inv. Plan v. Magnuson,* 2006 U.S. Dist. LEXIS 74670, at *58 (N.D.N.Y. July 13, 2006); *see also, e.g., In re Polaroid ERISA Litig.,* 362 F.Supp.2d 461, 473 (S.D.N.Y. 2005). Other district courts, however, have written that "where 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." *Urban v. Comcast Corp.,* 2008 WL 4739519, at *12 (E.D. Pa. 2008) (quoting *Moench v. Robertson,* 62 F.3d 553, 571 (3d Cir. 1995)); *see also, e.g., Graden v. Conexant Sys., Inc.,* 574 F.Supp.2d 456, 462 (D.N.J. 2008)

Here, this Court holds that neither the Investment Committee nor any other Plan fiduciary had a duty to override the Plans' mandate that Citigroup stock be offered as an investment option. Not only does that holding accord with traditional principles of trust law, but it is consistent with ERISA's language, structure, and purpose. Although ERISA is a "comprehensive and reticulated statute" which "should not be supplemented by extratextual remedies" and "common-law doctrines," the common law of trusts "may offer a 'starting point' for analysis" as long as it is not "inconsistent with the language of the statute, its structure, or its purposes." *Hughes Aircraft,* 525 U.S. at 447 (quotations and citations omitted); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.,* 530 U.S. 238, 250 (2000). Indeed, "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,* 472 U.S. 559, 570 (1985). Consequently, the Supreme Court has recognized that ERISA's fiduciary duties "draw much of their content from the common law of trusts." *Varity Corp. v. Howe,* 516 U.S. 489, 496 (1996) (citing *Cent. States,* 472 U.S. at 570).

As a "starting point," therefore, it is worth noting that common law trustees must follow trust terms that mandate investment in specified assets. Trustees have "a duty to administer the trust ... in accordance with the terms of the trust" and, in particular, "a duty to conform to the terms of the trust directing or restricting investments by the trustee." Restatement (Third) of Trusts §§ 76(1), 91(b) (2007). "The terms of the trust may limit the trustee's investment authority in various ways," and unless those limitations are unlawful, impossible, or abrogated by a court, they are "legally permissible and are ordinarily binding on the trustee in managing the trust assets, thus often displacing the normal duty of prudence." *Id.* § 91 cmt. e.

Those precepts of trust law are relevant here, for at least in the context of EIAPs and ESOPs, a fiduciary obligation to adhere to a plan's mandates regarding company stock is not "inconsistent with the language of [ERISA], its structure, or its purposes." *Hughes Aircraft,* 525 U.S. at 447.[3] The language of ERISA provides that

> a fiduciary shall discharge his duties with respect to a plan ... in accordance with the documents and instruments governing the plan insofar as such documents and instruments

[3] The relevance of trust law is not, however, unlimited. The Court recognizes, for example, that if an investment limitation would frustrate the purpose of the trust, a trustee may petition a court to modify the trust. See Restatement (Third) of Trusts § 66; see also *id.* § 91 cmt. e. In some circumstances, "the trustee may have a duty to apply to the court for permission to deviate from the terms of the trust." *Id.* § 91 cmt. e (citing *id.* § 66(2) & cmt. e). Those concepts are not present in ERISA.

> are consistent with the provisions of [ERISA, 29 U.S.C. §§ 1001–1191c, 1301–1461].

29 U.S.C. § 1104(a)(1), (a)(1)(D). Accordingly, if an ERISA plan mandates that employer stock be offered as an investment option, plan fiduciaries are required to follow that mandate as long as it is consistent with ERISA's other provisions. At least for EIAPs and ESOPs, investment in employer stock *is* consistent with ERISA's other provisions, as ERISA explicitly contemplates that EIAPs and ESOPs will invest in employer stock, *see* § 1107(d)(3), (5)-(6), and do so without diversifying, *see id.* § 1104(a)(2). Those textual markers strongly suggest that an EIAP or an ESOP may, consistent with ERISA, *require* that employer stock be offered to participants as an investment option. Such a requirement, therefore, is a plan term that fiduciaries should be compelled to follow.[4]

Not only does the language of ERISA support that conclusion, but the structure of ERISA does so as well. If fiduciaries were to override an EIAP's mandates about employer stock, they would, in effect, be *amending* the plan, as they would be altering the plan design as set forth in the plan agreement. ERISA requires that every plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). Thus, ERISA's structure re-

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[4] The complaint alleges, "upon information and belief," that the Plans do "not satisfy all of the statutory and regulatory mandates with respect to the ESOP or EIAP design and/or operation." (Compl. ¶ 90.) Plaintiffs have not, however, pleaded any facts in support of that conclusory allegation, and thus plaintiffs have failed to state that claim.

quires that *those* persons—the persons a plan identifies pursuant to subsection 1102(b)(3)—are the ones who may amend a plan if amendment is necessary. There is no indication that fiduciaries such as the Investment Committee—named pursuant to subsection 1102(a), not subsection 1102(b)(3)—have a separate authority to amend the plan by overriding plan terms, let alone any *duty* to do so.

Moreover, amending an ERISA plan is a settlor function, and ERISA assigns no fiduciary duties to sponsors when they "adopt, modify, or terminate" ERISA plans. *Hughes Aircraft,* 525 U.S. at 443. Insofar as overriding plan terms is the equivalent of amending a plan, imposing a duty on fiduciaries to override plan terms would be the equivalent of imposing a duty on plan sponsors to amend a plan. That, of course, is contrary to ERISA's structure, which assigns duties (and thus potential liability) to fiduciaries, but no duties (and thus no potential liability) to sponsors. *See id.*

Finally, not only do the language of ERISA and the structure of ERISA demonstrate that fiduciaries should be required to adhere to an EIAP's mandate that employer stock be offered as an investment option, but the purpose of ERISA does so as well. One of Congress's goals in passing ERISA was "safeguarding the interests of participants in employee benefit plans." *Moench,* 62 F.3d at 569 (quotation omitted). But Congress has also "repeatedly expressed its intent to encourage the formation of [EIAPs and][5] ESOPs by passing legislation granting

[5] Much of the caselaw in this area addresses ESOPs in particular, not just EIAPs in general. Nevertheless, nearly all of

such plans favorable treatment," and Congress has "warned against judicial and administrative action that would thwart that goal." *Id.; see also Kirschbaum v. Reliant Energy, Inc.,* 526 F.3d 243, 253 (5th Cir. 2008) ("Congress has expressed a strong preference for plan investment in employer's stock, although this preference may be in tension with ERISA's general fiduciary duties.") A provision in an EIAP or an ESOP requiring that employer stock be offered as an investment option is patently in line with Congress's goal of encouraging employee stock ownership. It would "thwart" that goal to hold a fiduciary liable for adhering to such a plan provision.

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the points made about ESOPs apply equally to EIAPs. The Third Circuit explained:

> Because one of the purposes of EIAPs is to promote investment in employer securities, they are subject to many of the same exceptions that apply to ESOPs. *See Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1094 (9th Cir. 2004). For example, § 1104(a)(2) provides that all EIAPs, not just ESOPs, are exempt from ERISA's duty to diversify: "In the case of an *eligible individual account plan* ... the diversification requirement ... and the prudence requirement (only to the extent that it requires diversification) ... is not violated by acquisition or holding of ... qualifying employer securities." 29 U.S.C. § 1104(a) (2) (emphasis added). And § 1108(e)(3)(A) states that ERISA's prohibitions against dealing with a party in interest or self-dealing "shall not apply to the acquisition or sale by a plan of qualifying employer securities ... if the plan is an *eligible individual account plan*." 29 U.S.C. § 1108(e)(3)(A) (emphasis added). Consequently, EIAPs, like ESOPs, "place employee retirement assets at much greater risk" than traditional ERISA plans. *Wright*, 360 F.3d at 1097 n. 2.

Edgar v. Avaya, Inc., 503 F.3d 340, 347 (3d Cir. 2007).

EIAPs and ESOPs are "not intended to guarantee retirement benefits." *Moench,* 62 F.3d at 568. The purpose of EIAPs and ESOPs is to give employees an ownership interest and thus a stake in the financial successes—and failures—of the companies for which they work. *See Steinman v. Hicks,* 352 F.3d 1101, 1103 (7th Cir. 2003) (clarifying that ESOPs were not "intended to replace traditional pension arrangements" but rather were "intended to promote the ownership, partial or complete, of firms by their employees"). The Third Circuit explained:

> Employee stock ownership plans are designed to invest primarily in qualifying employer securities. Thus, unlike the traditional pension plan governed by ERISA, ESOP assets generally are invested in securities issued by the plan's sponsoring company. In keeping with this, ESOPs, unlike pension plans, are not intended to guarantee retirement benefits, and indeed, by its very nature an ESOP places employee retirement assets at much greater risk than does the typical diversified ERISA plan.

Moench, 62 F.3d at 568 (quotations, citations, and alterations omitted); *see also Edgar v. Avaya, Inc.,* 503 F.3d 340, 347 (3d Cir. 2007) (noting that EIAPs "place employee retirement assets at much greater risk' than traditional ERISA plans" (quoting *Wright v. Oregon Metallurgical Corp.,* 360 F.3d 1090, 1094 (9th Cir. 2004))). Thus, if the price of employer stock collapses and the value of an EIAP or an ESOP declines, it is a natural result of the plan's design. No fault would lie with the plan's fiduciaries, who were adhering to the mandatory terms of a plan that was designed not to guarantee income but to encourage employee stock ownership.

Plaintiffs vigorously dispute that reasoning. They argue that the terms of an ERISA plan are void insofar as they eviscerate a fiduciary's duty of prudence. Plaintiffs note that, under ERISA, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty ... shall be void as against public policy." 29 U.S.C. § 1110(a). Thus, according to plaintiffs, if an EIAP or an ESOP mandates that employer stock be offered as an investment option, and if employer stock becomes an imprudent investment, then a fiduciary's duty of prudence would trump the plan's mandate, and the fiduciary would be duty-bound to override the plan's terms and divest the plan of its now-imprudent investment in employer stock.

Plaintiffs' analysis, however, is at odds with ERISA's provisions regarding EIAPs and ESOPs. An EIAP or an ESOP that mandates that employer stock be offered as an investment option is hardly an attempt to "relieve a fiduciary from responsibility or liability." Instead, when a plan mandates that employer stock be offered as an investment option, it follows a clear statutory path, laid out by Congress, to encourage employee stock ownership. *See id.* §§ 1104(a)(2), 1107(d)(3), (5)-(6); *cf. Steinman,* 352 F.3d at 1103 ("Since the very purpose of an ESOP is to give employees stock in the employer, it would be anomalous if the ESOP's trustees were required to sell most of the stock donated by the employer in order to create a diversified portfolio of stocks.")

Furthermore, under plaintiffs' interpretation of ERISA, plan fiduciaries could find themselves in a confusing, untenable position, as they would be required to make a perilous choice if the price of employer stock falters. Under plaintiffs' interpretation of ERISA, even if a plan's terms required that employer stock be offered as an investment option, fiduciaries would have a duty to override those terms if the employer stock became an imprudent investment. As the price of employer stock declined, fiduciaries would face two options. On the one hand, the fiduciaries could adhere to the plan's mandate regarding employer stock. In so doing, however, the fiduciaries could face liability for a breach of the duty of prudence for failing to divest. *Id.* § 1104(a)(1)(B). On the other hand, the fiduciaries could override the plan's terms and divest the plan of employer stock. That course of action, however, could lead to liability for violating the terms of the plan agreement; if the price of the divested stock rebounded, the fiduciary would almost certainly be sued for having overridden the plan terms. *See id.* § 1104(a)(1)(D).

Thus, under plaintiffs' interpretation of ERISA, fiduciaries would risk liability whether or not they decided to override the plans' terms. *Cf. Kirschbaum,* 526 F.3d at 256 ("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."); *Moench,* 62 F.3d at 571–72

("[C]ourts must recognize that if the fiduciary, in what it regards as an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution, particularly if the employer's securities thrive."). In short, plaintiffs' interpretation of ERISA asks too much of fiduciaries. It requires fiduciaries to be "virtual guarantors of the financial success of the ... plan." *Moench,* 62 F.3d at 570 (quotation omitted).

The correct interpretation of ERISA simply requires fiduciaries to adhere to a plan's terms regarding employer stock, even if the price of employer stock falls. That interpretation eliminates the Catch–22 faced by fiduciaries under plaintiffs' interpretation. It accords with ERISA's text, which exempts EIAPs from the diversification requirement. It accords with ERISA's structure, which treats plan amendment as a settlor function. And it accords with ERISA's purpose, which is, at least for EIAPs and ESOPs, to encourage employee stock ownership, not to guarantee retirement benefits. Here, therefore, neither the Investment Committee nor any other fiduciary had discretion to override the Plans' requirement that Citigroup stock be offered as an investment option. For that reason, plaintiffs' breach of fiduciary duty claim—insofar as plaintiffs allege a failure to override the Plans' terms—does not state a claim upon which relief can be granted.[6]

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[6] Plaintiffs further allege that the Investment Committee had discretion to override Plan terms because the Plans provided that

> notwithstanding the fact that provisions in the Plan mandate the creation and continuation of the Citigroup Com-

5. Citibank, as Trustee of the Citigroup Plan, Had No Discretion Regarding the Plan's Investment in Citigroup Stock

Citibank was appointed to serve as the trustee of the Citigroup Plan pursuant to a trust agreement. (*See* Trust Agreement, Compl. Ex. C.) Citibank was given a number of discretionary responsibilities (*id.* § 2.2), but when it came to decisions about how to invest the Fund, Citibank was required to follow the directions of the Investment Committee or an Investment Manager appointed by Investment Committee (*id.* § 4.2). *See also* 29 U.S.C. § 1103(a)(1). Citibank's powers were further circumscribed with respect to the Fund's investment in Citigroup Stock, for the Citigroup Plan provided that the "the Trustee *shall maintain,* within the Trust, the Citigroup

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> mon Stock Fund and provide that certain contributions to the Citigroup Common Stock Fund must remain invested in the Common Stock Fund for certain periods of time, if it is determined that there exists a duty on the part of any person (appointed under this Plan or otherwise) to determine whether such provisions should be modified, such duty shall be that of the Investment Committee.

(Citigroup Plan § 7.09(e); Citibuilder Plan § 7.09(e).) The exact meaning of that provision is unclear, but what is clear is that the provision is *conditional*. The provision applies only "*if* it is determined that there exists a duty on the part of any person (appointed under this Plan or otherwise) to determine whether such provisions should be modified." (*Id.* (emphasis added).) Since it has just been determined that no fiduciary had a duty to override Plan terms—or to "determine whether such provisions should be modified"—the provision does not apply here. Plaintiffs have not, in any event, pleaded that any other person "determined that there exists a duty" as described in section 7.09(e).

Common Stock Fund." (Citigroup Plan § 7.01 (emphasis added).)

It is unclear how plaintiffs believe that Citibank breached its fiduciary duties as the Citigroup Fund's trustee, but Citibank had no discretion to remove Citigroup stock from among the investment options offered to Plan participants. Thus, to the extent that plaintiffs allege any breach of fiduciary duties against Citibank in connection with the Plan's investment in Citigroup stock, those allegations fail to state a claim upon which relief can be granted.

6. Plaintiffs Have Failed to Plead a Plausible Claim that Citibank and Citigroup, the Sponsor of the Citibuilder and Citigroup Plans, Respectively, Functioned as De Facto Fiduciaries

Citibank was the sponsor of the Citibuilder Plan, and Citigroup was the sponsor of the Citigroup Plan. Citibank and Citigroup were acting as settlors of trusts, not as ERISA fiduciaries, when they created the Plan terms regarding the Citigroup Common Stock Fund. *See Hughes Aircraft Co.,* 525 U.S. at 443. Thus, plaintiffs cannot bring suit against Citibank and Citigroup for designing the Plans in a manner that mandated the existence of the Citigroup Common Stock Fund.

Instead, plaintiffs have alleged that Citibank and Citigroup functioned as de facto fiduciaries by exerting control of the Plans' investments. With respect to Citibank, the complaint alleges, without explanation, that "in light of" Citibank's "duties, responsibilities, and actions," it was "a *de facto* fiduciary of the Plans." (Compl.¶ 56.) With respect to Citigroup, the complaint alleges that Citigroup was a de facto fiduciary because it controlled the named fiduciaries:

> Upon information and belief, Citigroup exercised *de facto* authority and control with respect to the *de jure* responsibilities of the Board, Citibank, the Administration and Investment Committees, and/or any other employee fiduciaries, making itself fully responsible for the prudent and loyal fulfillment of the *de jure* responsibilities assigned by the governing Plan documents to those Defendants.

(*Id.* ¶ 49.) The complaint also alleges that, because "Citigroup had the authority and discretion to hire and terminate" its "officers and employees," "Citigroup had, at all applicable times, effective control over the activities of its officers and employees, including over their Plan related-activities." (*Id.* ¶ 50.)

Those allegations are insufficient to state a plausible claim that either Citigroup or Citibank was a de facto fiduciary. With respect to Citibank, Plaintiffs' allegations are entirely conclusory. With respect to Citigroup, the only "heft" plaintiffs have added to their claim, *see Twombly,* 550 U.S. at 557, is the allegation that Citigroup had the authority to hire and fire some of the named fiduciaries. That fact alone is insufficient to show that Citigroup exerted control over its employees' fiduciary responsibilities, and thus plaintiffs "have not nudged their claims" regarding Citigroup's de facto fiduciary status "across the line from conceivable to plausible." *Id.* at 570; *Iqbal,* 129 S.Ct. at 1950–51.

7. Offering Citigroup Stock as an Investment Option Was Presumptively Prudent

No defendant had discretion to eliminate Citigroup stock from among the investment options offered to Plan participants. But even if a defendant did have that discretion, plaintiffs' breach of fiduciary duty claims would fail. Defendants are entitled to a presumption that offering Citigroup stock as an investment option was prudent, and plaintiffs have been unable to plead facts in support of a plausible claim to overcome that presumption.

In *Moench,* 62 F.3d at 571–72, the Third Circuit set forth a presumption of prudence for an ESOP's investment in employer stock, and in *Avaya,* 503 F.3d at 347, the Third Circuit extended the presumption to cover EIAPs that encourage investment in employer stock. As an initial matter, it is important to note that *Moench* was "not concerned with a situation in which an ESOP plan in absolute unmistakable terms requires that the fiduciary invest the assets in the employer's securities regardless of the surrounding circumstances." 62 F.3d at 567 n. 4. Instead, *Moench* addressed a plan in which the fiduciaries were "not absolutely required to invest in employer securities" but were "more than simply permitted to make such investments." *Id.* at 571. Similarly, *Avaya* addressed an EIAP in which the fiduciaries were not required to invest in Avaya stock but had only "limited discretion not to offer Avaya stock as an investment option." 503 F.3d at 347 n. 11.

Nevertheless, *Moench* and *Avaya* implied, but did not hold, that if a plan *were* to require a fiduciary to invest in employer stock, the fiduciary would be entitled to more than just a presumption of prudence: the fiduciary would, in such a case, be "immune from judicial inquiry" for investing in employer stock. *See id.* at 346 (explaining that *Moench* looked to trust law and found that "if the trust 'requires' the trustee to invest in a particular stock, then the trustee is 'immune from judicial inquiry'" (quoting *Moench,* 62 F.3d at 571)); *see also Graden,* 574 F.Supp.2d at 462; *Urban,* 2008 WL 4739519, at *12. Here, the Citigroup Plans used "unmistakable terms" to require that Citigroup stock be offered as an investment option. Therefore, as discussed above, defendants did not have discretion to eliminate Citigroup stock as an investment option, and in the terms of *Moench* and *Avaya,* defendants are now "immune from judicial inquiry" in connection with the Plans' investments in Citigroup stock.

But even if defendants did have discretion to eliminate Citigroup stock as an investment option, the Plans here encouraged investment in employer stock, and thus the *Moench* presumption would apply. *See Avaya,* 503 F.3d at 347. *Moench* held that, because of "the purpose behind ERISA and the nature of ESOPs themselves," an ESOP fiduciary that decided to invest a fund's assets in employer stock was "entitled to a presumption that it acted consistently with ERISA by virtue of that decision." 62 F.3d at 571. A plaintiff could "overcome that presumption," *Moench* explained, only "by establishing that the fiduciary abused its discretion by investing in employer securities." *Id.*

The Second Circuit has not yet determined whether courts in this Circuit should apply the *Moench* presumption. *Moench'* s reasoning, however, is persuasive, and numerous courts have followed it. *See, e.g., Pugh v. Tribune Co.,* 521 F.3d 686, 701 (7th Cir. 2008); *Kirschbaum,* 526 F.3d at 254; *Kuper v. Iovenko,* 66 F.3d 1447, 1459 (6th Cir. 1995). The presumption, therefore, will be applied here: plaintiffs can plead a breach of fiduciary duty claim only by alleging facts that, if true, would make it plausible that offering Citigroup stock as an investment option during the class period constituted an abuse of discretion.

Plaintiffs object that if the *Moench* presumption applies at all, it should apply only on a motion for summary judgment, not on a motion to dismiss. It is true that *Moench* first articulated the presumption in the context of a motion for summary judgment, 62 F.3d at 556, and several courts have held that *Moench* does not apply when evaluating a Rule 12(b)(6) motion, *see, e.g., Enron,* 284 F.Supp.2d at 533 n. 3; *In re Westar Energy, Inc., ERISA Litig.,* No. 03–4032–JAR, 2005 U.S. Dist. LEXIS 28585, at *71 (D. Kan. Sept. 29, 2005); *see also Polaroid,* 362 F.Supp.2d at 475.

Nevertheless, following the Supreme Court's ruling in *Twombly,* 550 U.S. 544, courts have regularly applied *Moench* at the motion-to-dismiss stage, *see Avaya,* 503 F.3d at 349; *In re Bausch & Lomb Inc. ERISA Litig.,* No. 06–CV–6297, 2008 WL 5234281, at *4–6 (W.D.N.Y. Dec.12, 2008); *Graden,* 574 F. Supp.2d at 462–64; *Halaris v. Viacom, Inc.,* No. 3:06–CV–1646–N, 2008 WL 3855044, at *2 (N.D. Tex. Aug.19, 2008); *In re Dell, Inc. ERISA Litig.,* 563

F.Supp.2d 681, 692–93 (W.D. Tex. 2008); *In re Radio Shack Corp. ERISA Litig.,* 547 F.Supp.2d 606, 614 (N.D. Tex. 2008). Joining that trend, this Court will apply the *Moench* presumption in conjunction with defendants' motion to dismiss the complaint in this action. As *Avaya* explained, "if a plaintiff does not plead all of the essential elements of his or her legal claim, a district court is required to dismiss the complaint pursuant to Rule 12(b)(6)," and here there is "no reason to allow this case to proceed to discovery when, even if the allegations are proven true," plaintiffs "cannot establish that defendants abused their discretion." 503 F.3d at 349.

8. The Allegations in the Complaint Do Not Establish a Plausible Claim to Overcome the Presumption of Prudence

To overcome the *Moench* presumption on a motion to dismiss, a complaint must contain facts that, if true, would make it plausible that a fiduciary "'could not have believed reasonably' " that "'continued adherence'" to the plan's mandates regarding employer stock " 'as in keeping with the settlor's expectations of how a prudent trustee would operate.'" *Id.* at 348 (quoting *Moench,* 62 F.3d at 571). To that end, the complaint "may" contain allegations showing that, " 'owing to circumstances not known to the settlor and not anticipated by him,' investing in employer securities 'would defeat or substantially impair the accomplishment of the purposes of the trust.'" *Id.* (quoting *Moench,* 62 F.3d at 571).

In *Moench,* the court remanded the action to the district court to determine, in the first instance, whether the plaintiff had overcome the presumption of prudence. 62 F.3d at 572. Nevertheless, the court suggested that the plaintiff would be able to overcome the presumption by proving, as the plaintiff claimed, that the price of employer stock had suffered a "precipitous decline" and that the plan fiduciaries had had "knowledge of its impending collapse." *Id.* In *Moench,* a "precipitous decline" in stock price meant that the stock lost ninety-eight percent of its value over a two-year period, dropping from $18.25 per share to $0.25 per share. *Id.* at 557. An "impending collapse" meant that "federal regulators informed the company's Board of Directors that they had concerns about the company's financial condition and had uncovered various regulatory violations; the Federal Deposit Insurance Corporation eventually took over control of one of the company's subsidiaries; and, ultimately, the company filed for Chapter 11 bankruptcy." *Avaya,* 503 F.3d at 348 (summarizing *Moench,* 62 F.3d at 557).

While the allegations in *Moench* were, if substantiated, enough to overcome the presumption of prudence, other courts have provided examples of allegations that were *not* enough to overcome the presumption. In *Avaya,* the plaintiff alleged that

> defendants abused their discretion by knowingly or recklessly disregarding the fact that: (1) the cost of integrating a recent corporate acquisition was greater than defendants publicly represented; (2) rather than having a positive financial impact, the acquisition reduced Avaya's earnings by at least $0.06 per share during the 2005 fiscal year; (3) changes to Avaya's method of delivering products to

> market were causing severe disruptions in sales; and (4) the company was experiencing a dramatic reduction in demand for its products.

Id. Although those allegations showed that "Avaya was undergoing corporate developments that were likely to have a negative effect ... on the value of the company's stock," the court concluded that the drop in stock price—from $10.69 to $8.01 per share—did not create "the type of dire situation which would require defendants to disobey the terms of the Plans by not offering the Avaya Stock Fund as an investment option." *Id.*

In *Kirschbaum,* the Fifth Circuit provided particularly instructive guidance for courts applying the *Moench* presumption.[7] 526 F.3d at 255–57. "In contrast to the company-wide failure evidenced in *Moench," Kirschbaum* addressed a company whose stock had fallen forty percent. *Id.* at 255. That was not enough, *Kirschbaum* held, to show that the company's "viability as a going concern was ever threatened" or that the company's "stock was in danger of becoming essentially worthless." *Id.* The court did "not hold that the *Moench* presumption applies only in the case of investments in stock of a company that is about to collapse," but the court emphasized that the *Moench* presumption is a "substantial shield." *Id.*

[7] As in *Moench, Kirschbaum* declined "to speculate on the scope of a fiduciary duty to override clear and unequivocal plan terms." 526 F.3d at 255. Instead, *Kirschbaum* held that even if the defendants "had some discretion to override the Plan, Kirschbaum's allegations fail to rebut the *Moench* presumption of prudence." *Id.*

at 256. The 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.
>
> *Id*.

Here, plaintiffs allege that Citigroup engaged in "a pattern of risky loan practices" by "marketing, purchasing, and originating subprime loans without adequate considerations of the borrower's ability to pay and with unreasonably high risk of borrower default." (Compl. ¶ 7.) Also, plaintiffs allege that Citigroup invested in mortgage-related securities and took on liabilities associated with mortgage-related credit products. (*Id.* ¶¶ 130–31.) Many of those liabilities, plaintiffs claim, were not reflected on Citigroup's balance sheet but were, instead, contained in off-balance-sheet entities called "structured investment vehicles." (*Id.* ¶¶ 176, 178, 182.)

As a result, plaintiffs allege that Citigroup suffered losses totaling tens of billions of dollars when the bottom fell out of the subprime mortgage market. (*Id.* ¶ 134; *see also* ¶¶ 114–129.) For example, in the fourth quarter of 2007, the last full quarter of the class period, Citigroup reported a loss of $18.1 billion related to subprime mortgages. (*Id.* ¶ 134.) The price of Citigroup's stock, moreover, declined during the class period from a high of $55.70 per share on January 1, 2007 to a low of $26.94 per share on January 15, 2008—a fifty-two percent drop. (*Id.* ¶ 172.)

If true, those allegations would constitute evidence supporting the position that Citigroup adopted imprudent and risky business strategies that resulted in substantial losses to the company. But they would not suggest "the type of dire situation" that would have caused defendants to believe that " 'continued adherence" ' to the Plans' mandate regarding Citigroup stock was no longer " 'in keeping with the settlor's expectations of how a prudent trustee would operate.' " *Avaya,* 503 F.3d at 348 (quoting *Moench,* 62 F.3d at 571). For one thing, a fifty-two percent decline in stock price is significant, but courts have held that declines of similar or greater magnitude were *not* enough to overcome the *Moench* presumption. *See Kirschbaum,* 526 F.3d at 256 (forty percent drop in stock price); *Kuper,* 66 F.3d at 1451, 1459 (eighty percent drop); *Wright,* 360 F.3d at 1096, 1098 (seventy-five percent drop); *In re Duke Energy ERISA Litig.,* 281 F.Supp.2d 786, 795 (W.D.N.C. 2003) (fifty-five percent drop); *Crowley v. Corning, Inc.,* 234 F.Supp.2d 222, 227 (W.D.N.Y. 2002) (eighty percent drop).

Furthermore, the allegations in this action provide "no indication" that, during the class period, Citigroup's "viability as a going concern was ever threatened." *Kirschbaum,* 526 F.3d at 255. In absolute terms, Citigroup's losses were substantial—the company lost tens of billions of dollars during the class period. (Compl.¶ 134.) But for what plaintiffs acknowledge as the "world's largest bank by revenue" (*id.* ¶ 23), the losses were not cataclysmic. Citigroup was a mammoth corporation with hundreds of billions of dollars of market capitalization. (*Id.* ¶¶ 134, 173.) As of the filing of the complaint, Citigroup employed "approximately 358,000 staff around the world" and held "over 200 million customer accounts in more than 100 countries." (*Id.* ¶ 23.) Thus, while Citigroup suffered losses during the class period as a result of the collapse of the subprime mortgage market, the situation was "a far cry from the downward spiral in Moench, and much less grave than facts other courts routinely conclude are insufficient to rebut the *Moench* presumption." *Kirschbaum,* 526 F.3d at 255.

Plaintiffs' breach of fiduciary duty allegations are necessarily limited to the class period, which lasted from January 1, 2007 to January 15, 2008. Indeed, plaintiffs claim that defendants breached their fiduciary duties because, *"during the Class Period,* ... Defendants continued to offer Citigroup as an investment option for the Plans." (Compl. ¶ 219 (emphasis added).) Even assuming that Citigroup deteriorated after the class period ended (*see* Pls.' Mem. in Opp'n 32), the allegations in the complaint do not suggest any threat to Citigroup's viability prior to January 15, 2008. Thus, even if they are true, the allegations in the complaint do not support a determination that it is plausible that reasonable fiduciaries would have considered themselves bound to divest the Plans of Citigroup stock during the class period.

For that reason, the allegations in the complaint are insufficient to overcome the presumption that Citigroup stock was a prudent investment. Insofar as plaintiffs allege that defendants breached their fiduciary duties because Citigroup stock was an imprudent investment, plaintiffs fail to state a claim upon which relief can be granted.

9. Because Citigroup Stock Was a Prudent Investment, Plaintiffs Fail to Allege that Defendants Breached a Duty to Investigate

The final aspect of Count I is a claim that the Administration and Investment Committees breached their fiduciary duties by failing to investigate whether Citigroup stock was a prudent investment. The complaint alleges numerous "warning flags" that, according to plaintiffs, should have altered the Administration and Investment Committees to the need to investigate whether it was prudent to offer Citigroup stock as an investment option. (Compl.¶ 189.)

Since the Administration and Investment Committee had no discretion to divest the Plans of Citigroup stock—and since plaintiffs have not, in any event, overcome the presumption that Citigroup stock was a prudent investment—plaintiffs cannot show that a failure to investigate led to any losses to the Plan. *See In re McKesson HBOC, Inc. ERISA Litig.,* 391 F.Supp.2d 812, 833 (N.D. Cal. 2005) ("[A] plaintiff must show that an investment actually was imprudent before he can state a claim for failing to investigate other investment options."); *see also Wright,* 360 F.3d at 1099. Accordingly, insofar as plaintiffs' breach of fiduciary duty allegations are premised on a failure to investigate, plaintiffs have failed to state a claim upon which relief can be granted.

B. Count II: Defendants Allegedly Failed to Provide Plan Participants with "Complete and Accurate" Information About Citigroup's Financial Condition

Count II alleges that the "Communication Defendants"—that is, Citigroup, Prince, and the Administration Committee—breached their ERISA fiduciary duties by "failing to provide complete and accurate information" and by "conveying through statements and omissions inaccurate material information" regarding "the Company and Citigroup stock." (Compl.¶¶ 231, 237.) In particular, plaintiffs claim that defendants did not "inform participants of the true magnitude of the Company's involvement in subprime lending" and other investments related to subprime mortgages. (*Id.*) That claim appears to be grounded on two distinct allegations:

First, plaintiffs allege that defendants breached their fiduciary duties through their silence. That is, plaintiffs maintain that defendants knew of the "true magnitude of the Company's involvement in subprime lending" but failed to disclose what they knew to plan participants. (*See id.* ¶¶ 200, 237.)

Second, plaintiffs allege that, when defendants did communicate to plan participants, they breached their fiduciary duties by providing "materially false and misleading" information. (*Id.* ¶ 197.)

1. Defendants Had No Affirmative Duty to Disclose Information About Citigroup's Financial Condition

Assuming that each of the Communication Defendants had a fiduciary duty to communicate some information to Plan participants, none of the Communication Defendants had a duty to disclose financial information regarding "the Company and Citigroup stock."

The caselaw is clear that *if* an ERISA fiduciary communicates information to plan participants, the fiduciary must be truthful. *See Varity,* 516 U.S. at 506 ("[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in ... 29 U.S.C. 1104(a)(1)." (quotation omitted)); *see also Avaya,* 503 F.3d at 350 ("It is well-established that an ERISA fiduciary may not materially mislead those to whom section 1104(a)'s duties of loyalty and prudence are owed." (quotation omitted)). But the Second Circuit has not ruled directly on whether an ERISA fiduciary has an affirmative duty to inform plan participants about nonpublic corporate developments that might affect the value of employer stock.

In *Avaya,* the Third Circuit held that the failure of a plan's fiduciaries to "inform Plan participants about several adverse corporate developments" did "not constitute a breach of their disclosure obligations under ERISA." 503 F.3d at 350–51. Instead, the fiduciaries "fulfilled their duty of disclosure under ERISA by informing Plan participants about the potential risks associated with investment in the Avaya Stock Fund." *Id.* at 350. The fiduciaries did not, the court wrote, "have a duty to 'give investment advice' or 'to opine on' the stock's condition." *Id.* (quoting *Meinhardt v. Unisys Corp.,* 74 F.3d 420, 443 (3d Cir. 1996)).

Furthermore, even though the Second Circuit has not decided the exact issue presented here, the Second Circuit has provided guidance. In *Board of Trustees of CWA/ITU Negotiated Pension Plan v. Weinstein,* 107 F.3d 139 (2d Cir. 1997), a plan participant claimed that plan administrators had violated ERISA by failing to disclose "actuarial valuation reports" in response to the participant's request. The Second Circuit observed that section 104(b)(4) of ERISA set forth a precise list of documents that the administrators were required to provide "'upon written request of any participant or beneficiary.'" *Id.* at 142 (quoting 29 U.S.C. § 1024(b) (4)). Examining the definition of the terms on that list, the court concluded that section 104(b)(4) did not require the disclosure of actuarial reports. *Id.* at 142–46.

The court then addressed the participant's argument that "the Administrators were required to provide him with copies of the actuarial valuation reports pursuant to their general fiduciary duties of loyalty and prudence, set out in ERISA § 404(a)(1) (A)-(D)." *Id.* at 146 (citing 29 U.S.C. § 1104(a)(1)(A)-(D)). Noting that those "provisions say nothing explicitly about providing documents to participants," the panel found "in the general fiduciary duty provisions of ERISA no basis for requiring disclosure of the actuarial valuation reports." *Id.* at 146–47 (quotation omitted). The court reasoned that since it had "concluded that Congress intentionally fashioned § 104(b)(4) to limit the categories of documents that administrators must disclose on demand of plan participants," it was "inappropriate to infer an unlimited disclosure obligation on the basis of general provisions that say nothing about disclosure." *Id.* at 147;

see also Weiss v. Cigna Healthcare, 972 F.Supp. 748, 754 (S.D.N.Y. 1997) (holding that a plan fiduciary was not required to disclose "physician compensation arrangements" because the "general obligations set forth in ERISA § 404 do not refer to the disclosure of information to Plan participants" and had "Congress seen fit to require the affirmative disclosure of physician compensation arrangements, it could certainly have done so in ERISA §§ 101–111").

There are important similarities between the claim rejected by *Weinstein* and the disclosure claim asserted by plaintiffs in this action. Here, ERISA provided a "comprehensive set of 'reporting and disclosure' requirements" governing what defendants were required to disclose to Plan participants. *Curtiss–Wright Corp. v. Schoonejongen,* 514 U.S. 73, 83 (1995) (citing 29 U.S.C. §§ 1021–31). Just as the documents sought in *Weinstein* did not fall within the statute's explicit disclosure requirements, plaintiffs can point to no ERISA provision requiring that fiduciaries disclose information bearing on an employer's financial condition.

Rather, like the plan participant in *Weinstein,* 107 F.3d at 146, plaintiffs claim that defendants were required to disclose information about Citigroup's investments "pursuant to their general fiduciary duties of loyalty and prudence." That theory of relief is foreclosed by the reasoning of *Weinstein,* which made clear that it is "inappropriate to infer an unlimited disclosure obligation on the basis of general provisions that say nothing about disclosure." *Id.* at 147. Plaintiffs' failure-to-disclose claim must therefore be dismissed insofar as plaintiffs allege that defendants had an affirmative duty to convey financial information about Citigroup.

That holding is appropriate even though, as *Polaroid*—a district court case—recognized, several courts have determined that an ERISA fiduciary faces "'an affirmative duty to inform when the [fiduciary] knows that silence might be harmful.'" *Polaroid,* 362 F.Supp.2d at 478 (quoting *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund,* 12 F.3d 1292, 1300 (3d Cir. 1993), and citing *Devlin v. Empire Blue Cross & Blue Shield,* 274 F.3d 76, 87 (2d Cir. 2001); *Krohn v. Huron Mem'l Hosp.,* 173 F.3d 542, 547–48 (6th Cir. 1999); *Eddy v. Colonial Life Ins. Co. of Am.,* 919 F.2d 747, 750–51 (D.C. Cir. 1990)). The distinction centers on the fact that the cases cited in *Polaroid* involved information about plan *benefits,* not information about the financial status of plan *investments.* When a beneficiary asks a fiduciary whether he or she is eligible for benefits, "the fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance ... even if that information comprises elements about which the beneficiary has not specifically inquired." *Bixler,* 12 F.3d at 1300 (citing *Eddy,* 919 F.2d at 750); *see also Devlin,* 274 F.3d at 88–89 (addressing a claim that a fiduciary made "affirmative misrepresentations regarding plan benefits" and the plan's terms); *Krohn,* 173 F.3d at 548 (addressing a claim that a plan administrator "breached its fiduciary duty by failing to provide information about [a beneficiary's] entitlement to long-term disability benefits when her husband requested general information about the benefits to which she was entitled").

A fiduciary's duty to volunteer information about plan benefits derives straightforwardly from the fiduciary's obligation to "discharge his duties ... 'for the exclusive purpose' of providing *benefits* to them." *Devlin,* 274 F.3d at 88 (quoting 29 U.S.C. § 1104(a)(1)(A)-(B)) (emphasis added). But it is quite another matter to suggest that a fiduciary must volunteer financial information about companies in which participants may invest. That would transform fiduciaries into investment advisors, and as the Third Circuit has written, fiduciaries do "not have a duty to 'give investment advice' or 'to opine on' the stock's condition." *Avaya,* 503 F.3d at 350 (quoting *Meinhardt,* 74 F.3d at 443).

Thus, when it comes to information about plan benefits, a fiduciary may have "an affirmative duty to inform when the [fiduciary] knows that silence might be harmful." *Polaroid,* 362 F.Supp.2d at 478 (quotation and citations omitted). After all, ERISA's fiduciary provisions explicitly require a fiduciary to "discharge his duties ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i). But when it comes to financial information about companies in which participants may invest, it is "inappropriate to infer an unlimited disclosure obligation on the basis of general provisions that say nothing about disclosure." *Weinstein,* 107 F.3d at 147.

2. Neither Citigroup nor Prince Was "Acting as a Fiduciary" When Making Statements About Citigroup's Financial Condition

Plaintiffs allege that, regardless of whether or not the Communication Defendants had an affirmative duty to disclose information about Citigroup's financial condition, the Communication Defendants volunteered misleading information about Citigroup and thereby violated their fiduciary duty to speak truthfully to Plan participants.

With respect to Citigroup and Prince, plaintiffs allege, upon "information and belief," that:

• Citigroup and Prince "regularly" provided misleading information about Citigroup's financial condition in "newsletters, memos, letters, the Plans' documents, and/or other Plan related materials." (*Id.* ¶ 197.)

• "Citigroup representatives from the Company's headquarters" held "mandatory town hall meetings about every three months where they would assemble ... Plan participants ... and encourage [them] to invest in Citigroup stock through the Plans." (*Id.* ¶ 198.)

• Citigroup filed documents with the SEC—"including 8–Ks attaching Citigroup press releases, 10–Qs, and 10–Ks"—that were "materially false and misleading." (*Id.* ¶ 197.)

• Prince signed the misleading SEC filings, and the filings "quoted certain ... false and misleading statements" that Prince made. (*Id.*)

• The Plans' Summary Plan Descriptions "directed the Plans' participants to rely on Citigroup's filings with the SEC." (*Id.*)

All of those communications, plaintiffs claim, were misleading because they "fostered an inaccurately rosy picture of the soundness of Citigroup stock as a Plan investment" and "prevented the Plans' participants from appreciating the true risks presented by investments in Citigroup stock." (*Id.* ¶ 199.)

If, as plaintiffs claim, a Plan fiduciary volunteered information to participants about Citigroup's financial condition, that fiduciary had a duty to speak truthfully and not to mislead. *See Varity,* 516 U.S. at 506; *see also In re WorldCom, Inc. ERISA Litigation,* 263 F.Supp.2d 745, 766 (S.D.N.Y. 2003). But ERISA's duty to speak truthfully applies only to those who are, in fact, ERISA fiduciaries. As always, the "threshold question" in "every case charging breach of ERISA fiduciary duty" is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram,* 530 U.S. at 226. Thus, for plaintiffs to plead breach of fiduciary duty claims based on the allegedly misleading statements of Citigroup or Prince, plaintiffs must first sufficiently allege that each was "acting as a fiduciary (that is, was performing a fiduciary function)" when making the statements at issue.

Citigroup and Prince had only minor responsibilities under the Plans, and none of those responsibilities involved administering the Plans or communicating with Plan participants. Plaintiffs allege that Citigroup (and Prince, as a Citigroup director) had authority (1) to appoint the members of the Investment and Administration Committees; (2) to appoint the trustee of the Citigroup Plan; and (3) in connection with a dividend reinvestment plan, to direct the trustee to "receive company shares in lieu of cash dividends." (Compl. ¶¶ 46–48, 57; *see also* Trust Agreement §§ 4.1(n).)[8] Citigroup and Prince may have had fiduciary duties in connection with those limited responsibilities—for example, a duty to appoint members of the Investment and Administration Committees in a prudent and loyal manner. But it is clear from the Plan Agreements that Citigroup and Prince had no responsibility to communicate with Plan participants. Thus, even if Citigroup and Prince "regularly" provided Plan participants with misleading information about Citigroup's financial condition (Compl.¶ 197), those communications were not subject to ERISA's duty to speak truthfully. They were, instead, *corporate* communications from an employer to its employees, not *ERISA* communications from a fiduciary to participants.

Furthermore, emerging caselaw makes clear that those "who prepare SEC filings do not become ERISA fiduciaries through those acts" and, "consequently, do not violate ERISA if the filings contain misrepresentations." *WorldCom,* 263 F.Supp.2d at 767. That rule is sensible, as SEC filings are "documents that directors must execute to comply with a corporation's obligations under federal securities laws." *Id.* at 760. SEC filings do not, standing alone, have anything to do with ERISA. Thus, if Citigroup filed "materially false and misleading" 8–Ks, 10–Qs,

[8] Plaintiffs also claim that Citigroup exercised "de facto authority" over Plan fiduciaries. (Compl.¶ 49.) As described above, plaintiffs' allegations in support of that claim are insufficient to meet the pleading standard set forth in *Twombly*, 550 U.S. at 570, and *Iqbal*, 129 S.Ct. at 1949. See *supra* Subsection II.A.6.

and 10–Ks (Compl.¶ 197)—and if Prince signed those filings knowing them to be false (*id.*)—Citigroup and Prince may have run afoul of the federal securities laws, but Citigroup and Prince did not violate ERISA.

Plaintiffs contend that this is a case like *Varity,* 516 U.S. 489, where the Supreme Court held that a corporate officer was "acting as a fiduciary" when the officer spoke to a group of employees about how a corporate restructuring would affect the company's ERISA benefit plan. In *Varity,* the corporation was "both an employer and the benefit plan's administrator," and the corporation had not "authorized only special individuals" to "speak as plan administrators." *Id.* at 498, 503. Thus, the Court explained that the corporation could, at various times, wear two "hats," its " 'fiduciary,' as well as its 'employer,' hat." *Id.* at 498. There were times, the Court wrote, when the corporation communicated with its employees and was "acting only in its capacity as an employer." *Id.* But when the corporation held a meeting of employees and *"intentionally* connected its statements about [the corporation's] financial health to statements it made about the future of benefits," the corporation was wearing both hats and was thus "acting as a fiduciary." *Id.* at 503, 505.

Contrary to plaintiffs' contention, this case is not like *Varity*. Here, unlike in *Varity,* Citigroup was *not* "both an employer and the ... plan's administrator" and Citigroup *had* "authorized only special individuals" to "speak as plan administrators." *Id.* at 498, 503. The Plan Agreements explicitly designated a separate entity—the Administration Committee—to serve as the Plans' administrator:

> The Plan shall be administered by the [Administration] Committee. The Committee shall be the plan administrator within the meaning of Section 3(16)(A) of ERISA and shall have fiduciary responsibility for the general operation of the Plan.

(Citigroup Plan § 3.01(a); Citibuilder Plan § 3.01(a).) Thus, this is not a case where the employer wore two hats when speaking to plan participants. Rather, the unambiguous provisions of the Plan Agreements show that Citigroup had only minor fiduciary responsibilities and no responsibility to administer the Plans or to communicate with Plan participants. Thus, even if Citigroup held "town hall meetings" and made statements to Plan participants regarding Citigroup's financial condition (*see* Compl. ¶¶ 197–98), Citigroup could have been wearing only one hat—its employer hat—when it made those statements.[9]

As a result, neither Citigroup nor Prince was

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[9] Furthermore, plaintiffs fail to allege particularized facts to show that Citigroup and Prince's made any statements that were "*intentionally* connected" to Plan benefits. *Varity,* 516 U.S. at 504. For example, plaintiffs contend that when Citigroup and Prince spoke to Plan participants about "Citigroup stock," they were speaking as fiduciaries because Citigroup stock was "the single largest asset of both Plans." (Compl. ¶ 197; Pls.' Mem. in Opp'n 42.) That contention is unavailing. Plaintiffs cannot plead that Citigroup and Prince spoke as fiduciaries without additional factual allegations that Citigroup and Prince "intentionally connected" their statements about "Citigroup stock" to Plan benefits.

"acting as a fiduciary" when communicating with Plan participants regarding Citigroup's financial condition. Insofar as plaintiffs' breach of fiduciary duty claims rests on allegations that Citigroup and Prince violated ERISA's duty to speak truthfully, plaintiffs have failed to state a claim upon which relief can be granted.

3. Plaintiffs Have Failed to Plead a Plausible Claim that the Administration Committee Knew of Citigroup's Alleged Financial Problems

Unlike Citigroup and Prince, there is no doubt that the Administration Committee was a fiduciary with respect to communications. As discussed above, the Administration Committee was the administrator of the Plans, and thus the Administration Committee was responsible for fulfilling ERISA's numerous disclosure requirements. *See* 29 U.S.C. §§ 1021–31. If the Administration Committee communicated with Plan participants regarding Citigroup's financial condition, the Committee had a duty to be truthful.

Plaintiffs allege that, like Citigroup and Prince, the Administration Committee "regularly" provided misleading information about Citigroup's financial condition in "newsletters, memos, letters, the Plans' documents, and/or other Plan related materials." (Compl.¶ 197.) The complaint, however, provides only one specific example of such communications: plaintiffs claim that the Plans' Summary Plan Descriptions, issued by the Administration Committee, "directed the Plans' participants to rely on Citigroup's filings with the SEC." (*Id.*)

There is caselaw holding that, although those "who prepare and sign SEC filings do not become ERISA fiduciaries through those acts," those "who are ERISA fiduciaries ... cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings." *WorldCom,* 263 F.Supp.2d at 766.

Assuming that rule is sound, plaintiffs' claim against the Administration Committee nonetheless fails because the complaint does not contain facts showing that the Administration Committee knew or should have known anything about Citigroup's potential losses related to subprime mortgages. Nor does the complaint contain facts showing that the Administration Committee knew or should have known anything about the allegedly false and misleading information in Citigroup's SEC filings.

The complaint alleges baldly that "the Administration ... Committee Defendants knew or should have known about Citigroup's massive subprime exposure as a result of their responsibilities as fiduciaries of the Plans." (Compl. ¶ 188; *see also id.* ¶ 185.) The complaint does not, however, provide any facts in support of that allegation. Instead, plaintiffs' allegation that the Administration Committee "knew or should have known" of Citigroup's "massive subprime exposure" is no more than a " 'naked assertion[ ]' devoid of 'further factual enhancement.' " *Iqbal,* 129 S.Ct. at 1949 (quoting *Twombly,* 550 U.S. at 557). Without an allegation that the Administration Committee had any notion that Citigroup's SEC filings were "false and misleading," plaintiffs have failed to state a claim that the Committee breached its duty to speak truthfully. *Cf. Crowley,* 234 F.Supp.2d at 230.

C. Count III: Defendants Allegedly Failed to Monitor Plan Fiduciaries

Count III alleges that the so-called "Monitoring Defendants"—Citigroup, Prince, and Rubin—breached their fiduciary duties by failing to monitor the fiduciaries they appointed—the members of the Administration and Investment Committees. Plaintiffs articulate that claim in different ways, but their allegations boil down to one contention: the Plans "suffered enormous losses as a result of [the Committees'] imprudent actions and inaction with respect to [Citigroup] stock," and thus the Monitoring Defendants must have breached their duty to monitor the Committees by "failing to remove appointees whose performance was inadequate." (Compl. ¶ 250.)[10]

Several courts have held that the authority to appoint ERISA fiduciaries brings with it a duty to monitor the appointees. *See Polaroid,* 362 F.Supp.2d at 477 (collecting cases and noting that an "appointing fiduciary's duty to monitor his appointees is well-established"). But even if the duty to monitor exists, plaintiffs have failed to plead a breach of the duty to

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[10] Plaintiffs also allege that the Monitoring Defendants breached their duty to monitor by "failing to ensure that the monitored fiduciaries appreciated the true extent of Citigroup's highly risky and inappropriate business practices." (Comp. ¶ 250.) That claim will be addressed in connection with Count IV, which makes essentially the same allegations.

monitor here. Plaintiffs' failure-to-monitor claim rests entirely on plaintiffs' allegation that the Administration and Investment Committees acted imprudently with respect to the Plans' investment in Citigroup stock. As discussed above, the Committees had no discretion to eliminate Citigroup stock as an investment option and, in any event, investment in Citigroup stock was presumptively prudent. Thus, plaintiffs have failed to plead a breach of the duty to monitor because plaintiffs have failed to cite any instance of misconduct that the Monitoring Defendants failed to detect. *See, e.g., Smith v. Delta Air Lines, Inc.,* 422 F.Supp.2d 1310, 1333 (N.D. Ga. 2006) ("Plaintiff cannot maintain a claim of failure to monitor when those to be monitored were acting prudently.").

D. Count IV: Defendants Allegedly Failed to Disclose Information to Co–Fiduciaries

Count IV alleges that the Monitoring Defendants—Citigroup, Prince, and Rubin—breached their fiduciary duties by failing to provide non-public information about "the risks posed by investment in [Citigroup] stock" to the Administration and Investment Committees. (Compl.¶¶ 255, 257.) Plaintiffs claim that the Monitoring Defendants had a duty to disclose information to the Committees as part of their duty to monitor appointees and as an independent aspect of their general fiduciary obligations. (*Id.* ¶¶ 250, 255.)

That claim fails because, as discussed above, the Monitoring Defendants were fiduciaries only to the extent that they appointed the members of the Administration and Investment Committees. Their fiduciary obligations in no way extended to managing the Plans' investments or to communicating with Plan participants. To hold that the Monitoring Defendants had a duty to provide material, non-public information to the Plans' fiduciaries would extend the Monitoring Defendants' fiduciary responsibilities far past their limited role as outlined by the Plan Agreement. Accordingly, plaintiffs' allegations regarding the Monitoring Defendants' failure to provide information to Plan fiduciaries do not state a claim upon which relief can be granted.

E. Count V: Defendants Allegedly Performed Their Duties with Conflicts of Interest

Count V alleges that all defendants had conflicts of interest—and thus breached their duties of loyalty—because "the compensation and tenure of Defendants were tied to the performance of Citigroup stock and/or the publicly reported financial performance of Citigroup." (Compl.¶ 264.) A "conflict-of-interest claim" that is "based purely on the fact that Defendants' compensation was stock-based ... fails to state a claim for breach of fiduciary duty." *Polaroid,* 362 F.Supp.2d at 479 (citing *WorldCom,* 263 F.Supp.2d at 768). The allegations here are essentially the same, as plaintiffs claim that defendants' compensation was "tied to the performance of Citigroup stock." That is not enough to plead an actionable conflict of interest.

Count V also alleges that Prince and Rubin breached the ERISA duty of loyalty by selling millions of dollars of Citigroup stock during the class period. (Compl.¶ 264.) Plaintiffs do not, however, explain how sales of Citigroup stock created any conflict for Prince and Rubin. Accordingly, plaintiffs' conflict-of-interest allegations fail to state a claim upon which relief can be granted.

F. Count VI: Defendants Allegedly Face Co–Fiduciary Liability

Count VI brings a claim against all defendants on a theory of "co-fiduciary liability." ERISA provides that

> a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a). Here, plaintiffs have failed to allege a claim of co-fiduciary liability because, as described above, all of plaintiffs' other claims fail. Thus, plaintiffs have not alleged "a breach of fiduciary responsibility of another fiduciary," *id.* § 1105(a), and plaintiff's co-fiduciary claim must be dismissed.

IX. CONCLUSION

For the reasons set forth above, none of plaintiffs' allegations state a claim upon which relief can be granted. Defendants' motion to dismiss is accordingly granted, and the Clerk of Court is directed to enter judgment for defendants.[11]

SO ORDERED:

[11] The Clerk of Court is directed to enter judgment for defendants in each of the consolidated actions: 07 Civ. 9790, 07 Civ. 10294, 07 Civ. 10341, 07 Civ. 10396, 07 Civ. 10442, 07 Civ. 10458, 07 Civ. 10461, 07 Civ. 10472, 07 Civ. 11156, 07 Civ. 11158, 07 Civ. 11164, 07 Civ. 11207, and 07 Civ. 11369.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 09–3804–CV

IN RE: CITIGROUP ERISA LITIGATION.

STEPHEN GRAY, JAMES BOLLA, AND SAMIER TADROS,
Lead Plaintiffs–Appellants,

SANDRA WALSH, ANTON K. RAPPOLD, AND ALAN STEVENS, *Plaintiffs–Appellants*,

v.

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

[Filed Feb. 23, 2012]

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: CITIGROUP ERISA LITIGATION

STEPHEN GRAY, JAMES BOLLA AND SAMIER TADROS,

Lead Plaintiffs-Appellants

SANDRA WALSH, ANTON K. RAPPOLD, AND ALAN STEVENS,

Plaintiffs-Appellants

v.

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

BRIEF OF AMICUS CURIAE, THE SECRETARY OF LABOR IN SUPPORT OF APPELLANTS' PETITION FOR PANEL OR EN BANC REHEARING

BACKGROUND AND INTEREST OF THE SECRETARY

Petitioners seek rehearing of the decisions in these companion cases brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, by participants in pension plans sponsored by Citigroup and McGraw-Hill. In both cases, participants allege that plan fiduciaries failed to comply with their statutory duty of prudence with respect to billions of dollars of plan investments in employer stock. The companies allegedly misled plan and public investors about the companies' exposure to potentially catastrophic risks in the subprime mortgage market in which they played central roles – in Citigroup's case, as a market participant with huge undisclosed investments in subprime lending and in McGraw-Hill's case (through S & P), as a rating agency knowingly and systematically overstating the value of mortgage-backed securities. Heedless of the risks to plan participants, and despite their status as allegedly knowledgeable corporate insiders, the fiduciaries allegedly took no action to protect participants from apparent danger. Instead, they continued to buy stock for the plans at prices that were artificially inflated by market fraud while doing nothing to warn participants of the risks posed by the companies' conduct.

Despite the fact that the fiduciaries were duty bound by ERISA to operate under a standard of care that is, as this Court long-ago recognized, the "highest known to the law," *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982), the panel concluded that even if the plaintiffs' allegations were true, the fiduciaries had no obligation to do anything to protect the plans' participants. Thus, the panel held that neither the fiduciaries' purported awareness "of the impending collapse of the subprime-mortgage market," nor the allegation that they "failed to investigate the continued prudence of investing in Citigroup stock," nor the allegedly foreseeable loss of "tens of billions of dollars" in Citigroup's value, nor the allegations that "Citigroup's stock price was 'inflated' during the Class Period because the price did not reflect the company's true underlying value" sufficed to state a claim for fiduciary breach. *In re Citigroup ERISA Litig.*, 2011 WL 4950368, at *9, *10 (2d Cir. Oct. 19, 2011). In the panel's view, even if the fiduciaries had investigated or otherwise knew the true facts at the company, they would not have breached their duties because they were not "compelled to conclude . . . that Citigroup was in the sort of dire financial situation that required them to override Plan terms in order to limit participants' investments in Citigroup stock." *Id.* at *10. Nor, according to the panel, did the fiduciaries have an affirmative duty to disclose nonpublic information about the company's stock to the plan participants and other investors as a means of protection. *Id.* at *11.

In reaching its holdings, the panel did not apply the prudence standard expressly set forth in ERISA's text – a fiduciary obligation to act in accordance with the trust law's stringent prudent man standard. 29 U.S.C. § 1104(a)(1)(B). Under the statutory test, dismissal would not be appropriate because one could not plausibly conclude that a prudent person "acting in a like capacity and familiar with such matters" would have knowingly overpaid for stock and failed to take any action whatsoever to protect plan participants' from the clear dangers presented. The panel, however, following the lead of a number of other Circuits, adopted a "presumption of prudence" so stringent that even the allegations above were insufficient to trigger an obligation to do anything to protect plan participants.[1]

The panel's holdings render ERISA's fiduciary protections illusory in the context of publicly-traded employer stock in all but the most "dire situations," "a standard that the majority neglects to define in any meaningful way." 2011 WL 4950368, at *15 (Straub, J., dissenting). Its adoption of a presumption of prudence for employer stock investments finds no support in the text of this "comprehensive

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[1] 2001 WL 4950368, at *6 (citing *Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447, 1451 (6th Cir. 1995); *Kirschbaum v. Reliant Energy, In.*, 526 F.3d 243, 254 (5th Cir. 2008); *Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010).

and reticulated statute," *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985), which neither refers to "dire situations" nor suggests that the fiduciary duty of prudence is an obligation merely to protect participants from disastrous losses, while ignoring other risks of serious injury.

The panel's endorsement, on policy grounds, of a diminished standard of prudence disregards Supreme Court cases prohibiting the courts from using federal common law to rewrite the text of ERISA and gives short shrift to the exacting standard of prudence previously imposed on plan fiduciaries in this Circuit. And although the panel concluded that the plaintiffs' factual allegations were too conclusory to support a finding that the defendants had actual knowledge of the companies' subprime exposure, the broad application of the presumption would preclude liability even for the knowing overpayment for employer stock except in the rare case where the fiduciaries are "compelled to conclude that [the company] was in a dire situation." 2011 WL 4950368, at *10. The decision thus undermines ERISA's protections and disregards uniform case law recognizing that fiduciaries breach their duties by overpaying for plan investments. Likewise, the panel's rejection of the well-recognized fiduciary duty to disclose needed information to plan participants – apparently even in "dire situations" – contradicts both the trust law and the uniform law of the many other circuits that have considered the issue.

The Secretary of Labor, who has primary authority for enforcing and administering Title I of ERISA, 29 U.S.C. §§ 1002(13), 1136(b), agrees with the dissent that the panel's holdings represent "both an alarming dilution" of ERISA "and a windfall for fiduciaries, who may now avail themselves of the corporate benefits of employee stock ownership plans (ESOPs) without the costs of complying with the statutorily mandated obligations of prudence." 2011 WL 4950368, at *15 (Straub, J., dissenting). The issues are of exceptional importance under Federal Rules of Appellate Procedure 35(a)(2) and (b)(1)(B) because they put hundreds of billions of dollars in pension plan assets at undue risk.

ARGUMENT

I. A PRESUMPTION OF PRUDENCE FINDS NO SUPPORT IN, AND INDEED CONFLICTS WITH, ERISA'S STATU-TORY TEXT AND PURPOSES, AND LEADS TO ABSURD RESULTS

Nothing in ERISA supports the application of a presumption of prudence to investments in employer stock by retirement plans. Consistent with its "central purpose [] 'to protect beneficiaries of employee benefit plans,'" *Citigroup*, 2011 WL 4950368, at *5 (citation omitted), ERISA imposes upon all fiduciaries the duties to act exclusively in the interests of the participants and beneficiaries and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of a like character and with like aims." 29 U.S.C. §§ 1104(a)(1)(A) & (B); S. Rep. No. 93-127, 1974 U.S.C.C.A.N. 4838, 4863, 4866 ("the core principles of fiduciary conduct . . . place a . . . duty on *every* fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act") (emphasis added). At a minimum, these duties require "a review of the fiduciary's independent investigation of the merits of a particular investment." *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983); *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) ("[t]he court's task is to inquire 'whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment'") (citation omitted).

There is no basis in ERISA for a special, less exacting obligation to prudently evaluate and structure plan investments in employer stock. While the Act exempts certain investments in employer securities from ERISA's diversification requirement, it expressly limits the scope of the carve-out – fiduciaries are relieved from the "prudence requirement (*only* to the extent that it requires diversification)," *id.* § 1104(a)(2) (emphasis added).[2] Thus, ERISA fiduciaries must otherwise manage employer securities under the statute's exacting standard of care. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 422-23

[2] In those few instances where the statute exempts fiduciaries from their duty to act prudently, it does so expressly. *E.g., Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 217 (2d Cir. 2006) (ERISA exempts "top-hat" plans from fiduciary requirements); *Gilliam v. Nev. Power Co.*, 488 F.3d 1189, 1192-93 (9th Cir. 2007) (fiduciary exemption of top-hat plans was "no small matter" … and "Congress created a special regime to cover them") (citation omitted).

(4th Cir. 2007) (rejecting a four-part test of fiduciary duty with regard to investments in employer securities and holding, instead, that "ERISA itself sets forth the *only* test of a fiduciary's duties") (emphasis added). Rather than rely on the text of ERISA's prudence provision, however, the panel's opinion relied on two policy concerns that it believed were in tension with the duty of prudence: "(1) the Plan language mandating that the Stock Fund be included as an investment option and (2) the 'favored status Congress has granted to employee stock investments in their own companies.'" 2011 WL 4950368, at *5 (citation omitted). Neither concern supports the presumption.

As to the former concern, the statute expressly addresses situations where plan documents conflict with statutory duties, and states that the duties set forth in the Act trump plan language. Far from imposing "competing obligations" on fiduciaries, *id.* at *7, the statute clearly provides that fiduciaries must follow plan documents only "insofar as such documents and instruments are consistent with [title I and IV of ERISA]." 29 U.S.C. § 1104(a)(1)(D); *Cent. States, Se. and Sw. Areas Pension Fund v. Cent. Trans., Inc.*, 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA"); *Esden v. Bank of Boston*, 229 F.3d 154, 173 (2d Cir. 2000) ("[t]he Plan cannot contract around the statute"). *See also* 29 U.S.C. § 1110 (any plan documents that reduce liability for fiduciary breaches are "void as against public policy"). The legislative history is also clear on this point, explaining that, unlike the trust law, ERISA bars "deviations" from fiduciary duties based on plan language. S.

Rep. No. 93-127, 1974 U.S.C.C.A.N. at 4866; H.R. Rep. No. 93-533, 1974 U.S.C.C.A.N. 4639, 4650 (noting that ERISA departs from the trust framework – which permitted "investments which might otherwise be considered imprudent" based on the settlor's expressed intent to allow such investments – because "the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and nature").

Thus, the panel's conclusion that only "in a 'dire situation' that was objectively unforeseeable by the settlor could require a fiduciary to override plan terms," 2011 WL 4950368, at *8, cannot be squared with ERISA's mandate that the fiduciary's general obligation to follow plan documents always gives way to the overriding statutory duty to act prudently and loyally in managing the plan and its assets. *See Herman v. NationsBank*, 126 F.3d 1354, 1368-69 & n.15 (11th Cir. 1997) (rejecting an argument that an "ERISA trustee must follow a plan provision unless it is facially invalid, or unless following the provision would be an abuse of the trustee's discretion," and holding instead that the trustee must "disregard the provision" if it "leads to an imprudent result"). Nor is it consistent with the objective nature of prudence, *see Katsaros*, 744 F.2d at 279, which is not measured by the subjective expectations of the plan sponsor.

Likewise, the special status of employer securities under ERISA provides no support for the panel's dilution of the prudence standard. It is certainly true that Congress has created explicit incentives to encourage plan ownership of employer stock in the form of favorable tax treatment, a pass from diversification, and an exemption to the prohibited transactions rules that would otherwise forbid the plan's purchase of stock from the employer. *See Moench*, 62 F.3d at 568. However, Congress granted preferential tax treatment to all pension plans, and this tax-favored status is one of the reasons that it is particularly important to ensure that ERISA's fiduciary obligations are enforced. *See* H.R. Rep. No. 93-1280, at 45 (1974), 1974 U.S.C.C.A.N. 5038, 5083 (noting that, in exchange for tax preferences, "the safeguards … that a prudent investor would adhere to must be present"); S. Rep. No. 93-383, at 86, 93 (1974), 1974 U.S.C.C.A.N. 4889, 4978, 4984 (noting that IRS's generally applicable prudence rules *continue* to apply to employer stock post-ERISA); 119 Cong. Rec. 17651 (daily ed. May 31, 1973). Certainly, the taxpayer is ill-served by a legal standard that permits fiduciaries to waste tax-deductible contributions on stock that is worth significantly less than the plan assets expended on the stock. Preferential tax treatment is one reason that employers will continue to sponsor plans that invest in stock, not a rationale for lesser protections. *See* 2011 WL 4950368, at *20-*21 (Straub, J., dissenting).

Moreover, both the prohibited transaction exemption and the pass from diversification, as exemptions from "certain *per se* violations on investments in employer securities," *Eaves v. Penn*, 587 F.2d 453, 459 (10th Cir. 1978), should generally be read narrowly, as Judge Straub points out in his dissent. 2011 WL 4950368, at *20 (citing *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 955-56 (D.C. Cir. 1985) ("fiduciaries must be subject to the closest scrutiny under the prudent person rule, in spite of the strong policy preference in favor of investment in employer stock") (internal quotations omitted); *Eaves*, 587 F.2d at 460 ("ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments.")). That Congress intended such a narrow construction is especially evident here because in the very same provision in which Congress permitted undiversified investments in employer stock, it expressly declined to otherwise abrogate the fiduciary's duty of prudence. 29 U.S.C. § 1104(a)(2).

Thus, ERISA provides no support for the panel's adoption of a deferential standard of review that provides that, regardless of what a prudent fiduciary in like circumstances would do, a plan fiduciary has no liability if it continued to buy stock at an inflated price, failed to investigate the prudence of stock investments, and disclosed nothing at all to participants about apparent dangers so long as the company was not in a sufficiently "dire" situation.[3] The panel's adoption of this standard as a "substantial shield" for fiduciaries, 2011 WL 4950368, at *8 (citing *Kirschbaum*, 526 F.3d at 256), represents a whol-

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[3] Whether or not circumstances are dire, prudence always requires fiduciaries to investigate and monitor the appropriateness of any plan investments, as this Court has recognized. See *Katsaros*, 744 F.2d at 279; *cf. Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("if a fiduciary was aware of a risk to the fund, he may be held liable for failing to investigate fully the means of protecting the fund from that risk"). Were it otherwise, it is not clear how fiduciaries would even know when circumstances are sufficiently "dire" to require them to take protective action.

ly unwarranted creation of federal common law. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995) ("It is undesirable to make the law more complicated by proliferating special review standards without good reasons."). The creation of an alternative, common law standard for fiduciary conduct untethered to the statutory text is particularly unwarranted here because ERISA expressly adopts the familiar trust-law standard of prudence. *See Mertens v. Hewitt Assocs.*, 508 U.S, 248, 259 (1993) ("[t]he authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute"); *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 581 (2d Cir. 2006) (finding no basis for deferring to fiduciary decisions with respect to statutory compliance). Moreover, as the dissent correctly points out, the largely "undefined" new standard adds not a wit of certainty to the equation, while promoting "arbitrary line-drawing" that protects "careless decisions to invest in employer securities so long as the employer's 'situation' is just shy of 'dire.'" 2011 WL 4950368, at *15.

Even if a measure of deference were appropriate in some circumstances, it is wholly inappropriate to create a standard that excuses plan fiduciaries from overpaying for stock that they knew, or should have known, was artificially inflated because of misrepresentations or inadequate public disclosures of the companies' exposure to subprime lending, as alleged here. 2011 WL 4950368, at *4, *10; *Citigroup* Complaint, A-100, 105, 111-12, ¶¶ 197, 219, 238-39; *Gearren* Complaint, A-1569, 1572-78, ¶¶ 52, 54, 66-70. In this context, presuming that the fiduciaries acted prudently is unwarranted, and whether the company is in a "dire situation" is irrelevant. This follows from the well-established rule that a fiduciary breaches his duties by paying too much for an asset for the plan. *See, e.g., Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). Knowingly overpaying for an asset is never prudent or in the best interest of plan participants and beneficiaries, and this Court has recognized as much. *See Donovan v. Bierwirth (II)*, 754 F.2d 1049, 1054-55 (2d Cir. 1985) (where fiduciaries "caused the plaintiffs to sell too cheaply or to buy too dearly," they are "liable for the difference between what the plaintiffs paid … and what the stock was in fact worth"). *See also LaLonde v. Textron, Inc.*, 369 F.3d 1, 6-7 (1st Cir. 2004) (misrepresentations that caused artificial inflation of stock price could establish fiduciary breach); Restatement (Third) of Trusts § 205 cmt. e, illus. 9 ("if a trustee is authorized to purchase property for the trust, but in breach of trust he pays more than he should pay, he is chargeable with the amount he paid in excess of its value"); *Horn v. McQueen*, 215 F. Supp. 2d 867, 875 (W.D. Ky. 2002) (presumption of prudence only applies to claims for failure to divest existing holdings, no deference applicable in overpayment claims).[4] *Cf.* U.S. Dep't of Labor Field Assistance

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[4] Even where prudence dictates that the fiduciary take some course of action to protect plan participants in light of serious and undisclosed problems, however, it does not necessarily require the divestiture of the plan's holdings in employer

Bulletin 2004-03 (Dec. 17, 2004) ("if a directed trustee has non-public information indicating that a company's public financial statements contain material misrepresentations that significantly inflate the company's earnings, the trustee could not simply follow a direction to purchase that company's stock at an artificially inflated price"). But that is exactly what is allowed under the panel's decision: so long as the company is not in a "dire situation," even fiduciaries who know that that the market is being misled about the value of the stock need not consider taking action, but may allow the plans they serve to continue buying stock at inflated prices.

II. THE PANEL'S HOLDING THAT THE FIDUCIARIES HAVE NO DISCLOSURE OBLIGATIONS IN THIS CASE CON-FLICTS WITH UNIFORM CASE LAW FROM OTHER CIRCUITS

In addition to foreclosing the need for fiduciaries to take any action with regard to company stock until the company's situation is sufficiently dire, the panel held that fiduciaries need never disclose information to plan participants and the market about the stock investment as a means of protecting plan participants, apparently no matter how "dire" the situation. 2011 WL 4950368, at *11. This holding conflicts with the universally recognized duty of ERISA fiduciaries, like their trust-law counterparts, to disclose information that participants and benefi-

securities if such a course of action would not protect the plan's participants or another action would better protect them. See *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 917 (2d Cir. 1979).

ciaries need to know. Under trust law, beneficiaries are "'always entitled to such information as is reasonably necessary to enable [them] to enforce [their] rights under the trust or to prevent or redress a breach of trust.'" Restatement (Second) of Trusts § 173, cmt. c (1959); *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N.Y. 483, 489 (N.Y. 1918) (a trustee may not remain silent "if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practiced eye"). Thus, every other Circuit to have considered the issue has concluded broadly that ERISA's duties of prudence and loyalty incorporate the trust-law duty to disclose information to plan participants where a fiduciary "knows that silence might be harmful." *Bixler v. Cent. Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993).[5]

Contrary to the panel's conclusion, these cases do not all "relate to administrative, not investment matters" such as eligibility or calculation of benefits, *e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (undisclosed fees and other information about stock investments), and the reasoning of these cases fully supports a disclosure duty

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[5] Accord *Watson v. Deaconess Waltham Hosp.*, 298 F.3d 102, 115 (1st Cir. 2002); *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 381 (4th Cir. 2001); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009); *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995); *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750-51 (D.C. Cir. 1990).

here, where benefits are not guaranteed and the value of each participant's pension benefits ultimately is based on the performance of the investments. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1, 255-56 (2008). Particularly where the fiduciaries take no other action to protect plan participants, such as putting a stop to the purchase of stock at inflated prices, public disclosure may be the simplest and most effective way of ensuring that the market price reflects the true value of the companies' stock and that plan participants can protect their interests. The plaintiffs are not, as the panel suggests, asking for investment advice from the fiduciaries or requesting that the fiduciaries give their opinions about the "expected performance" of the company stock. If, however, as the plaintiffs plausibly allege, the fiduciaries knew that plan participants' retirement accounts were at real risk because of significant financial and reporting improprieties, the fiduciaries had to do more than give the participants' warnings about the general risks of non-diversification. Because the Court's opinions instead say that the fiduciaries were free to do nothing at all, they should be reversed.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant the petitions for panel or en banc rehearing and reverse the decision of the district court dismissing these suits.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
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_/s/ Thomas Tso__
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APPENDIX E

1. 29 U.S.C. 1002(21)(A) provides:

§ 1002. Definitions

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

2. 29 U.S.C. 1104 provides in pertinent part:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

3. 29 U.S.C. 1107(d)(3)(A) provides in pertinent part:

§ 1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold--

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of—

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4)(A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2)(A) If this paragraph applies to an eligible individual account plan, the portion of such plan which consists of applicable elective deferrals (and earnings allocable thereto) shall be treated as a separate plan--

(i) which is not an eligible individual account plan, and

(ii) to which the requirements of this section apply.

(B)(i) This paragraph shall apply to any eligible individual account plan if any portion of the plan's applicable elective deferrals (or earnings allocable thereto) are required to be invested in qualifying employer securities or qualifying employer real property or both--

(I) pursuant to the terms of the plan, or

(II) at the direction of a person other than the participant on whose behalf such elective deferrals are made to the plan (or a beneficiary).

(ii) This paragraph shall not apply to an individual account plan for a plan year if, on the last day of the preceding plan year, the fair market value of the assets of all individual account plans maintained by the employer equals not more than 10 percent of the fair market value of the assets of all pension plans (other than multiemployer plans) maintained by the employer.

(iii) This paragraph shall not apply to an individual account plan that is an employee stock ownership plan as defined in section 4975(e)(7) of Title 26.

(iv) This paragraph shall not apply to an individual account plan if, pursuant to the terms of the plan, the portion of any employee's applicable elective deferrals which is required to be invested in qualifying employer securities and qualifying employer real property for any year may not exceed 1 percent of the employee's compensation which is taken into account under the plan in determining the maximum amount of the employee's applicable elective deferrals for such year.

(C) For purposes of this paragraph, the term "applicable elective deferral" means any elective deferral (as defined in section 402(g)(3)(A) of Title 26) which is made pursuant to a qualified cash or deferred arrangement as defined in section 401(k) of Title 26.

4. 29 U.S.C. 1108(e) provides:

§ 1108. Exemptions from prohibited transactions

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)--

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if--

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

5. 29 U.S.C. 1110 provides:

§ 1110. Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude--

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

6. Section 803(h) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1590, provides:

(h) Intent of Congress Concerning Employee Stock Ownership Plans.— The Congress, in a series of laws (the Regional Rail Reorginazation Act of 1973, the Employee Retirement Income Security Act of 1974, the Trade Act of 1974, and the Tax Reduction Act of 1975) and this Act has made clear its interest in encouraging employee stock ownership plans as a bold and innovative method of strengthening the free provate enterprise system which will solve th dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans. Because of the special purposes forp which employee stock ownership plans are established, it is consistent with the intent of Congress to permit these plans (whether structured as pension, stock bonus, or profit–sharing plans) to distribute income on employer securities currently.