

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2010
(Argued: September 28, 2010 Decided: October 19, 2011)
Docket No. 09-3804-cv

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IN RE: CITIGROUP ERISA LITIGATION

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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.

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B e f o r e : WALKER, CABRANES, and STRAUB, Circuit Judges.

Plaintiffs, participants in retirement plans offered by
defendants Citigroup Inc. and Citibank, N.A., and covered by the

1 Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.
2 § 1001 et seq., appeal from a judgment of the United States
3 District Court for the Southern District of New York (Sidney H.
4 Stein, Judge) dismissing their ERISA class action complaint.
5 Plan documents required that a stock fund consisting primarily of
6 Citigroup common stock be offered among the plans' investment
7 options. Plaintiffs argue that because Citigroup stock became an
8 imprudent investment, defendants should have limited plan
9 participants' ability to invest in it. We hold that plan
10 fiduciaries' decision to continue offering participants the
11 opportunity to invest in Citigroup stock should be reviewed for
12 an abuse of discretion, and we find that they did not abuse their
13 discretion here. We also hold that defendants did not have an
14 affirmative duty to disclose to plan participants nonpublic
15 information regarding the expected performance of Citigroup
16 stock, and that the complaint does not sufficiently allege that
17 defendants, in their fiduciary capacities, made any knowing
18 misstatements regarding Citigroup stock. AFFIRMED.

19 Judge STRAUB dissents in part and concurs in part in a
20 separate opinion.

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30 JOHN M. WALKER, JR., Circuit Judge:

31 Plaintiffs, participants in retirement plans offered by
32 defendants Citigroup Inc. and Citibank, N.A., and covered by the
33 Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.
34 § 1001 et seq., appeal from the judgment of the United States
35 District Court for the Southern District of New York (Sidney H.
36 Stein, Judge) dismissing their ERISA class action complaint.¹

1 ¹ This case was argued in tandem with Gearren v. McGraw-Hill
2 Cos., Nos. 10-0792, 10-0934, which we resolve in a separate
3 opinion filed today.

1 Plan documents required that a stock fund consisting primarily of
2 employer stock (the Citigroup Common Stock Fund) be offered among
3 the investment options. Plaintiffs allege that, because
4 Citigroup stock became an imprudent investment, defendants'
5 failure to limit plan participants' ability to invest in the
6 company violated ERISA. We hold that the plan fiduciaries'
7 decision to continue offering participants the opportunity to
8 invest in Citigroup stock should be reviewed for an abuse of
9 discretion, and we find that they did not abuse their discretion
10 here. We also hold that defendants did not have any affirmative
11 duty to disclose to plan participants nonpublic information
12 regarding the expected performance of Citigroup stock, and that
13 the complaint does not sufficiently allege that defendants, in
14 their fiduciary capacities, made any knowing misstatements to
15 plan participants regarding Citigroup stock. We therefore AFFIRM
16 the district court's dismissal of plaintiffs' complaint.

17 **BACKGROUND**

18 **I. Factual Background**

19 Plaintiffs are participants in the Citigroup 401(k) Plan
20 (the "Citigroup Plan") or the Citibuilder 401(k) Plan for Puerto
21 Rico (the "Citibuilder Plan") (collectively, the "Plans"). These
22 employee pension benefit plans are governed by ERISA, which

1 characterizes them as "eligible individual account plans."² 29
2 U.S.C. § 1107(d)(3); see also 29 U.S.C. § 1002(2)(A) (defining
3 "employee pension benefit plan"). Defendant Citigroup Inc.
4 ("Citigroup"), a Delaware corporation and financial services
5 company, is the sponsor of the Citigroup Plan. Defendant
6 Citibank, N.A. ("Citibank"), a subsidiary of Citigroup, is the
7 sponsor of the Citibuilder Plan and the trustee of the Citigroup
8 Plan. The Citibuilder Plan's trustee - not a defendant in this
9 action - is Banco Popular de Puerto Rico. Each Plan is managed by
10 the same two committees: the "Administration Committee,"
11 consisting of eight members, charged with administering the Plans
12 and construing the Plans' terms, and the "Investment Committee,"
13 consisting of ten members, responsible for selecting the
14 investment fund options offered to Plan participants.

15 The Citigroup Plan is offered to Citigroup employees, and
16 the Citibuilder Plan is offered to Puerto Rico employees of
17 Citibank. In all material respects, the Plans are the same.
18 Participants in each Plan may make pre-tax contributions, up to a
19 certain percentage of their salary, to individual retirement
20 accounts. The participants are then free to allocate the funds

1 ² An eligible individual account plan is a defined
2 contribution plan that is "(i) a profit-sharing, stock bonus,
3 thrift, or savings plan; (ii) an employee stock ownership plan;
4 or (iii) a money purchase plan which . . . [is] invested
5 primarily in qualifying employer securities." 29 U.S.C.
6 § 1107(d)(3)(A).

1 within their accounts among approximately 20 to 40 investment
2 options selected by the Investment Committee. Both Plans state
3 that participants' accounts are to be invested in these
4 investment options "in the proportions directed by the
5 Participant."

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

16 Both Plans mandate that the Fund be included as an
17 investment option. Section 7.01 of each provides that the Plan
18 trustee "shall maintain, within the Trust, the Citigroup Common
19 Stock Fund and other Investment Funds," and section 7.01 of the
20 Citigroup Plan adds that "the Citigroup Common Stock Fund shall
21 be permanently maintained as an Investment Fund under the Plan."
22 Section 7.09(e) of each Plan states that "provisions in the Plan
23 mandate the creation and continuation of the Citigroup Common
24 Stock Fund." Further, section 15.06(b) of the Citigroup Plan

1 requires that the Trustee "maintain at least 3 Investment Funds
2 in addition to the Citigroup Common Stock Fund."

3 **II. Procedural History**

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

17 Plaintiffs allege that Citigroup's participation in the ill-
18 fated subprime-mortgage market caused the price drop during the
19 Class Period. Citigroup, according to plaintiffs, consistently
20 downplayed its exposure to that market, even as it recognized the
21 need to start reducing its subprime-mortgage exposure in late
22 2006. At the end of 2007, Citigroup publicly reported a
23 subprime-related loss of \$18.1 billion for the fourth quarter,
24 and further substantial losses continued through 2008.

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

16 Counts III-VI, in substance, are derivative of the
17 violations alleged in Counts I and II. Count III alleges that
18 Citigroup and the Director Defendants failed to properly monitor
19 the fiduciaries that they appointed; Count IV alleges that the
20 same defendants, who had some authority to appoint members of the
21 Administration and Investment Committees, failed to disclose
22 necessary information about Citigroup's financial status to these
23 members; Count V alleges that all defendants breached their
24 fiduciary duty of loyalty by putting the interests of Citigroup

1 and themselves above the interests of Plan participants; and
2 Count VI alleges that Citigroup, Citibank, and the Director
3 Defendants are liable as co-fiduciaries for the actions of their
4 co-defendants.

5 On August 31, 2009, the district court granted in full
6 defendants' motion to dismiss. In re Citigroup ERISA Litig., No.
7 07-cv-9790, 2009 WL 2762708 (S.D.N.Y. Aug. 31, 2009). The
8 district court held that plaintiffs failed to state a claim
9 against defendants related to the Plans' continued investment in
10 Citigroup stock because "defendants had no discretion whatsoever
11 to eliminate Citigroup stock as an investment option, and
12 defendants were not acting as fiduciaries to the extent that they
13 maintained Citigroup stock as an investment option." Id. at *8
14 (internal citation omitted). The district court found,
15 alternatively, that even if defendants did have discretion to
16 eliminate Citigroup stock, they were entitled to a presumption
17 that investment in the stock, in accordance with the Plans'
18 terms, was prudent and that the facts alleged by plaintiffs, even
19 if proven, were insufficient to overcome this presumption. Id.
20 at *15-19. As for the Communications Claim, the district court
21 held that defendants had no duty to disclose information about
22 Citigroup's financial condition and that any alleged
23 misstatements made by defendants were either not knowingly false
24 or not made by defendants acting in their fiduciary capacities.

1 Id. at *20-25. The district court also dismissed plaintiffs'
2 claims regarding defendants' failure to monitor Plan fiduciaries,
3 failure to disclose information to co-fiduciaries, and breach of
4 the duty of loyalty. Id. at *25-27.

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

7 **DISCUSSION**

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

20 ERISA's central purpose is "to protect beneficiaries of
21 employee benefit plans." Slupinski v. First Unum Life Ins. Co.,
22 554 F.3d 38, 47 (2d Cir. 2009). The statute does so by imposing
23 fiduciary duties of prudence and loyalty on plan fiduciaries.
24 The duty of prudence requires that fiduciaries act "with the

1 care, skill, prudence, and diligence under the circumstances then
2 prevailing that a prudent man acting in a like capacity and
3 familiar with such matters would use in the conduct of an
4 enterprise of a like character and with like aims." 29 U.S.C.
5 § 1104(a)(1)(B). The duty of loyalty requires fiduciaries to act
6 "solely in the interest" of plan participants and beneficiaries.
7 Id. § 1104(a)(1).

8 A person is only subject to these fiduciary duties "to the
9 extent" that the person, among other things, "exercises any
10 discretionary authority or discretionary control respecting
11 management of such plan" or "has any discretionary authority or
12 discretionary responsibility in the administration of such plan."
13 29 U.S.C. § 1002(21)(A). As a result, "a person may be an ERISA
14 fiduciary with respect to certain matters but not others."
15 Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 302
16 F.3d 18, 28 (2d Cir. 2002) (quoting F.H. Krear & Co. v. Nineteen
17 Named Trustees, 810 F.2d 1250, 1259 (2d Cir. 1987)). Therefore,
18 in suits alleging breach of fiduciary duty, the "threshold
19 question" is whether the defendants were acting as fiduciaries
20 "when taking the action subject to complaint." Pegram v.
21 Herdrich, 530 U.S. 211, 226 (2000).

22 In their Prudence Claim, plaintiffs allege that the
23 Investment Committee, the Administration Committee, Citigroup,
24 and Citibank violated their duties of prudence and loyalty by

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

10 **I. Prudence Claim**

11 While plaintiffs bring the Prudence Claim against the
12 Investment Committee, the Administration Committee, Citigroup,
13 and Citibank, only the Investment Committee and Administration
14 Committee were fiduciaries with respect to plaintiffs' ability to
15 invest through the Plan in Citigroup stock. The Plans delegated
16 to the Investment Committee the authority to add or eliminate
17 investment funds, and the Plans delegated to the Administration
18 Committee the authority to impose timing and frequency
19 restrictions on participants' investment selections. Citigroup
20 and Citibank, by contrast, lacked the authority to veto the
21 Investment Committee's investment selections. Plaintiffs
22 nevertheless allege that Citigroup and Citibank acted as "de
23 facto fiduciaries" with respect to investment selection.
24 Plaintiffs allege that Citigroup had "effective control over the

1 activities of its officers and employees" on the Investment and
2 Administration Committees, but do not provide any example of this
3 "effective control," nor do they suggest what actions Citigroup
4 took as a de facto fiduciary. Similarly, plaintiffs do not
5 provide any description whatsoever of how Citibank "retained"
6 certain duties delegated under the Citibuilder Plan to the
7 Investment and Administration Committees.

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

23 A. A Presumption of ERISA Compliance in Employee Stock
24 Ownership Plans and Eligible Individual Account Plans
25

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

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

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

11 ERISA requires that fiduciaries act "in accordance with the
12 documents . . . governing the plan insofar as such documents . .
13 . are consistent with the provisions of [ERISA]." 29 U.S.C.
14 § 1104(a)(1)(D). The Act does not, however, explain when, if
15 ever, plan language requiring investment in employer stock might
16 become inconsistent with the statute's fiduciary obligations,
17 such that fiduciaries would be required to disobey the
18 requirements of the ESOP and halt the purchase of, or perhaps
19 even require the sale of, the employer's stock.

20 The Third, Fifth, Sixth, and Ninth Circuits have addressed
21 this question, and we find their decisions helpful. The Third
22 Circuit, in Moench v. Robertson, 62 F.3d 553 (3rd Cir. 1995),
23 adopted a presumption of compliance with ERISA when an ESOP
24 fiduciary invests assets in the employer's stock. There, a

1 participant in an ESOP challenged the ESOP's continued investment
2 in employer stock after the stock's share price dropped from
3 \$18.25 per share to \$0.25 per share over a two-year period. Id.
4 at 557. The court noted that while "ESOPs, unlike pension plans,
5 are not intended to guarantee retirement benefits," id. at 568,
6 "ESOPs are covered by ERISA's stringent requirements, and [except
7 for in enumerated circumstances not directly applicable here]
8 ESOP fiduciaries must act in accordance with the duties of
9 loyalty and care," id. at 569. The court proceeded to describe
10 the standard by which it would judge an ESOP fiduciary's refusal
11 to divest an ESOP of employer stock:

12 [A]n ESOP fiduciary who invests the assets in employer
13 stock is entitled to a presumption that it acted
14 consistently with ERISA by virtue of that decision.
15 However, the plaintiff may overcome that presumption by
16 establishing that the fiduciary abused its discretion
17 by investing in employer securities.
18

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

1 The Sixth, Fifth, and Ninth Circuits have all adopted the
2 Moench presumption. In Kuper v. Iovenko, 66 F.3d 1447 (6th Cir.
3 1995), the employer's stock price had dropped from more than \$50
4 per share to just over \$10 per share. Id. at 1451. The court
5 "agree[d] with and adopt[ed] the Third Circuit's holding that a
6 proper balance between the purpose of ERISA and the nature of
7 ESOPs requires that we review an ESOP fiduciary's decision to
8 invest in employer securities for an abuse of discretion." Id.
9 at 1459. A failure to properly investigate the prudence of
10 continued investment in employer stock could not alone overcome
11 the presumption; rather, plaintiffs were required to demonstrate
12 that conducting such an investigation "would have revealed to a
13 reasonable fiduciary that the investment at issue was
14 improvident." Id. at 1460. The Fifth and Ninth Circuits have
15 also applied the presumption to situations in which employer
16 stock funds were offered as investment options within EIAPs. See
17 Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir.
18 2008) ("The Moench presumption . . . applies to any allegations
19 of fiduciary duty breach for failure to divest an EIAP or ESOP of
20 company stock."); Quan v. Computer Scis. Corp., 623 F.3d 870, 881
21 (9th Cir. 2010) (adopting the presumption because it "is
22 consistent with the statutory language of ERISA and the trust
23 principles by which ERISA is interpreted"). No court of appeals
24 has rejected the presumption of prudence.

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

19 We reject plaintiffs' argument - endorsed by the dissent -
20 that we should analyze the decision to offer the Stock Fund as we
21 would a fiduciary's decision to offer any other investment
22 option. We agree with the Sixth and Ninth Circuits that were it
23 otherwise, fiduciaries would be equally vulnerable to suit either
24 for not selling if they adhered to the plan's terms and the

1 company stock decreased in value, or for deviating from the plan
2 by selling if the stock later increased in value. See
3 Kirschbaum, 526 F.3d at 256 n.13; Quan, 623 F.3d at 881. Such a
4 result would be particularly troublesome in light of the “long-
5 term horizon of retirement investing,” which “requires protecting
6 fiduciaries from pressure to divest when the company’s stock
7 drops.” Quan, 623 F.3d at 882 (quoting Kirschbaum, 526 F.3d at
8 254). Also, as a general matter, plaintiffs’ proposal fails to
9 adequately account for Congress’s concern that employees’ ability
10 to invest in employer stock would be endangered were courts to
11 apply ERISA to ESOPs and EIAPs in the same way they apply the
12 statute to other retirement plans. See, e.g., Tax Reform Act of
13 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1583, 1590
14 (expressing the concern that treating ESOP plans as conventional
15 retirement plans will “block the establishment and success of
16 these plans”).

17 The dissent argues that, rather than providing an
18 “accommodation” between competing interests, our adoption of the
19 Moench presumption allows the policies favoring ESOPs to
20 “override the policies of ERISA.” Dissent at [11]. The “policy
21 concerns” we cite today do not, in Judge Straub’s view, justify
22 the adoption of a standard of review that “renders moot ERISA’s
23 ‘prudent man’ standard of conduct.” Id. at [4, 10]. We
24 emphasize in response that, more than simply accommodating

1 competing policy considerations, the Moench presumption balances
2 the duty of prudence against a fiduciary's explicit obligation to
3 act in accordance with plan provisions to the extent they are
4 consistent with ERISA. See 29 U.S.C. § 1104(a)(1)(D). When, as
5 here, plan documents define an EIAP as "comprised of shares of"
6 employer stock, and authorize the holding of "cash and short-term
7 investments" only to facilitate the "orderly purchase" of more
8 company stock, the fiduciary is given little discretion to alter
9 the composition of investments. If we were to judge that
10 fiduciary's conduct using the same standard of review applied to
11 fiduciaries of typical retirement plans, we would ignore not only
12 the policy considerations articulated by Congress but also the
13 very terms of the plan itself. Our endorsement of Moench is
14 therefore based not on "indefensible policy concerns," Dissent at
15 **[16]**, but on a recognition of the competing obligations imposed
16 on ERISA fiduciaries.

17 The district court also ruled that defendants were insulated
18 from liability because they had no discretion to divest the Plans
19 of employer stock. In re Citigroup ERISA Litig., 2009 WL
20 2762708, at *13. We take issue with this holding because such a
21 rule would leave employees' retirement savings that are invested
22 in ESOPs or EIAPs without any protection at all - a result that
23 Congress sought to avoid in enacting ERISA. See Kuper, 66 F.3d
24 at 1457 ("[T]he purpose of ESOPs cannot override ERISA's goal of

1 ensuring the proper management and soundness of employee benefit
2 plans.”). Especially in light of ERISA’s requirement that
3 fiduciaries follow plan terms only to the extent that they are
4 consistent with ERISA, 29 U.S.C. § 1104(a)(1)(D), we decline to
5 hold that defendants’ decision to continue to offer the Stock
6 Fund is beyond our power to review.

7 Finally, we reject plaintiffs’ argument that the Moench
8 presumption should not apply at the pleading stage. The
9 “presumption” is not an evidentiary presumption; it is a standard
10 of review applied to a decision made by an ERISA fiduciary.
11 Where plaintiffs do not allege facts sufficient to establish that
12 a plan fiduciary has abused his discretion, there is no reason
13 not to grant a motion to dismiss. See Edgar, 503 F.3d at 349
14 (applying Moench to grant a motion to dismiss because there was
15 “no reason to allow [the] case to proceed to discovery when, even
16 if the allegations [were] proven true, [the plaintiff could not]
17 establish that defendants abused their discretion”); Gearren v.
18 The McGraw-Hill Cos., Inc., 690 F. Supp. 2d 254, 269 (S.D.N.Y.
19 2010).

20 B. Applying the Moench Presumption

21 We turn now to whether plaintiffs have pled facts sufficient
22 to overcome the presumption of prudence and successfully alleged
23 that the Investment and Administration Committees abused their
24 discretion by allowing participants to continue to invest in

1 Citigroup stock. The Moench court, relying on trust law,
2 explained that fiduciaries should override Plan terms requiring or
3 strongly favoring investment in employer stock only when "owing to
4 circumstances not known to the [plan] settlor and not anticipated
5 by him," maintaining the investment in company stock "would defeat
6 or substantially impair the accomplishment of the purposes of the
7 [Plan]." 62 F.3d at 571 (quoting Restatement (Second) of Trusts §
8 227 cmt. g). We agree with this formulation and cannot imagine
9 that an ESOP or EIAP settlor, mindful of the long-term horizon of
10 retirement savings, would intend that fiduciaries divest from
11 employer stock at the sign of any impending price decline.
12 Rather, we believe that only circumstances placing the employer in
13 a "dire situation" that was objectively unforeseeable by the
14 settlor could require fiduciaries to override plan terms. Edgar,
15 503 F.3d at 348. The presumption is to serve as a "substantial
16 shield," Kirschbaum, 526 F.3d at 256, that should protect
17 fiduciaries from liability where "there is room for reasonable
18 fiduciaries to disagree as to whether they are bound to divest
19 from company stock," Quan, 623 F.3d at 882. The test of prudence
20 is, as the dissent points out, one of conduct rather than results,
21 and the abuse of discretion standard ensures that a fiduciary's
22 conduct cannot be second-guessed so long as it is reasonable.

23 Although proof of the employer's impending collapse may not
24 be required to establish liability, "[m]ere stock fluctuations,

1 even those that trend downhill significantly, are insufficient to
2 establish the requisite imprudence to rebut the Moench
3 presumption." Wright v. Or. Metallurgical Corp., 360 F.3d 1090,
4 1099 (9th Cir. 2004). We judge a fiduciary's actions based upon
5 information available to the fiduciary at the time of each
6 investment decision and not "from the vantage point of hindsight."
7 29 U.S.C. § 1104(a)(1)(B) (establishing that the prudence of an
8 ERISA fiduciary is to be measured in light of "the circumstances
9 then prevailing"); Chao v. Merino, 452 F.3d 174, 182 (2d Cir.
10 2006) (quoting Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir.
11 1984)). We cannot rely, after the fact, on the magnitude of the
12 decrease in the employer's stock price; rather, we must consider
13 the extent to which plan fiduciaries at a given point in time
14 reasonably could have predicted the outcome that followed.

15 Here, plaintiffs allege that Citigroup made ill-advised
16 investments in the subprime-mortgage market while hiding the
17 extent of those investments from Plan participants and the public.
18 They also allege that, just prior to the start of the Class
19 Period, Citigroup became aware of the impending collapse of the
20 subprime market and that, ultimately, Citigroup reported losses of
21 about \$30 billion due to its subprime exposure. As a result,
22 plaintiffs argue, Citigroup's stock price was "inflated" during
23 the Class Period because the price did not reflect the company's
24 true underlying value. Of course, as plaintiffs acknowledge,

1 these facts alone cannot sufficiently plead a fiduciary breach:
2 that Citigroup made bad business decisions is insufficient to show
3 that the company was in a "dire situation," much less that the
4 Investment Committee or the Administration Committee knew or
5 should have known that the situation was dire. Like the Fifth
6 Circuit in Kirschbaum, we "cannot say that whenever plan
7 fiduciaries are aware of circumstances that may impair the value
8 of company stock, they have a fiduciary duty to depart from ESOP
9 or EIAP plan provisions." See Kirschbaum, 526 F.3d at 256.

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

20 Plaintiffs' allegations are insufficient to state a claim
21 against the Investment and Administration Committees for breach of
22 the duty of prudence. As an initial matter, plaintiffs' bald
23 assertion, without any supporting allegations, that the Investment
24 and Administration Committees knew about Citigroup's subprime

1 activities cannot support their claims. Bell Atl. Corp. v.
2 Twombly, 550 U.S. 544, 555 (2007) (“[A] plaintiff’s obligation to
3 provide the grounds of his entitlement to relief requires more
4 than labels and conclusions . . .”). Moreover, that the
5 fiduciaries allegedly failed to investigate the continued prudence
6 of investing in Citigroup stock cannot alone rescue plaintiffs’
7 claim; plaintiffs have not pled facts that, if proved, would show
8 that such an investigation during the Class Period would have led
9 defendants to conclude that Citigroup was no longer a prudent
10 investment. As we noted above, plaintiffs must allege facts that,
11 if proved, would show that an “adequate investigation would have
12 revealed to a reasonable fiduciary that the investment at issue
13 was improvident.” Kuper, 66 F.3d at 1460. This they have not
14 done.

15 Additionally, even if we assume that an investigation would
16 have revealed all of the facts that plaintiffs have alleged, the
17 Investment and Administration Committees would not have been
18 compelled to conclude that Citigroup was in a dire situation.
19 While the Committee may have been able to uncover Citigroup’s
20 subprime investments, the facts alleged by plaintiffs, if proved,
21 are not sufficient to support a conclusion that the Investment and
22 Administration Committees could have foreseen that Citigroup would
23 eventually lose tens of billions of dollars. And even if the
24 Committee could have done so, it would not have been compelled to

1 find that Citigroup, with a market capitalization of almost \$200
2 billion, was in a dire situation. While fiduciaries' decisions
3 are not to be judged in hindsight, we note for the record that
4 during the Class Period, Citigroup's share price fell from \$55.70
5 to \$28.74, a drop of just over 50%. Other courts have found
6 plaintiffs unable to overcome the Moench presumption in the face
7 of similar stock declines. See Kirschbaum, 526 F.3d at 247 (40%
8 drop); Edgar, 503 F.3d at 344 (25% drop); Kuper, 66 F.3d at 1451
9 (80% drop).

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

17 **II. Communications Claim**

18 Plaintiffs allege in Count II of their complaint that the
19 "Communications Defendants" (Citigroup, the Administration
20 Committee, and Prince) breached their fiduciary duty of loyalty by
21 (1) "failing to provide complete and accurate information
22 regarding . . . Citigroup" and (2) "conveying through statements
23 and omissions inaccurate material information regarding the
24 soundness of Citigroup stock." Compl. ¶ 237. We reject the first

1 theory of liability because fiduciaries have no duty to provide
2 Plan participants with non-public information that could pertain
3 to the expected performance of Plan investment options. And we
4 reject the second theory because there are no facts alleged that
5 would, if proved, support a conclusion that defendants made
6 statements, while acting in a fiduciary capacity, that they knew
7 to be false.

8 A. Duty to Provide Information

9 ERISA contains a "comprehensive set of 'reporting and
10 disclosure' requirements." Curtiss-Wright Corp. v. Schoonejongen,
11 514 U.S. 73, 83 (1995) (citing 29 U.S.C. §§ 1021-1031). The
12 statute, for example, requires plan administrators to "describ[e]
13 the importance of diversifying the investment of retirement
14 account assets," 29 U.S.C. § 1021(m)(2), and to inform
15 participants "of the risk that holding more than 20 percent of a
16 portfolio in the security of one entity (such as employer
17 securities) may not be adequately diversified," id. §
18 1025(a)(2)(B)(ii)(II) (emphasis added). Additionally, regulations
19 in place during the Class Period required plan administrators, in
20 certain circumstances, to provide plan participants with a
21 "description of the investment alternatives available under the
22 plan and, with respect to each designated investment alternative,
23 a general description of the investment objectives and risk and
24 return characteristics of each such alternative." 29 C.F.R. §

1 2550.404c-1(b)(2)(B)(1)(ii) (2009).

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

10 Plaintiffs instead argue that defendants violated ERISA's
11 more general duty of loyalty, 29 U.S.C. § 1104(a)(1), by failing
12 to provide participants with information regarding the expected
13 future performance of Citigroup stock. They rely on cases
14 stating, in broad terms, that fiduciaries must disclose to
15 participants information related to the participants' benefits.
16 See, e.g., Dobson v. Hartford Fin. Servs. Grp., Inc., 389 F.3d
17 386, 401 (2d Cir. 2004) ("A number of authorities assert a plan
18 fiduciary's obligation to disclose information that is material to
19 beneficiaries' rights under a plan . . .").

20 The cases cited by plaintiffs are inapposite for two reasons.
21 First, in many of them, the court imposed a duty to inform at
22 least in part because further information was necessary to correct
23 a previous misstatement or to avoid misleading participants. See,
24 e.g., Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 10 (2d

1 Cir. 1997) (relying in part on the "materially misleading
2 information" provided by a "benefits counselor" to conclude "that
3 Kodak breached its fiduciary duty to provide Becker with complete
4 and accurate information about her retirement options"). Second,
5 all of the cases cited by plaintiffs relate to administrative, not
6 investment, matters such as participants' eligibility for defined
7 benefits or the calculation of such benefits; none require plan
8 fiduciaries to disclose nonpublic information regarding the
9 expected performance of a plan investment option. See, e.g.,
10 Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 88-89 (2d
11 Cir. 2001) (holding that an employer may be liable for
12 misstatements or omissions about the availability of lifetime life
13 insurance benefits); Estate of Becker, 120 F.3d at 9-10 (imposing
14 liability based on an employer's providing misleading information
15 about participants' eligibility for lump-sum retirement benefits).

16 We decline to broaden the application of these cases to
17 create a duty to provide participants with nonpublic information
18 pertaining to specific investment options.⁴ ESOP fiduciaries do
19 "not have a duty to give investment advice or to opine on the
20 stock's condition." Edgar, 503 F.3d at 350 (internal quotation
21 marks omitted). We agree with the district court that such a

1 ⁴ Although the dissent would hold that ERISA fiduciaries have
2 an affirmative duty to disclose material information to plan
3 participants, Judge Straub acknowledges that ERISA does not
4 explicitly impose such a duty.

1 requirement would improperly "transform fiduciaries into
2 investment advisors." In re Citigroup ERISA Litig., 2009 WL
3 2762708, at *22. Here, the Administration Committee provided
4 adequate warning that the Stock Fund was an undiversified
5 investment subject to volatility and that Plan participants would
6 be well advised to diversify their retirement savings. Even
7 assuming that they had the ability to do so, defendants had no
8 duty to communicate a forecast as to when this volatility would
9 manifest itself in a sharp decline in stock price.

10 B. Misrepresentations

11 Plaintiffs next argue that, even if defendants had no
12 affirmative duty to provide information regarding Plan
13 investments, they nevertheless breached their duty of loyalty by
14 making misrepresentations as to the expected performance of
15 Citigroup stock. ERISA requires a fiduciary to "discharge his
16 duties with respect to a plan solely in the interest of the
17 participants and beneficiaries." Varity Corp. v. Howe, 516 U.S.
18 489, 506 (1996) (quoting 29 U.S.C. § 1104(a)(1)). Because "lying
19 is inconsistent with the duty of loyalty," ERISA fiduciaries
20 violate this duty when they "participate knowingly and
21 significantly in deceiving a plan's beneficiaries." Id.; see also
22 Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 66 (2d
23 Cir. 2006).

24 Plaintiffs assert misrepresentation claims against Citigroup,

1 Prince, and the Administration Committee. We hold that Citigroup
2 and Prince were not acting in a fiduciary capacity when making the
3 statements alleged in the complaint, and that the complaint does
4 not adequately allege that the Administration Committee knew that
5 it was making false or misleading statements.

6 1. Citigroup and Prince

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

16 Plaintiffs rely on the Supreme Court's decision in Varity
17 Corp. v. Howe, 516 U.S. 489 (1996), in which the Court found an
18 employer liable for misstatements made to plan participants in
19 part because the employer "intentionally connected" its statements
20 to "the future of [plan] benefits." Id. at 505. Plaintiffs,
21 however, overlook that the employer in Varity was also the plan
22 administrator, id. at 491, and that only the plan administrator is
23 responsible for meeting ERISA's disclosure requirements and
24 therefore for communicating with Plan participants. 29 U.S.C.

1 § 1132(c). That the employer in Varity "intentionally connected"
2 its statements to plan benefits highlighted that it acted as a
3 plan administrator and fiduciary - and not merely an employer -
4 when making the statements in question. Cf. Amato v. W. Union
5 Int'l, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (stating that an
6 employer is only liable under ERISA for actions it takes while
7 acting as an ERISA fiduciary), abrogated on other grounds by Mead
8 Corp. v. Tilley, 490 U.S. 714, 721 (1989). Here, Citigroup and
9 Prince were not Plan administrators and were not responsible for
10 communicating with Plan participants.⁵ Citigroup and Prince
11 therefore spoke to Plan participants as employers and not as Plan
12 fiduciaries. They cannot be held liable, at least under ERISA,
13 for any alleged misstatements made to Citigroup employees.

1 ⁵ The dissent contends that Citigroup and Prince acted as
2 fiduciaries because they "intentionally connected" their
3 statements about Citigroup's financial health and stock
4 performance to the likely future of Plan benefits. Dissent at
5 [32] (quoting Varity, 516 U.S. at 505). We disagree with the
6 dissent's characterization of the facts alleged here. The
7 employer in Varity transferred all of its money-losing divisions
8 into a newly created subsidiary that was destined to fail, and
9 induced its employees to switch employers to the subsidiary by
10 falsely assuring them that their benefits would remain secure.
11 516 U.S. at 492-94. The parent corporation therefore
12 "intentionally connected its statements about [the subsidiary's]
13 financial health to statements it made about the future of
14 benefits," which "in that context [was] an act of plan
15 administration." Id. at 505 (emphasis in original). Plaintiffs,
16 by contrast, allege only that Citigroup generally encouraged its
17 employees - "and thus Plan participants" - to invest in Citigroup
18 stock. Compl. ¶ 198. These allegations do not suggest the kind
19 of intentional connection the Supreme Court relied on to find a
20 fiduciary relationship in Varity.

1 2. Administration Committee

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

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

23 Plaintiffs are also unable to support their argument that the
24 Administration Committee members should have known of the

1 misstatements because they should have performed an independent
2 investigation of the accuracy of Citigroup's SEC filings. While
3 we cannot rule out that such an investigation may be warranted in
4 some cases, plaintiffs have not alleged facts that, without the
5 benefit of hindsight, show that it was warranted here. Plaintiffs
6 have not alleged that there were any "warning flags," specific to
7 Citigroup, that triggered the need for an investigation. Rather,
8 plaintiffs provide a list of publicly available articles and news
9 reports that signaled potential trouble in the subprime market as
10 a whole.

11 We are also mindful that requiring Plan fiduciaries to
12 perform an independent investigation of SEC filings would increase
13 the already-substantial burden borne by ERISA fiduciaries and
14 would arguably contravene Congress's intent "to create a system
15 that is [not] so complex that administrative costs, or litigation
16 expenses, unduly discourage employers from offering [ERISA] plans
17 in the first place." Conkright v. Frommert, 130 S. Ct. 1640, 1649
18 (2010) (quoting Varity, 516 U.S. at 497 (alterations in
19 original)). Furthermore, we are hesitant to "run the risk of
20 disturbing the carefully delineated corporate disclosure laws."
21 Baker v. Kingsley, 387 F.3d 649, 662 (7th Cir. 2004). While we
22 have the authority to create a "common law of rights and
23 obligations" under ERISA, "the scope of permissible judicial
24 innovation is narrower in areas where other federal actors are

1 engaged." Black & Decker Disability Plan v. Nord, 538 U.S. 822,
2 831-32 (2003) (internal quotation marks and citation omitted).
3 Accordingly, while we intimate no view as to the possible
4 investigatory responsibilities of other fiduciaries who are privy
5 to additional "warning" signs or who are operating under
6 substantially different circumstances, in the situation presented
7 here we decline to hold that the Plan fiduciaries were required to
8 perform an independent investigation of SEC filings before
9 incorporating them into the SPDs.

10 **III. Plaintiffs' Remaining Claims**

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

21 Count V appears to be based entirely on the fact that the
22 compensation of some of the fiduciaries was tied to the
23 performance of Citigroup stock and that Prince and Robert Rubin,
24 another Director Defendant, sold some of their Citigroup stock

1 during the Class Period. Plaintiffs do not allege any specific
2 facts suggesting that defendants' investments in Citigroup stock
3 prompted them to act against the interests of Plan participants.
4 Under plaintiffs' reasoning, almost no corporate manager could
5 ever serve as a fiduciary of his company's Plan. There simply is
6 no evidence that Congress intended such a severe interpretation of
7 the duty of loyalty. We agree with the many courts that have
8 refused to hold that a conflict of interest claim can be based
9 solely on the fact that an ERISA fiduciary's compensation was
10 linked to the company's stock. See, e.g., In re Polaroid ERISA
11 Litig., 362 F. Supp. 2d 461, 477 (S.D.N.Y. 2005); In re Worldcom,
12 Inc. ERISA Litig., 263 F. Supp. 2d 745, 768 (S.D.N.Y. 2003).
13 Accordingly, we affirm the judgment of the district court insofar
14 as it held that plaintiffs failed to state a claim for relief on
15 Count V.

16
17 **CONCLUSION**

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

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

2 The August 2007 collapse of the \$2 trillion subprime¹ mortgage market unleashed “a
3 global contagion,”² the virulence of which is well demonstrated by plaintiffs’ allegations in this
4 case.

5 Plaintiffs are current and former employees of Citigroup who invested years of savings in
6 their employer’s retirement Plans. They did so at the cajoling of Citigroup and the other named
7 defendants, who, according to plaintiffs, repeatedly and materially misrepresented Citigroup’s
8 dismal financial outlook and its massive subprime exposure. Defendants allegedly knew or
9 should have known that Citigroup stock was an imprudent investment, but nonetheless permitted
10 and encouraged the Plans to hold and to acquire billions of dollars in Citigroup stock. As
11 Citigroup’s “dire financial condition was revealed,” its price per share declined by over 74% in a
12 little over one year—a loss in market value of over \$200 billion. Compl. ¶ 175. According to
13 plaintiffs, their retirement Plans suffered enormous losses during the relevant time period.

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).

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

6 In affirming the District Court's dismissal of plaintiffs' Prudence Claim, the majority
7 holds that defendants' decisions to invest in employer stock are entitled to a presumption of
8 prudence. According to the majority, plaintiffs can overcome the presumption only through
9 allegations, accepted as true, that would establish that the employer was in a "dire situation."
10 Maj. Op. at [23] (internal quotations omitted). Such arbitrary line-drawing leaves employees
11 wholly unprotected from fiduciaries' careless decisions to invest in employer securities so long
12 as the employer's "situation" is just shy of "dire"—a standard that the majority neglects to define
13 in any meaningful way. But the duty of prudence does not wax and wane depending on
14 circumstance; ERISA fiduciaries must act prudently at all times, and those who are derelict must
15 be subject to accountability. Because I find no justification for cloaking fiduciaries' investment
16 decisions in a mantle of presumptive prudence, I must respectfully dissent.

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

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

1 dismissal of the Prudence and Communication Claims was improper, I also dissent with respect
2 to Counts III, IV, and VI.

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

7 ***I. Prudence Claim***

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

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

16 ***A. Moench-Type Deference Should Not Apply***

17 The District Court concluded that defendants, in offering the Fund to Plan participants as
18 an investment option, were entitled to a presumption that they did so prudently. *In re Citigroup*
19 *ERISA Litig.*, No. 07 Civ. 9790, 2009 WL 2762708, at *1, 15-19 (S.D.N.Y. Aug. 31, 2009). By
20 upholding this ruling, the majority aligns our Court with those that have embraced the doctrine
21 articulated in *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995), *cert. denied*, 516 U.S. 1115
22 (1996). *See, e.g., Quan v. Computer Scis. Corp.*, 623 F.3d 870, 881 (9th Cir. 2010); *Kirschbaum*

1 *v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1459
2 (6th Cir. 1995).

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

13 ***I. ERISA’s Prudent Man Standard of Conduct***

14 ERISA was designed to ensure “the continued well-being and security of millions of
15 employees and their dependents” through the regulation of employee benefit plans. *See* 29
16 U.S.C. § 1001(a). *See also Varsity Corp. v. Howe*, 516 U.S. 489, 496 (1996). The statute thus
17 imposes stringent standards of conduct upon fiduciaries who oversee such plans. *See* 29 U.S.C.
18 § 1001(b). Indeed, we have said that ERISA’s fiduciary standards of conduct are “the highest
19 known to the law.” *LaScala v. Scrufari*, 479 F.3d 213, 219 (2d Cir. 2007) (quoting *Donovan v.*
20 *Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982)). Of particular
21 relevance here is the ERISA fiduciary’s duty to act in accordance with the “prudent man”
22 standard of conduct—that is, “with the care, skill, prudence, and diligence under the

1 circumstances then prevailing that a prudent man acting in a like capacity and familiar with such
2 matters would use in the conduct of an enterprise of a like character and with like aims.” 29
3 U.S.C. § 1104(a)(1)(B). Although this standard is rooted in the common law of trusts, ERISA’s
4 standard is “more exacting.” *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983).

5 ERISA allows for the creation of ESOPs, which are “designed to invest primarily in
6 qualifying employer securities.” 29 U.S.C. § 1107(d)(6)(A). To fulfill this purpose, ESOP
7 fiduciaries are exempt from certain standards of conduct that apply to other kinds of ERISA
8 plans. For example, although fiduciaries of pension benefit plans generally must diversify
9 investments so as to minimize risk, *see id.* § 1104(a)(1)(C), ESOP fiduciaries need not do so.
10 Specifically, section 404(a)(2) of ERISA provides that “the diversification requirement . . . and
11 the prudence requirement (only to the extent that it requires diversification) . . . is not violated by
12 acquisition or holding of . . . qualifying employer securities.” *Id.* § 1104(a)(2). ESOP fiduciaries
13 are also exempted from ERISA’s prohibition against dealing with a party in interest. *Id.* §
14 1106(b)(1). But they are not otherwise excused from the stringent “prudent man” standard that
15 governs fiduciary conduct under typical ERISA plans. *See, e.g., Quan*, 623 F.3d at 878;
16 *Moench*, 62 F.3d at 569; *Fink v. Nat’l Sav. & Trust Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985).

17 **2. Policy Justifications for Deferential Standards of Review**

18 Whether a standard of *conduct*—such as ERISA’s “prudent man” standard—is judicially
19 enforced turns on the standard of *review* used to test the legality of the conduct at issue. In many
20 contexts, the two standards are aligned. For instance, “the standard of conduct that governs
21 automobile drivers is that they should drive carefully, and the standard of review in a liability
22 claim against a driver is whether he drove carefully.” Melvin Aron Eisenberg, *The Divergence*

1 *of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437,
2 437 (1993) (internal footnote omitted). In such instances, the governing standard of conduct
3 retains its bite.

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

16 Considerations of “fairness and policy” led to the adoption of this deferential standard.
17 Eisenberg, *supra*, at 443. Business judgments are often “made on the basis of incomplete
18 information and in the face of obvious risks.” *Id.* at 444. A reasonableness standard of review
19 could thus discourage directors from making “bold but desirable decisions,” and might even
20 deter directors from serving at all. *Id.* In addition, “courts are ill-equipped to determine after the
21 fact whether a particular business decision was reasonable” under the circumstances. William T.
22 Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due*

1 *Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of*
2 *Review Problem*, 96 NW. U. L. REV. 449, 452 (2002). Examining directors' decisions under a
3 standard of review that is more lenient than the relevant standard of conduct thus "furthers
4 important public policy values." *Id.* at 449.

5 **3. Policy Considerations Do Not Warrant Deferential Review of ESOP**
6 **Fiduciaries' Investment Decisions**
7

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

11 **a. The Moench Court's Policy Considerations**

12 The named plaintiff in *Moench* alleged that the fiduciaries of his ESOP breached ERISA
13 standards of conduct by continuing to invest in employer stock despite the deterioration of the
14 employer's financial condition. *See Moench*, 62 F.3d at 558-59. For our purposes, the issue in
15 *Moench* was what standard of review is appropriate to test the fiduciaries' liability for their
16 investment decisions. *See id.* at 568. *See also Edgar v. Avaya, Inc.*, 503 F.3d 340, 346 (3d Cir.
17 2007).

18 To answer this question, the *Moench* court first considered the special status of ESOPs
19 under ERISA. *Moench*, 62 F.3d at 568. Specifically, the court noted that ESOP fiduciaries are
20 exempt from ERISA's duty to diversify, and from the statute's prohibition against dealing with a
21 party in interest. *Id.* (discussing the exemptions under 29 U.S.C. §§ 1104(a)(2) and 1108(b)(1).)
22 The court explained that these exemptions "arise[] out of the nature and purpose of ESOPs
23 themselves," *id.*, which is "to 'invest primarily in qualifying employer securities,'" *Edgar*, 503
24 F.3d at 346 (quoting 29 U.S.C. § 1107(d)(6)(A)). That ESOPs are undiversified means that they

1 place participants' retirement assets "at much greater risk" than other ERISA plans. *Moench*, 62
2 F.3d at 568 (internal quotations omitted). But Congress did not intend ESOPs to *guarantee*
3 retirement benefits. *Id.* Rather, Congress intended that ESOPs would function as both employee
4 retirement benefit plans and as a "technique of corporate finance that would encourage employee
5 ownership." *Id.* at 569 (internal quotations omitted). Notwithstanding ESOPs' unique status,
6 the *Moench* court emphasized that ESOP fiduciaries are still required to act in accordance with
7 ERISA's standards of prudence and loyalty. *See Moench v. Robertson*, 62 F.3d 553, 569 (3d Cir.
8 1995); *see also Edgar*, 503 F.3d at 346.

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

14 The court rejected plenary review as destructive of such balancing. *See id.* at 570. The
15 court reasoned that "strict judicial scrutiny" of fiduciaries' investment decisions "would render
16 meaningless the ERISA provision excepting ESOPs from the duty to diversify." *Id.* In addition,
17 the court feared that plenary review "would risk transforming ESOPs into ordinary pension
18 benefit plans," which would frustrate Congress's desire to facilitate employee ownership. *Id.*
19 "After all," the court asked, "why would an employer establish an ESOP if its compliance with
20 the purpose and terms of the plan could subject it to strict judicial second-guessing?" *Id.*
21 Finally, the court looked to the common law of trusts, which requires that interpretation of trust
22 terms be controlled by the settlor's intent. *Id.* "That principle is not well served in the long run

1 by ignoring the general intent behind such plans in favor of giving beneficiaries the maximum
2 opportunities to recover their losses.” *Id.*

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

15 Pursuant to this deferential review, an ESOP fiduciary who invests plan assets in
16 employer stock “is entitled to a presumption that it acted consistently with ERISA by virtue of
17 that decision. However, the plaintiff may overcome that presumption by establishing that the
18 fiduciary abused its discretion by investing in employer securities.” *Moench*, 62 F.3d at 571. To
19 do so, plaintiffs must show that the fiduciaries “could not have believed reasonably that
20 continued adherence to the ESOP’s direction was in keeping with the settlor’s expectations of
21 how a prudent trustee would operate.” *Id.* Thus, plaintiffs may introduce evidence to the effect
22 that, “owing to circumstances not known to the settlor and not anticipated by him,” investing in

1 employer securities “would defeat or substantially impair the accomplishment of the purposes of
2 the trust.”³ *Id.* (internal quotations omitted).

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

5
6 The question remains whether the policy concerns articulated in *Moench*—and reiterated
7 by the majority here—warrant our adoption of a standard of review that is more lenient than
8 ERISA’s “prudent man” standard of conduct. I answer that question in the negative.

9 ***i. Moench Deference Does Not Appropriately Balance***
10 ***ERISA’s Competing Values***

11
12 In my view, the *Moench* presumption strikes no acceptable “accommodation,” (Maj. Op.
13 at [19]), between the competing ERISA values of protecting employees’ retirement assets and
14 encouraging investment in employer stock. The majority favorably cites to decisions that note
15 that the *Moench* presumption “would be difficult to rebut,”⁴ and that refer to the presumption as
16 a “substantial shield”⁵ to fiduciary liability. As these authorities implicitly acknowledge, the
17 *Moench* presumption precludes, in the ordinary course, judicial enforcement of the prudent man
18 standard of conduct. In a case that was argued in tandem with the instant matter,⁶ the Secretary
19 of Labor noted that the *Moench* presumption relegates the duty of prudence to protecting
20 employees only “from the complete loss of their assets in the wake of a company’s collapse,”

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 [23] (quoting *Edgar*, 503 F.3d at 348).

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.*, No. 10-792-cv (2d Cir. [DATE]) (per curiam).

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

12 The statutory structure further demonstrates the impropriety of *Moench’s*
13 “accommodation.” ESOPs are merely one type of benefit plan under the broader ERISA
14 framework. That they are exempt from certain of ERISA’s standards of conduct does not mean
15 that the policies favoring ESOPs should override the policies of ERISA. Indeed, when a general
16 statutory policy is qualified by an exception, courts generally read “the exception narrowly in
17 order to preserve the primary operation of the [policy].” *John Hancock Mut. Life Ins. Co. v.*
18 *Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993) (parenthetically quoting *Comm’r of Internal*
19 *Revenue v. Clark*, 489 U.S. 726, 739-40 (1989)). Accordingly, the investment decisions of
20 ESOP fiduciaries must be “subject to the closest scrutiny under the prudent person rule, in spite
21 of the strong policy and preference in favor of investment in employer stock.” *Fink v. Nat’l Sav.*
22 *& Trust Co.*, 772 F.2d 951, 955-56 (D.C. Cir. 1985) (internal quotations omitted); *see also Eaves*

1 *v. Penn*, 587 F.2d 453, 460 (10th Cir. 1978) (“ESOP fiduciaries are subject to the same fiduciary
2 standards as any other fiduciary except to the extent that the standards require diversification of
3 investments.”).

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

8 ***ii. Plenary Review Would Not Deter ESOP Formation***
9

10 I further reject the *Moench* court’s assertion, echoed by the majority here, that plenary
11 review of a fiduciary’s investment decisions would spell doomsday for the ESOP institution. *See*
12 *Moench*, 62 F.3d at 570; Maj. Op. at [20]. ESOPs (under ERISA) had been in existence for more
13 than twenty years before the Court of Appeals for the Third Circuit issued its decision in
14 *Moench*. I have seen no evidence that plenary review during that time or thereafter⁷ resulted in
15 ESOP termination, or deterred ESOP formation. ESOP growth apparently slowed in the early
16 1990s. But commentators (including the ESOP Association, an amicus here) attribute the
17 subsidence to legislative and market factors—not to fiduciaries’ fears of being subjected to a
18 particular brand of judicial review.⁸

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

1 The *Moench* court questioned why an employer would “establish an ESOP if its
2 compliance with the purpose and terms of the plan could subject it to strict judicial second-
3 guessing[.]” *Moench v. Robertson*, 62 F.3d 553, 570 (3d Cir. 1995). But the incentives for
4 ESOP creation are well documented. First, corporations often establish ESOPs to help raise
5 funds, which can then be used, for example, to provide working capital or to buy out large
6 shareholders. See Michael E. Murphy, *The ESOP at Thirty: A Democratic Perspective*, 41
7 WILLAMETTE L. REV. 655, 664 (2005). Second, ESOPs confer significant tax advantages on
8 employers.⁹ Third, employers use ESOPs to accomplish various business objectives, including
9 management entrenchment (by placing large amounts of stock in friendly hands), and avoiding
10 hostile takeovers (by purchasing publicly held shares of employer stock as a defensive measure).
11 See Aditi Bagchi, *Varieties of Employee Ownership: Some Unintended Consequences of*
12 *Corporate Law and Labor Law*, 10 U. PA. J. BUS. & EMP. L. 305, 317 (2008).

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

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 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).

1 can satisfy by acting reasonably.” *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 920 (8th
2 Cir. 1994).

3 ***iv. Plenary Review Would Not Render Meaningless ESOPs’***
4 ***Exemption From The Duty To Diversify***

5
6 I further disagree with the contention that plenary review of fiduciaries’ investment
7 decisions would read the diversification exemption out of ERISA. *See Moench*, 62 F.3d at 570.
8 As previously noted, ERISA provides that “the diversification requirement . . . and the prudence
9 requirement (*only to the extent that it requires diversification*) . . . is not violated by acquisition
10 or holding of . . . qualifying employer securities.” 29 U.S.C. § 1104(a)(2) (emphasis added).
11 The exemption thus allows ESOP fiduciaries to be “released from certain *per se* violations on
12 investments in employer securities.” *Eaves*, 587 F.2d at 459.

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

20 The plaintiffs here . . . do not base their claims on the failure to diversify holdings
21 of an otherwise prudent investment. Instead, they assert that the market was
22 being misled to overvalue the stock, and that the plan’s fiduciaries continued to
23 purchase and hold the stock anyway. Diversification is not the issue; it was
24 imprudent for the fiduciaries to knowingly buy even a single share at an inflated
25 price.
26

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

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

10 **4. Summary**

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

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

18 **B. The District Court Erred In Dismissing Plaintiffs’ Prudence Claim**

19 **1. Applicable Law**

20
21 To state a claim for breach of fiduciary duty under ERISA, plaintiffs must adequately
22 allege that defendants were plan fiduciaries who, while acting in that capacity, engaged in
23 conduct constituting a breach of fiduciary duty under ERISA. *See* 29 U.S.C. § 1109; *Pegram v.*

1 *Herdrich*, 530 U.S. 211, 222-24 (2000). I agree with the majority that plaintiffs sufficiently
2 alleged that the Investment Committee and the Administration Committee were ERISA
3 fiduciaries with respect to plaintiffs’ ability to invest through the Plans in Citigroup stock.
4 Accordingly, I turn now to whether plaintiffs’ allegations, accepted as true, would render it
5 plausible that these defendants, acting in their fiduciary capacities, breached any ERISA-
6 imposed responsibilities, obligations or duties.

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

11 The court’s task in evaluating fiduciary compliance with the prudent man standard is to
12 inquire “whether the individual [fiduciary], at the time [he] engaged in the challenged
13 transactions, employed the appropriate methods to investigate the merits of the investment and to
14 structure the investment.” *Flanigan*, 242 F.3d at 86 (internal quotations omitted). The question
15 is thus whether the fiduciary acted “reasonably” in light of the facts of which he knew or should
16 have known at the time he engaged in the challenged transaction. *See Roth*, 16 F.3d at 920. “A
17 [fiduciary] who simply ignores changed circumstances that have increased the risk of loss to the
18 trust’s beneficiaries is imprudent.” *Armstrong*, 446 F.3d at 734.

19 **2. Application of Law to Facts**

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

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

6 Pursuant to Plan documents, the Administration Committee was charged with managing
7 the operation and administration of the Plans. The Plans also delegated to the Administration
8 Committee the authority to impose certain restrictions on participants' investment selections.
9 Meanwhile, the Plan documents charged the Investment Committee with, among other things,
10 selecting and monitoring investment options for the Plans; it "had the discretion and authority to
11 suspend, eliminate, or reduce any Plan investment, including investments in Citigroup stock."
12 Compl. ¶ 69. Plaintiffs explicitly allege that the Investment Committee "regularly exercised its
13 authority to suspend, eliminate, reduce, or restructure Plan investments." *Id.* Given plaintiffs'
14 allegation that, as of 2008, Citigroup was the largest bank in the world in terms of revenue, we
15 may reasonably infer (a) that Citigroup appointed relatively sophisticated businesspersons to
16 staff the Investment Committee (as well as the Administration Committee); and (b) that such
17 relatively sophisticated Investment Committee members would have had at least a basic
18 knowledge of current events and market trends, especially insofar as they related to the selection
19 and monitoring of Plan investments.

20 Plaintiffs' Complaint contains detailed allegations regarding the growth of subprime
21 lending and Citigroup's ill-fated entry into the subprime marketplace. By 2006 and 2007, reports
22 of an incipient subprime meltdown began to appear in the *Wall Street Journal*, the *New York*

1 *Times*, the *Financial Times*, *Bloomberg News*, and *Reuters*. *Id.* ¶ 189(a)-(y). Plaintiffs allege
2 that the crisis was “foreseeable by at least the end of 2006, given the steady decline in the
3 housing market, . . . the plethora of published reports by governmental agencies, real estate and
4 mortgage industries, [and] the media at large.” *Id.* ¶ 136.

5 Citigroup allegedly increased its activity in the subprime and securitization market in
6 early 2005. By November 2007, its subprime exposure “amounted to a staggering \$55 billion in
7 at least one of its banking units—almost 30% of what the entire Company was worth at the
8 time.” *Id.* ¶ 134. According to plaintiffs, Citigroup reported subprime-related losses of \$18.1
9 billion for the fourth quarter of 2007, and \$7.5 billion for the first quarter of 2008. Plaintiffs
10 allege that, as a result of Citigroup’s “dire financial condition,” its share price declined by over
11 74% between June 2007 and July 2008—a loss of over \$200 billion in market value in a little
12 over one year. *Id.* ¶ 175. The losses sustained during the Class Period of January 1, 2007
13 through January 15, 2008 allegedly “had an enormous impact on the value of participants’
14 retirement assets,” *id.* ¶ 238.

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

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

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

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

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.

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

7 ***II. Communications Claim***

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

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

15 ***A. Duty to Disclose***

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

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.”).

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

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

16 Such a duty is firmly rooted in the common law of trusts. *See Glaziers & Glassworkers*
17 *Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1180 (3d Cir. 1996).
18 Indeed, the “duty to disclose material information is the core of a fiduciary’s responsibility,
19 animating the common law of trusts long before the enactment of ERISA.” *Eddy v. Colonial*
20 *Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990). According to the Restatement of
21 Trusts, the trustee “is under a duty to communicate to the beneficiary material facts affecting the
22 interest of the beneficiary which he knows the beneficiary does not know and which the

1 beneficiary needs to know for his protection in dealing with a third person.”¹² REST. (SECOND)
2 OF TRUSTS § 173, cmt. d. *See also, e.g., Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N.Y.
3 483, 489 (1918) (Cardozo, *J.*) (“A beneficiary, about to plunge into a ruinous course of dealing,
4 may be betrayed by silence as well as by the spoken word. . . . [A trustee] cannot rid himself of
5 the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the
6 surface, or lurking beneath the surface, but visible to his practised eye . . .”). The duty to
7 disclose thus entails “an affirmative duty to inform when the [fiduciary] knows that silence might
8 be harmful.” *Bixler v. Cent. Pa. Teamsters Health-Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir.
9 1993). It compensates for “the disparity of training and knowledge that potentially exists
10 between a lay beneficiary and a trained fiduciary.” *See id.*

11 Nothing in ERISA warrants a dilution of the common law requirements. In order to
12 comport with the statutory duty of loyalty, an ERISA fiduciary must “discharge his duties with
13 respect to a plan solely in the interest of the participants and beneficiaries,” 29 U.S.C. §
14 1104(a)(1), and for the “exclusive purpose” of “providing benefits to participants and their
15 beneficiaries,” *id.* § 1104(a)(1)(A). These provisions incorporate the fiduciary standards of the
16 common law of trusts. *See, e.g., Pegram v. Herdrich*, 530 U.S. 211, 224 (2000); *Bixler*, 12 F.3d
17 at 1300 (citing *Eddy*, 919 F.2d at 750). Yet, ERISA makes the common law requirements even
18 “more exacting.” *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983); *see also Varsity*
19 *Corp.*, 516 U.S. at 497 (“ERISA’s standards and procedural protections partly reflect a
20 congressional determination that the common law of trusts did not offer completely satisfactory

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.

1 protection.”). Indeed, ERISA’s legislative history indicates that Congress recognized the
2 importance of disclosure, which it viewed as “a device to impart to employees sufficient
3 information and data to enable them to know whether the plan was financially sound and being
4 administered as intended. It was expected that the information disclosed would enable
5 employees to police their plans.” S. Rep. No. 93-127, at 27 (1974), *reprinted in* 1974
6 U.S.C.C.A.N. 4838, 4863. I thus find no basis in ERISA for adopting a disclosure rule that
7 affords beneficiaries *less* protection than they enjoyed at common law. *See Firestone Tire &*
8 *Rubber Co. v. Bruch*, 489 U.S. 101, 113-14 (1989).

9 In light of the stringent statutory duty of loyalty, our sister courts of appeals have
10 recognized a duty to advise participants of circumstances that severely threaten plan assets, when
11 fiduciaries have reason to know that their silence may be harmful. In *McDonald v. Provident*
12 *Indemnity Life Insurance Co.*, for example, the Fifth Circuit held that the duty to disclose
13 material information under such circumstances is an “obvious component” of ERISA’s fiduciary
14 duty provision. 60 F.3d 234, 237 (5th Cir. 1995). There, a trustee of a group health insurance
15 plan failed to inform the plan sponsor—a small business owner—of a replacement insurer’s new
16 rate schedule, which set “prohibitive” premiums following the occurrence of a “single
17 catastrophic claim.” *Id.* at 237. When the business owner’s dependent suffered a near-fatal
18 accident, the insurer, over the course of one year, increased the company’s premiums from
19 \$2000 per month to over \$15,000 per month. *Id.* Unable to afford continued coverage, the
20 company was forced to let the policy lapse. *Id.* The *McDonald* court concluded that information
21 regarding the rate schedule was material due to the “impact” the schedule would have had on any
22 small employer. *Id.* The trustee thus had a duty to disclose. *Id.* According to a subsequent

1 panel of the Court of Appeals for the Fifth Circuit, *McDonald* adopted a “case by case” approach
2 in which the duty to disclose is triggered under “special circumstance[s],” such as when
3 concealed information could cause an “extreme impact” to plan participants and beneficiaries.
4 *Ehlmann v. Kaiser Found. Health Plan of Tex.*, 198 F.3d 552, 556 (5th Cir. 2000).

5 Other courts have recognized that a disclosure duty may arise under similar
6 circumstances.¹³ See, e.g., *Watson v. Deaconess Waltham Hosp.*, 298 F.3d 102, 114-15 (1st Cir.
7 2002) (explaining that an affirmative duty to inform beneficiaries of material facts about the plan
8 arises where “there was some particular reason that the fiduciary should have known that his
9 failure to convey the information would be harmful” (citing *Griggs v. E.I. DuPont de Nemours &*
10 *Co.*, 237 F.3d 371, 381-82 (4th Cir. 2001); *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397,
11 1403 (9th Cir. 1995); *Eddy*, 919 F.2d at 749)). See also *Pegram*, 530 U.S. at 227 n.8 (noting, in
12 dictum, that “it could be argued that [an HMO] is a fiduciary insofar as it has discretionary
13 authority to administer the plan, and so it is obligated to disclose characteristics of the plan and
14 of those who provide services to the plan, *if that information affects beneficiaries’ material*
15 *interests*” (emphasis added)); *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644
16 (8th Cir. 2007); *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 87 (2d Cir. 2001);

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 [30].

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).

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

9 These authorities lead me to conclude that ERISA fiduciaries must disclose material
10 information that plan participants reasonably need to know in order to adequately protect their
11 retirement interests. I thus agree with those district courts that have found in ERISA’s fiduciary
12 provisions a duty to disclose material, adverse information regarding an employer’s financial
13 condition or its stock, where such information could materially and negatively affect the
14 expected performance of plan investment options. *See, e.g., In re Polaroid ERISA Litig.*, 362 F.
15 Supp. 2d 461, 478-79 (S.D.N.Y. 2005) (holding that plaintiffs stated a claim based on
16 defendants’ alleged failure “to keep Plan participants informed of material adverse
17 developments” regarding the employer’s deteriorating financial situation); *In re Enron Corp.*
18 *Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 562 (S.D. Tex. 2003) (holding that
19 plaintiffs stated a claim based on defendants’ alleged failure to disclose information about
20 Enron’s “dangerous financial condition” of which the defendants knew or should have known);
21 *In re Dynege, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 888 (S.D. Tex. 2004) (“[W]hen the . . .
22 defendants distributed [materials] that encouraged plan participants to carefully review Dynege’s

1 SEC filings, they also triggered an affirmative duty to disclose material adverse information that
2 the . . . defendants knew or should have known regarding the risks and appropriateness of
3 investing in company stock.” (citing *McDonald*, 60 F.3d at 237)).

4 The majority believes that such a duty would “improperly transform fiduciaries into
5 investment advisors” by forcing them “to give investment advice or to opine on the stock’s
6 condition.” Maj. Op. at [31] (quotations omitted). I disagree. Plaintiffs do not seek, and the
7 duty to disclose would not compel, the provision of “investment advice” or “opinions” regarding
8 corporate stock. Rather, the duty to disclose would merely ensure that, where retirement plan
9 assets are severely threatened, employees receive complete, factual information such that they
10 can make their own investment decisions on an informed basis. *See, e.g., In re CMS Energy*
11 *ERISA Litig.*, 312 F. Supp. 2d 898, 916 (E.D. Mich. 2004) (finding that plaintiffs had “not
12 alleged that defendants had any duty to provide the participants with investment advice”; rather,
13 plaintiffs’ allegations “concern[ed] the fiduciary duties surrounding disclosure found in ERISA;
14 i.e. that [defendants] could not mislead or fail to disclose information that they knew or should
15 have known would be needed by participants to prevent losses”).

16 I also take issue with the majority’s conclusion that “the Administration Committee
17 provided adequate warning that the Stock Fund was an undiversified investment subject to
18 volatility and that Plan participants would be well advised to diversify their retirement savings,”
19 Maj. Op. at [31]. As a preliminary matter, whether information provided to participants was
20 adequate to inform them of the risks of investing in employer stock is generally a “fact-intensive
21 inquiry that must await a full factual record.” *In re Morgan Stanley ERISA Litig.*, 696 F. Supp.
22 2d 345, 363 (S.D.N.Y. 2009) (quotations omitted). In any event, I fail to see how generalized

1 warnings concerning the inherent risks of undiversified investments could, as a matter of law,
2 place lay beneficiaries on notice of the specific fiduciary misconduct alleged here. *See, e.g., In*
3 *re SunTrust Banks, Inc. ERISA Litig.*, 749 F. Supp. 2d 1365, 1377 (N.D. Ga. 2010) (ruling that
4 boilerplate warning “cannot satisfy Defendants’ duty to disclose material negative information to
5 Plan Participants, particularly when, as Plaintiffs allege, Defendants were aware of the
6 deteriorating nature of the Company and its Stock”); *Brieger v. Tellabs, Inc.*, 629 F. Supp. 2d
7 848, 865 (N.D. Ill. 2009) (explaining that fiduciaries do not discharge their duty by merely
8 warning that a particular investment was the “riskiest” option; “the important question is whether
9 [the fiduciaries] . . . withheld material information that plaintiffs needed to make an informed
10 decision about their investment selections”).

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

15 ***B. Misrepresentations***

16 The majority also concludes that plaintiffs failed to state a claim for breach of the
17 statutory duty of loyalty based on certain alleged misrepresentations made by Citigroup, Prince,
18 and the Administration Committee. Specifically, the majority holds (1) that neither Citigroup
19 nor Prince “acted as a Plan fiduciary when making the statements at issue,” Maj. Op. at [32]; and
20 (2) that plaintiffs alleged insufficient facts to demonstrate that the Administration Committee
21 knew or should have known that its statements were false, Maj. Op. at [34]. I disagree with both
22 holdings.

1 ***I. Plaintiffs Sufficiently Alleged that Citigroup and Prince Acted as ERISA***
2 ***Fiduciaries***
3

4 “In every case charging breach of ERISA fiduciary duty,” the threshold question is
5 whether the defendant “was acting as a fiduciary (that is, was performing a fiduciary function)
6 when taking the action subject to complaint.” *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000);
7 *see also Bell v. Pfizer, Inc.*, 626 F.3d 66, 73 (2d Cir. 2010) (citing *Pegram*). In pertinent part,
8 section 3(21)(A) of ERISA states that a defendant “is a fiduciary with respect to a plan to the
9 extent . . . he has any discretionary authority or discretionary responsibility in the administration
10 of such plan.” 29 U.S.C. § 1002(21)(A). This test is a functional one¹⁴ that expands “the
11 universe of persons subject to fiduciary duties.” *See Mertens v. Hewitt Assocs.*, 508 U.S. 248,
12 262 (1993). As we have emphasized, Congress intended “that ERISA’s definition of fiduciary
13 be broadly construed.” *Frommert v. Conkright*, 433 F.3d 254, 271 (2d Cir. 2006) (citing
14 *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997)).

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

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.”).

1 For our purposes, the issue in *Varity* was whether the employer was “acting in its
2 capacity as an ERISA ‘fiduciary’ when it significantly and deliberately misled the [plaintiffs].”
3 *Id.* at 491. The Court answered that question in the affirmative. Drawing on the common law of
4 trusts, the Court concluded that “[c]onveying information about the likely future of plan benefits,
5 thereby permitting beneficiaries to make an informed choice about continued participation,”
6 constitutes a discretionary act of plan “administration” within the meaning of section 3(21)(A).
7 *Id.* at 502-03. The employer thus “was acting as a fiduciary (that is, was performing a fiduciary
8 function),” *Pegram*, 530 U.S. at 226, when it misled the plaintiffs. The Court did not base its
9 holding on the mere fact that the employer made statements about the subsidiary’s expected
10 financial condition, or on the mere fact that the employer’s business decision turned out to have
11 an adverse impact on the plan. *Varity*, 516 U.S. at 505. Rather, the determinative factor was that
12 the employer “*intentionally* connected its statements about [the subsidiary’s] financial health to
13 statements it made about the future of benefits, so that its intended communication about the
14 security of benefits was rendered materially misleading.” *Id.* The Court emphasized that
15 “making intentional representations about the future of plan benefits in that context *is an act of*
16 *plan administration*” under section 3(21)(A). *Id.* (emphasis added).

17 In light of *Varity*, I conclude that plaintiffs have sufficiently alleged that Citigroup and
18 Prince were acting as fiduciaries within the meaning of section 3(21)(A) when they made the
19 misrepresentations here at issue. Plaintiffs allege that Citigroup and Prince were fiduciaries to
20 the extent they exercised authority or responsibility over the “administration” of the Plans.
21 Compl. ¶¶ 52, 61. This conclusion is supported with factual allegations which, if true, would

1 establish that Citigroup and Prince conveyed information—albeit misleading information—about
2 the “likely” future of Plan benefits. *See Varsity*, 516 U.S. at 504.

3 Specifically, plaintiffs allege that Citigroup and Prince “regularly communicated with . . .
4 the Plans’ participants[] about Citigroup’s performance, future financial and business prospects,
5 and Citigroup stock, the single largest asset of [the] Plans.” Compl. ¶ 197 (emphasis added);
6 *see also id.* ¶¶ 30, 48. These communications, which were directed to Plan participants in
7 various writings and at mandatory town hall meetings, allegedly encouraged employees to invest
8 in Citigroup stock through the Plans. According to plaintiffs, the communications fostered “an
9 inaccurately rosy picture of the soundness of Citigroup stock as a Plan investment” by, among
10 other things, failing to disclose “the significance and the risks posed by the Company’s subprime
11 exposure.” *Id.* ¶¶ 199-200; *see also id.* ¶¶ 60 (“Prince made numerous statements, many of
12 which were incomplete and inaccurate, to employees, and thus Plan participants, regarding the
13 Company, and the future prospects of the Company specifically with regard to the risk, or
14 purported lack thereof, faced by the Company as a result of its subprime exposure.”), 133, 136,
15 191, 237. As a result, Citigroup and Prince allegedly “prevented the Plans’ participants from
16 appreciating the true risks presented by invest[ing] in Citigroup stock,” and thus deprived
17 participants of the opportunity to make informed investment decisions. *Id.* ¶ 199.

18 Accepting these allegations as true, and drawing all reasonable inferences in the
19 plaintiffs’ favor, I would hold that plaintiffs sufficiently alleged that Citigroup and Prince acted
20 as fiduciaries within the meaning of section 3(21)(A) of ERISA. This is because plaintiffs’
21 allegations, if true, would demonstrate that Citigroup and Prince “*intentionally* connected” their
22 statements about the financial health of Citigroup and the performance of its stock to the likely

1 future of Plan benefits, such that their “intended communication about the security of benefits
2 was materially misleading,” *Varity*, 516 U.S. at 505. That is, plaintiffs sufficiently allege that
3 Citigroup and Prince acted as fiduciaries because, under the circumstances, the making of
4 intentional representations about the future of plan benefits “is an act of plan administration”
5 within the meaning of ERISA. *See id.*

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

11 I do not understand *Varity* or ERISA to impose such a formalistic limitation. As the
12 Supreme Court has emphasized, ERISA provides that a person is a “fiduciary” not only if he is
13 so named by a benefit plan, but also if he exercises discretionary authority over the plan’s
14 administration. *See Mertens*, 508 U.S. at 251 (citing 29 U.S.C. §§ 1102(a), 1002(21)(A)). In
15 other words, ERISA “defines ‘fiduciary’ not in terms of formal trusteeship, but in *functional*
16 terms of . . . authority over the plan.” *Id.* at 262. As a result, persons other than designated plan
17 administrators may, by performing an administrator-type function, acquire fiduciary status. The
18 majority may be correct that Citigroup and Prince were not the *official* Plan administrators, and
19 thus “were not [officially] *responsible* for communicating with Plan participants,” Maj. Op. at
20 [33] (emphasis added). But actors cannot take refuge from fiduciary status in official titles or
21 responsibilities where their “*ultra vires*” conduct is fiduciary in nature. A rule to the contrary
22 would create perverse incentives anathema to ERISA.

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

9 I am not alone in this view. *See, e.g., Marks v. Newcourt Credit Group, Inc.*, 342 F.3d
10 444, 454 n.2 (6th Cir. 2003) (citing *Varity*, and noting that “we have only recognized [fiduciary
11 duty] claims when a plan administrator, *or an employer exercising discretionary authority in*
12 *connection with the plan’s management or administration* misrepresents a material fact”
13 (internal quotations omitted) (emphasis added)); *Luckasevic v. World Kitchen, Inc.*, No. 06 Civ.
14 1629, 2007 WL 2683995, at *4 (W.D. Pa. Sept. 7, 2007) (rejecting defendants’ claim that *Varity*
15 is inapposite based on the “plan administrator” distinction, and noting that “the employer need
16 not be the administrator to be deemed a fiduciary”); *Adamczyk v. Lever Bros. Co., Div. of*
17 *Conopco*, 991 F. Supp. 931, 937-938, 938 (N.D. Ill. 1997) (“To the extent to which
18 [communications] are related to plan administration, [they] trigger fiduciary duties on the part of
19 the communicator, *regardless of his or her identity*. Even where an independent plan
20 administrator has been appointed, it is entirely possible that it will be the employer that engages
21 in such communications with the employees. Neither the statute nor the Supreme Court’s

1 holding in *Varity* precludes the possibility that the employer acts as a fiduciary in such a case.”
2 (emphasis added)).

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

5
6 The majority also concludes that plaintiffs failed to adequately allege that the
7 Administration Committee made statements it knew to be false. According to the majority, the
8 Complaint contains only one, conclusory allegation on this front: that the Administration
9 Committee members “‘knew or should have known about Citigroup’s massive subprime
10 exposure as a result of their responsibilities as fiduciaries of the Plans,’” Maj. Op. at [35]
11 (quoting Compl. ¶ 188). The majority holds that this “‘naked assertion’” does not satisfy the
12 plausibility standard mandated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Maj. Op.
13 at [35] (quoting *Twombly*, 550 U.S. at 557).

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

17 Plaintiffs allege that the Administration Committee “regularly” provided “materially false
18 and misleading” information to Plan participants about Citigroup’s performance, future financial
19 and business prospects, and its stock. Compl. ¶ 197. The Administration Committee allegedly
20 conveyed such false information through newsletters, memos, Plan documents, and other related
21 materials, as well as through the Plans’ Summary Plan Descriptions, which incorporated by
22 reference Citigroup’s misleading filings with the Securities and Exchange Commission. *Id.* ¶¶
23 67, 143 (“Citigroup did not disclose any subprime-related problems or the amount of its
24 subprime-related loan loss exposure in its 2006 Form 10-K.”), 197. According to plaintiffs,

1 these communications “fostered an inaccurately rosy picture of the soundness of Citigroup stock
2 as a Plan investment,” *id.* ¶ 199, because they failed to disclose the magnitude of Citigroup’s
3 “involvement in subprime lending and other improper business practices,” *id.* ¶ 237.

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

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

1 to such a review, I would hold that plaintiffs' Prudence Claim withstands scrutiny under Rule
2 12(b)(6) of the Federal Rules of Civil Procedure. I would also hold that the District Court erred
3 in dismissing plaintiffs' Communication Claim. Accordingly, I would vacate the District Court's
4 dismissal of the foregoing claims, as well as its dismissal of the secondary claims (Counts II, IV,
5 and VI), and would remand for further proceedings.

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