No. 09-3804-cv

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

IN RE: CITIGROUP ERISA LITIGATION [09-3804-cv]

Stephen Gray, James Bolla and Samier Tadros,
Lead Plaintiffs-Appellants,

Sandra Walsh, Anton K. Rappold, and Alan Stevens,
Plaintiffs-Appellants,

v.

(For Continuation of Caption See Inside Cover)

**On Appeal from the United States District Court
for the Southern District of New York**

**BRIEF OF AMICUS CURIAE HILDA L. SOLIS,
SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR
IN SUPPORT OF APPELLANT REQUESTING REVERSAL**

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- v -

Citigroup Inc., Citibank, N.A., The Plans Administration Committee, The Plans Investment Committee, Charles O. Prince, Robert E. Rubin, Jorge Bermudez, Michael Burke, Steve Calabro, Larry Jones, Faith Massingale, Thomas Santangelo, Alisa Seminara, Richard Tazik, James Costabile, Robert Grogan, Robin Leopold, Glenn Regan, Christine Simpson, Timothy Tucker, Leo Viola, Donald Young, Marcia Young, and John Does 1-20,

Defendants-Appellees.

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29 U.S.C. § 1001 et, seq:

THE SECRETARY'S INTEREST

As the head of the federal agency with primary responsibility for Title I of ERISA, the Secretary of Labor has a strong interest in ensuring that courts correctly interpret ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-693 (7th Cir. 1986) (en banc). The district court's decision contravenes the weight of legal authority and grants "judicial immunity" to fiduciaries for alleged breaches of their fiduciary duties. If upheld, this broad holding would effectively bar most suits against fiduciaries with regard to plan investments in company stock. The court alternatively relied on the presumption of prudence first proposed in Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995), which this Court has not yet adopted. The Secretary has a substantial interest in dissuading this Court from adopting the presumption, particularly at the pleadings stage, and, more broadly, because it should not apply to a fiduciary's knowing purchases of imprudently overpriced investments. Finally, the Secretary has a substantial interest in establishing that fiduciaries have a duty to disclose information that participants and other fiduciaries need to know in order to protect their interests in their plans and that they have a similar categorical duty, recognized by Varity Corp. v. Howe, 516 U.S. 489 (1996), to speak truthfully to plan participants.

<u>STATEMENT OF THE ISSUES</u>

1. Whether the district court erred in holding that the defendants were not fiduciaries and had no fiduciary duty with respect to the retirements plans' investment in Citigroup stock because plan documents contemplated investment in such stock.

2. Whether the district court erred in holding that the defendants' actions allegedly allowing the plans to purchase Citigroup stock at inflated prices were presumptively prudent.

3. Whether the district court erred in concluding that plan fiduciaries had no duty to disclose accurate information about Citigroup's financial condition and to deal truthfully with plan participants.

<u>STATEMENT OF THE CASE</u>

This is a putative ERISA class action by current and former employees of Citigroup, Inc., who are participants in the Citigroup 401(k) Plan and the Citibuilder 401(k) Plan for Puerto Rico ("Plans"). Special Appendix for Appellants ("SPA"), SPA-5. The Plans offered several investment options, including the Citigroup Common-Stock Fund ("the Fund"), consisting of Citigroup common-stock and small amounts of cash or cash-equivalents. SPA-7-8.

Citigroup allegedly invested extensively in subprime mortgages and securities related to subprime mortgages. Joint Appendix ("A"), A72-74.

Citigroup allegedly knew that heavy losses would inevitably result from the subprime loans but misled investors about Citigroup's subprime exposure by using "structured investment vehicles" that kept the exposure off balance sheets. A-90-92. Following the subprime mortgage market's collapse, Citigroup lost tens of billions of dollars in its subprime-mortgage-related investments. E.g., A-89. As a result, the price of Citigroup stock fell sharply in value during the class period, and plan participants suffered corresponding losses. A-109.

The Plans divide the fiduciary obligations among several fiduciaries: the Investment Committee is responsible for selecting investment options; the Administrative Committee is responsible for all other aspects of plan administration; and Citigroup is responsible for appointing the Committees and the trustee. See SPA-5-6. Citibank, the plan's trustee, is responsible for investing the funds and valuing the Plans' assets. The board of directors exercised ultimate authority over Citigroup's appointment powers. SPA-6.

These responsibilities correspond to the plaintiffs' alleged fiduciary breaches: failure to consider the prudence of allowing the plan to invest in the Fund (Investment Committee, Administrative Committee, Citigroup, and Citibank), failure to provide complete and truthful information to participants (Citigroup, Administrative Committee, and Director defendants), and failure to monitor the Committees (Citigroup and the Director defendants).

The district court dismissed all claims pursuant to Federal Rule of Civil Procedure 12(b)(6). SPA-51. The court held that because the Plans mandated inclusion of a company stock option, the defendants were not fiduciaries with respect to the selection and retention of the Fund, and were thus immune from liability for the stock investment. SPA-29. The court relied primarily on trust law, and although the court recognized that under ERISA section 404(a)(1)(D), fiduciaries follow plan terms only insofar as they are consistent with ERISA's other provisions, the court concluded that investment in company stock by eligible individual account plans ("EIAPs"), such as the Plans, is consistent with ERISA because the statute exempts such plans from ERISA's diversification provisions. SPA-20. The court believed that ERISA's structure bolstered its conclusion because, in the court's view, requiring fiduciaries to override plan provisions would be tantamount to requiring them to amend plans, which is generally a non-fiduciary settlor function. SPA-21.

The court also concluded that the defendants' actions were presumptively prudent, whether or not the investment in company stock was mandated. SPA-31, SPA-36. Relying on the Third Circuit's decisions in Moench and Edgar v. Avaya, 503 F.3d 340, 347 (3d Cir. 2007), the court held that the Moench presumption applies to the pleadings stage and had not been overcome. SPA-34. The court reasoned that the allegations concerning Citigroup's subprime investments "would constitute evidence supporting the position that Citigroup adopted imprudent and risky business strategies that resulted in substantial losses to the company. But they would not suggest 'the type of dire situation' that would have caused defendants to believe that 'continued adherence' to the Plans' mandate regarding Citigroup stock was no longer 'in keeping with the settlor's expectations of how a prudent trustee would operate.'" Id. (quoting Avaya and Moench).

The court next held that the defendants had no affirmative duty under ERISA to disclose the company's financial information to the participants, SPA-37, nor did Citigroup or Director defendants have an obligation to disclose information about the company's health to the other fiduciaries. SPA-49.

SUMMARY OF ARGUMENT

The district court erred in concluding that fiduciaries to defined contribution plans have no fiduciary duties with respect to an investment in company stock if the plan terms mandate continued investment in company stock. To the contrary, ERISA expressly provides that statutory duties override plan terms inconsistent with ERISA, as the vast majority of courts have recognized, and trust law supposedly to the contrary is irrelevant.

Nor does ERISA support application of a presumption of prudence with respect to the purchase of employer stock by a defined contribution plan. Even if such a presumption were appropriate in some situations, no presumption should apply to the purchase and retention of stock that the fiduciaries allegedly knew was inflated by misleading financial statements, because such actions are clearly imprudent under ERISA and trust law. Furthermore, the district court's application of a presumption at the pleadings stage was improper.

Finally, contrary to the district court's conclusion, ERISA demands that fiduciaries disclose to plan participants the information necessary for the protection of their benefits, including information concerning the value of plan investments, a duty well-established in both ERISA and trust-law jurisprudence. As in Varity, fiduciaries may not hide behind their corporate roles to evade this duty with impunity and mislead participants.

ARGUMENT

I. UNDER ERISA SECTION 404(a)(1)(D), DEFENDANTS HAD FIDUCIARY DUTIES WITH RESPECT TO THE PLANS' INVESTMENT IN EMPLOYER STOCK, DESPITE PLAN TERMS MANDATING SUCH INVESTMENT

The district court erroneously held that defendants could not be plan fiduciaries with respect to the selection and retention of the Fund, and thus could not be held liable for any imprudence with regard to the Fund, because the plan documents required that the Fund be offered as an investment option. If affirmed, this holding would eliminate fiduciary responsibility for all decisions to invest in company stock whenever plan documents require the stock investment, thereby immunizing fiduciaries from responsibility for even the most imprudent and disloyal investments in such stock. SPA-29 (because "defendants did not have discretion to eliminate Citigroup stock as an investment option," they "are now 'immune from judicial inquiry' in connection with the Plans' investments in Citigroup stock").

But this holding should not be upheld. It is flatly contradicted by ERISA section 404(a)(1)(D). Under the provision's plain terms, although plan fiduciaries are required to follow plan documents, they must do so only "insofar as such documents and instruments are consistent with the provisions" of Title I and Title IV of ERISA. 29 U.S.C. § 1104(a)(1)(D). See Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995) ("a fiduciary may only follow plan terms to the extent that the terms are consistent with ERISA"); Coleman v. Interco Inc. Divisions' Plans, 933 F.2d 550, 551 (7th Cir. 1991) (noting that when ERISA and plan language diverge, "ERISA is trumps"); cf. Imel v. Laborers Pension Trust Fund for N. Cal., 904 F.2d 1327, 1330 (9th Cir. 1990) ("[p]rivate parties may not agree to alter statutory duties") (citing Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946)). Other subsections of 404, itself a part of Title I, impose upon ERISA fiduciaries the familiar trust law duties of loyalty and care. Thus, section 404 requires plan fiduciaries to act exclusively in the interests of the participants and beneficiaries and exercise the level of "care, skill, prudence, and diligence … that a prudent man acting in a like capacity and familiar with such matters would use."

29 U.S.C. § 1104(a)(1)(A)-(B). Together these provisions require that only those plan terms that are otherwise consistent with ERISA be given effect, and provide that ERISA's terms, including its prudence and loyalty provisions, cannot be contractually overridden. See DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 420 (4th Cir. 2007) (recognizing fiduciary duty to consider "removal or closure of a company fund" that was mandated with regard to company match); Laborer's Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313, 322 (5th Cir. 1999) (investment manager must disregard plan if investing plan assets as required by plan would violate its duty of prudence).

This plain reading of ERISA section 404(a)(1)(D) comports with a plain reading of ERISA's other statutory provisions and its overall structure. ERISA requires that plan assets be managed at all times by fiduciaries, a mandate fundamentally inconsistent with the district court's conclusion that no fiduciary was responsible for assessing the prudence of employer stock as an investment because it was required, in the court's view, by the Plans' terms. See generally 29 C.F.R. § 2509.75–8 FR-12-15. Thus, Section 402(a)(1) provides that plans must be maintained pursuant to plan documents that provide for "one or more fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). Similarly, ERISA section 403(a) mandates that "*all* assets of an employee benefit plan shall be held in trust by one or more trustees" who "have exclusive authority and discretion to manage and control the assets of the plan," subject only to the proper direction of the named trustee where the plan so provides. 29 U.S.C. § 1103(a) (emphasis added).[1] Moreover, ERISA section 410, 29 U.S.C. § 1110, "void[s] as against public policy" "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part," subject to an exception for the purchase of insurance. Under these statutory provisions it is clear that plan documents can allocate, but not eliminate, fiduciary duties with respect to ERISA plans and the management of their assets. See Levy v. Local Union Number 810, 20 F.3d 516, 519 (2d Cir. 1994) (plan documents violated ERISA because they removed discretion to replace trustees even in face of fiduciary breach).

Thus, ERISA protects plan participants by ensuring that all plan assets are controlled by fiduciaries charged with ERISA's stringent obligations of prudence and loyalty. As this Court has recognized, these fiduciary obligations are "the highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). Plan drafters may not simply choose to opt out of ERISA's fiduciary

[1] While Section 403(b) of ERISA excepts some assets from the trust requirement, such as insurance policies, there is no such exception for employer stock. 29 U.S.C. § 1103(b). Trustees are, of course, plan fiduciaries, as are any persons exercising control over plan assets, even in the absence of discretionary authority. See LoPresti v. Terwillinger, 126 F.3d 34, 40 (2d Cir. 1997) (citing 29 U.S.C. § 1002(21)(A)(i)); Chao v. Day, 436 F.3d 234, 236-37 (D.C. Cir. 2006).

structure, and deprive participants of critical statutory protections, by the simple expedient of mandating investment in a particular asset.

These principles apply equally to cases involving plan investments in employer stock funds. Thus, under section 404(a)(1)(D), courts have uniformly recognized that fiduciaries are obligated to follow plan terms requiring investment in employer stock only to the extent that doing so is otherwise consistent with fiduciary duties, even in the context of employee stock ownership plans (ESOPs), which are designed to be primarily invested in employer securities. Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983) ("ESOP fiduciaries remain subject to the general requirements of [s]ection 404."). See also Moench, 62 F.3d at 569 ("ESOPs are covered by ERISA's stringent requirements, and except for a few select provisions ... ESOP fiduciaries must act with the duties of loyalty and care."). Although this Court has not yet considered the issue, every circuit court to have done so has recognized that ESOP fiduciaries are under a continuing obligation to consider whether it is prudent to invest in employer stock, and they may follow plan terms requiring such an investment only if prudent to do so. See, e.g., Kuper, 66 F.3d at 1458-459; Harzewski v. Guidant Corp., 489 F.3d 799, 808-09 (7th Cir. 2007); Herman v. Mercantile Bank, N.A., 143 F.3d 419, 421 (8th Cir. 1998); In re Syncor ERISA Litig., 516 F.3d 1095, 1102-1103 (9th Cir. 2008); Fink

v. Nat'l Sav. & Trust Co., 772 F.2d 951, 954-55 (D.C. Cir. 1985); Eaves v. Penn, 587 F.2d 453, 459 (10th Cir. 1978).

Not surprisingly, courts have applied this same rule – that plan fiduciaries must override plan terms where it is clearly imprudent to follow them – to plans that hold employer stock. See, e.g., Fink, 772 F.2d at 955-56; Eaves, 587 F.2d at 459-60. For instance, the district court in the Enron case correctly held that despite plan language that required matching funds for the plan to be primarily invested in company stock, the fiduciaries "had an overriding fiduciary duty to monitor the prudence of allowing Enron to continue to match employee contributions with Enron stock if the stock became an imprudent investment." In re Enron Corp. Sec., Derivative & "ERISA" Litig., 284 F. Supp. 2d 511, 669-70 (S.D. Tex. 2003); accord In re Ikon Office Solutions, Inc. Sec. Litig., 86 F. Supp. 2d 481, 492-93 (E.D. Pa. 2000); cf. Laborer's Nat'l Pension Fund, 173 F.3d at 322 (recognizing that prudence may require fiduciaries to override plan documents that mandate particular investments but holding that fiduciaries established the prudence of following the documents as a factual matter). This is consistent with the Department of Labor's longstanding position. See U.S. Dep't of Labor Opinion Letter No. 90-05A, 1990 WL 172964, at *3 (Mar. 29, 1990) (despite plan provisions to the contrary, fiduciaries are responsible to determine, based on all relevant facts, the prudence of investing plan assets in qualifying employer securities); U.S. Dep't of Labor Opinion Letter No. 83-6A, 1983 WL 22495, at *1-*2 (Jan. 24, 1983) (same); cf. Gualandi v. Adams, 385 F.3d 236, 243 (2d Cir. 2004) ("we have often relied on DOL Opinion Letters for their persuasive value").

The plain statutory text, the prevailing case-law and the Department's longstanding view all support one conclusion: the district court erred in concluding that defendants were not fiduciaries and "immune from judicial inquiry" because the plans' terms required investment in the Fund. Instead, whatever the Plans provided, the fiduciaries had a duty to stop investing in the Fund if they knew, as alleged, that the stock was overpriced and therefore an imprudent investment.

Despite these authorities, the district court erroneously concluded that no fiduciary "had a duty to override the Plans' mandate that Citigroup stock be offered as an investment option." SPA-21. The court relied on trust law, which allows plan settlors, through the trust's written terms, to excuse trustees from their fiduciary duties and requires trustees to follow those terms except in rare circumstances where doing so violates the settlor's presumed intent. See Restatement (Third) of Trusts § 91 cmt. a. (2007) ("recognizing that most – but not all – trust fiduciary law is default law and therefore not applicable to the extent permissibly modified by trust terms"). ERISA, however, plainly departs from the trust law on these matters. See S. Rep. No. 93-127, 93rd Cong., 2d Sess. 1974, 1974 U.S.C.C.A.N. 4838, 4864-865 (1973) (explaining why ERISA's fiduciary duties, unlike state trust law, do not permit "deviations" based on settlor's intent). Under section 404(a)(1)(D) "documents cannot excuse trustees from their duties under ERISA," Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 568 (1985), including their fundamental duties of prudence and loyalty. And ERISA section 410, as we have noted, "void[s]" any plan terms that purport to immunize fiduciaries of liability for violating their statutory duties. See Levy, 20 F.3d at 519 (holding that a trust agreement that insulated the trustee from removal effectively eliminated oversight over the trustee, and therefore improper under ERISA); Solis v. Plan Ben. Servs., Inc., 620 F. Supp. 2d 131, 145 & n.6 (D. Mass. 2009) (reading Levy as a case about section 410). Thus, application of trust law principles on this issue is unwarranted. Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 250 (2000) (holding that trust law only "offers a 'starting point for analysis'" of ERISA and is not relevant if "'it is inconsistent with the language of the statute, its structure, or its purposes'") (citation omitted).

The court next reasoned that "if an ERISA plan mandates that employer stock be offered as an investment option, plan fiduciaries are required to follow that mandate as long as it is consistent with ERISA's other provisions," and then concluded "[a]t least for EIAPs and ESOPs, investment in employer stock is consistent with ERISA's other provisions" because the statute contemplates that such plans will invest in company stock, "and do so without diversifying." SPA-20. But the fact that ERISA contemplates undiversified investment in employer stock does not mean that imprudent investments in such stock are allowed. Indeed, the provision that the court cites expressly exempts EIAPs from "the diversification requirement of [section 404(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification)." 29 U.S.C. § 1104(a)(2) (emphasis added). See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 97 (1993) ("when a general policy is qualified by an exception, the Court 'usually read[s] the exception narrowly in order to preserve the primary operation of the [policy]'") (referring to ERISA) (citation omitted).[2] The plain meaning of this

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[2] Congress exempted certain plans that hold employer stock only from the fiduciary duty to diversify, not from ERISA's other fiduciary obligations. When fiduciaries fail to diversify plan holdings, they generally expose plans to the undue risk posed by even normal fluctuations in a single asset's market value. See 29 U.S.C. § 1104(a)(1)(C) (stating that diversification "minimizes the risk of large losses"); Steinman v. Hicks, 352 F.3d 1101, 1104-1105 (7th Cir. 2003); Leigh v. Engle, 858 F.2d 361, 368 (7th Cir. 1988); George Bogert, Law of Trusts and Trustees, 2d ed. § 612 (1991) (recognizing that diversification insures against possible risks of concentrated investments). The plaintiffs here, however, do not base their claims on the failure to diversify holdings of an otherwise prudent investment. Instead, they assert that the market was being misled to overvalue the stock, and that the plan's fiduciaries continued to purchase and hold the stock anyway. Diversification is not the issue; it was imprudent for the fiduciaries to knowingly buy even a single share at an inflated price. The defendants could not disregard the specific risks associated with such undisclosed, excessively risky, and deceptive practices. See U.S. Liab. Ins. Co. v. Selman, 70 F.3d 684, 690 (1st Cir. 1995) (recognizing that, under insurance law's "known loss" doctrine, diversification ceases to serve its purpose if the insured "knows in advance" "that a specific loss has already happened or is substantially certain to happen");

provision is that prudence (and ERISA's other requirements, including loyalty) otherwise applies to the fiduciaries' actions with regard to their decisions to purchase company stock, as many courts have held. See, e.g., Fink, 772 F.2d at 955-956.

The court's conclusion that the structure and purpose of ERISA "mandate that plan fiduciaries offer employer stock as an investment option," SPA-21, is likewise in error. The court reasoned that requiring a fiduciary to override an employer stock mandate is equivalent to requiring a plan amendment. Id. And because "amending a plan is a settlor function," the district court concluded, no fiduciary duties apply. Id. This misconstrues the plaintiffs' claim. Plaintiffs' claim is not that the defendants should have formally exercised its discretion to amend or terminate the plan but that, as fiduciaries, they were required under ERISA section 404(a)(1)(D) to override plan terms in order to prevent a fiduciary breach, such as preventing investment in imprudent stocks. See, e.g., In re Unisys Corp. Retiree Medical Benefits ERISA Litig., 579 F.3d 220, 237 (3d Cir. 2009) ("The injunction is designed to remedy Unisys' violation of its fiduciary duty to the plaintiffs for actions it took in its fiduciary capacity, and the specific equitable relief provision

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Steinman, 352 F.3d at 1106 (recognizing possible imprudence of an investment with a known increase in "bankruptcy risk"); cf. Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) ("[i]f a fiduciary was aware of a risk to the fund, he may be held liable for failing to investigate fully the means of protecting the fund from that risk").

of ERISA … trumps the application of the general principle that ERISA does not regulate settlor activity.").

Finally, the district court contends that "holding a fiduciary liable for adhering" to a plan provision requiring that employer stock be offered as an investment option "thwart[s]" Congress' goal to encourage the formation of ESOPs. SPA-22. This unsupported assertion fails to acknowledge ERISA's primary goal to "promote the interests of employees and their beneficiaries" and fundamentally disregards section 404(a)(1)(D), which clearly provides that fiduciary duties trump contrary plan terms, as discussed above. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990).

II. THE DISTRICT COURT ERRED IN DISMISSING THE CASE BASED ON A PRESUMPTION THAT THE FIDUCIARIES ACTED PRUDENTLY IN ALLOWING THE PLAN TO PURCHASE EXCESSIVELY RISKY EMPLOYER STOCK AT ALLEGEDLY INFLATED PRICES

The district court also erred in dismissing the case based on its application of the Moench presumption of prudence. In Moench, a plan participant sued an ESOP committee for breach of fiduciary duty based on its continued investment in employer stock when the employer's financial condition deteriorated. 62 F.3d at 558-59. The Third Circuit confirmed that ESOP fiduciaries must, like all fiduciaries, act prudently and loyally when deciding whether to purchase or retain employer securities under such circumstances. Id. at 569. However, based on the diversification exemption, the court held that an ESOP fiduciary that invested plan assets in employer stock is entitled to a rebuttable presumption that he acted consistently with ERISA. Id. at 571. The court held that the factors Moench alleged (precipitous drop in stock prices, committee members' knowledge of the impending collapse, and their conflicted loyalties as corporate insiders and fiduciaries), if proven, could overcome the presumption, and reversed summary judgment for the defendants. Id. at 572.

As an initial matter, this Court, which has neither considered nor adopted Moench, ought not adopt any presumption of prudence with regard to investment in employer stock.[3] Moreover, whatever its utility in other situations, there is no rationale for applying the Moench presumption where, as here, the fiduciaries allegedly knew or should have known that the stock was artificially overpriced. It is always imprudent for ERISA fiduciaries to knowingly overpay for stock and they are not entitled to any contrary presumption. Even if such a presumption were to be applied, the plaintiffs' allegations – that the fiduciaries knowingly allowed the plan to purchase overpriced stock – suffice to overcome any such presumption

[3] The Fifth and Sixth Circuits have adopted the Moench presumption. See, e.g., Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 254 (5th Cir. 2008); Kuper, 66 F.3d at 1457. The Seventh Circuit has not explicitly adopted it but has agreed with some of its reasoning. See, e.g., Steinman, 352 F.3d at 1103. The Ninth Circuit has expressly declined to adopt it. Syncor, 516 F.3d at 1102; see also Bunch v. W.R. Grace & Co., 555 F.3d 1, 10 (1st Cir. 2009) (declining to apply presumption to fiduciary's decision against investing in company stock).

(without the need to additionally allege that such purchase was incongruent with the plan sponsor's intent or that Citigroup was about to collapse). Finally, the district court's dismissal on the pleadings based on application of the Moench presumption, which involves evidentiary burden-shifting, is inconsistent with Federal Rule of Civil Procedure 8(a).

a. Nothing in ERISA requires that a presumption of prudence attach to investment in employer stock by retirement plans. As fiduciaries of ERISA-covered plans, the defendants must generally comply with ERISA's standard of care without any special presumption in their favor. See 29 U.S.C. § 1104. Section 404 mandates that plan fiduciaries act exclusively in the interests of the participants and beneficiaries and exercise the level of "care, skill, prudence, and diligence … that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(A)-(B).

These standards of loyalty and care are not altered for individual account plans, including the Plans at issue here. All that is altered is the requirement in section 404 to "diversify[] the investments of the plan so as to minimize the risk of large losses," id. § 1104(a)(1)(C), and the "prudence requirement (only to the extent that it requires diversification)" with respect to the acquisition or holding of employer securities. Id. § 1104(a)(2) (emphasis added). Thus, except for an exemption from diversification requirements, ERISA fiduciaries of 401(k) plans, including those allowing for employer stock purchases, are subject to ERISA's exacting standard of fiduciary care. See Bierwirth, 680 F.2d at 272 n.8. These provisions require the fiduciaries to do more than merely refrain from arbitrary conduct; they must meet ERISA's stringent standards of prudence and loyalty. See, e.g., John Blair Commc'ns, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan, 26 F.3d 360, 369 (2d Cir. 1994).

The Moench presumption is not supported by ERISA's text and policies. As the district court recognized, non-diverse employer stock investments put "employee retirement assets at much greater risk than does the typical diversified ERISA plan," SPA-23 (quoting Moench, 62 F.3d at 568). Moreover, in defined contribution plans, such as the Plans at issue here, workers' retirement benefits are not guaranteed, but instead are entirely dependent on the investments earnings on contributions. See 29 U.S.C. §1002(34). When such plans hold non-diverse employer stock investments, ERISA's other protections, including its standards of prudence and loyalty, are all the more necessary. For these reasons, this Court should not adopt the presumption created as a federal common law rule in Moench. See Krishna v. Colgate Palmolive Co., 7 F.3d 11, 14 (2d Cir. 1993) (recognizing that "courts may develop a federal common law under ERISA" only "[i]n appropriate circumstances").

b. In any event, the Moench presumption does not apply or is rebutted in this case. The question in Moench was not whether the fiduciaries paid the wrong price for the stock, but was instead whether they should have purchased the stock at all, even if at the right price. 62 F.3d at 571. Indeed, the Third Circuit later suggested that the Moench presumption did not apply in a similar case involving a 401(k) plan's investment in employer stock alleged to be "unlawfully and artificially inflated" in value. In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 233, 237-38 (3d Cir. 2005); see also Syncor, 516 F.3d at 1102 (declining to adopt the presumption because there was an issue of genuine material fact as to whether "the fiduciaries breached the prudent man standard by knowing of, and/or participating in, the illegal scheme while continuing to hold and purchase artificially inflated Syncor stock for the ERISA Plan").

Accordingly, the Moench presumption should not apply to a case, like this one, that challenges the prudence and loyalty of purchasing company stock in light of information that the stock's price was "unlawfully and artificially inflated." Schering-Plough, 420 F.3d at 233. In this context, presuming that the fiduciaries acted prudently is unwarranted, and the company's viability is irrelevant. Knowingly overpaying for an asset is neither prudent nor in the interest of plan participants and beneficiaries. See, e.g., Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992). This follows from the well-established rule that a fiduciary breaches his duties by knowingly paying too much for an asset for the plan. See Feilen, 965 F.2d at 671; Restatement (Third) of Trusts § 205 cmt. e, illus. 9. Whether the plan gets nothing in return for its payment or too little, the breach is the same. Cf. U.S. Dep't of Labor Field Assistance Bulletin 2004-03 (Dec. 17, 2004) ("if a directed trustee has non-public information indicating that a company's public financial statements contain material misrepresentations that significantly inflate the company's earnings, the trustee could not simply follow a direction to purchase that company's stock at an artificially inflated price"); In re Halpin, 566 F.3d 286, 290 n.2 (2d Cir. 2009) (applying Skidmore deference to Field Assistance Bulletins).

Even if the presumption were to be applied, the allegations here, if proven, overcome any presumption that the fiduciaries acted reasonably. They suffice to survive a motion to dismiss and the plaintiff need not additionally allege the company's "impending collapse," a threshold that no circuit court has adopted. See, e.g., In re Ford Motor Co. ERISA Litig., 590 F. Supp. 2d 883, 907-8 & n.9 (E.D. Mich. 2008) (listing cases that reject an "impending collapse" threshold); In re The Goodyear Tire & Rubber Co. ERISA Litig., 438 F. Supp. 2d 783, 794 (N.D. Ohio 2006) (allegations that defendants knew of inflated earnings sufficed to overcome Moench presumption; plaintiffs did not need to plead that an "impending collapse"); In re Sprint Corp. ERISA Litig., 388 F. Supp. 2d 1207, 1224-25 (D. Kan. 2004).[4]

c. Even assuming that Moench applies, a presumption inherently shifts burdens of proof, which is an evidentiary matter, not a pleading requirement. See Moench, 62 F.3d at 571 (recognizing the presumption as evidentiary burden-shifting). Inserting this presumption into the pleading stage, therefore, is inconsistent with Federal Rule of Civil Procedure 8(a)'s notice pleading requirement. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); see also Braden v. Wal-Mart Stores, Inc., No. 08-3798, 2009 WL 4062105, at *7-*8 (8th Cir. 2009) (holding that, after Twombly and Iqbal, plaintiffs need only plead facts that give defendants a "fair notice" of "acts indirectly showing unlawful behavior" but need not "rebut" "lawful reasons" for such behavior.). It is also inconsistent with Congressional intent. See H.R. Rep. No. 93-553, 93d Cong., 1st Sess. 17 (1973), 1974 U.S.C.C.A.N. 4639, 4655 (ERISA designed, among other things, to eliminate "jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary duties"); see also 29 U.S.C. § 1001(b).

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[4] For these reasons, if adopted, the Moench presumption should be at most a "permissive presumption or inference" rather than a "mandatory rebuttable presumption" against plaintiffs. See County Court of Ulster County, N. Y. v. Allen, 442 U.S. 140, 158-160 & n.16 (1979); Miskel v. Karnes, 397 F.3d 446, 455-56 (6th Cir. 2005) (summarizing jurisprudence on this issue).

Numerous decisions have correctly refused to apply Moench when deciding a motion to dismiss. See, e.g., In re Goodyear, 438 F. Supp. 2d at 794; In re Elec. Data Sys. Corp. "ERISA" Litig., 305 F. Supp. 2d 658, 670 (E.D. Tex. 2004); Rankin v. Rots, 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003). Other courts, while stopping short of a categorical rule against applying Moench at the motion to dismiss stage, have correctly found allegations similar to the ones made in this case to be sufficient to "clear the Rule 12(b)(6) hurdle." LaLonde v. Textron, Inc., 369 F.3d 1, 6, 7 (1st Cir. 2004) (plaintiffs alleged that "Textron artificially inflated its stock price by concealing" numerous problems at the company that were also the subject of a shareholders' derivative action against the company); Sprint, 388 F. Supp. 2d at 1223-24; In re Honeywell Int'l ERISA Litig., No. 03-1214, 2004 WL 3245931, at *11 n.16 (D.N.J. June 14, 2004). Even if the presumption is treated as an affirmative defense, nothing in the complaint in this case, which plausibly alleged that the investment in Citigroup stock was imprudent under the circumstances, establishes the defense. Compare Avaya, 503 F.3d at 349, with Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 901 (7th Cir. 2004) ("[o]nly when the plaintiff pleads itself out of court – that is, admits all the ingredients of an impenetrable defense – may a complaint that otherwise states a claim be dismissed under Rule 12(b)(6)").

III. FIDUCIARIES HAD A DUTY NOT TO MISLEAD PLAN PARTICIPANTS AND TO DISCLOSE INFORMATION NECESSARY FOR THE PROTECTION OF THEIR BENEFITS

ERISA imposes upon fiduciaries a duty to provide truthful information to participants. A fiduciary's duty of loyalty includes an obligation not to materially mislead plan participants. See, e.g., Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 88 (2d Cir. 2001) (a fiduciary has "'a duty to deal fairly and honestly with its beneficiaries'") (quoting Ballone v. Eastman Kodak Co., 109 F.3d 117, 123-24 (2d Cir. 1997)). See also Varity, 516 U.S. at 506 ("lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA"). Nor may fiduciaries mislead participants through inaction or silence; instead they are required to protect participants from misleading information, even when it originates from others. See, e.g., Devlin, 274 F.3d at 88-89; Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 9 (2d Cir. 1997).

ERISA fiduciaries are not only prohibited from misleading plan participants or allowing others to do so, but also have an affirmative duty to disclose material information that plan participants need to know to adequately protect their interests. See Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 115 (1st Cir. 2002); Bixler v. Cent. Penn. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (affirmative disclosure duty "where the trustee knows that silence would be harmful"); Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d

371, 381 (4th Cir. 2001); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995); Krohn v. Huron Mem. Hosp., 173 F.3d 542, 548 (6th Cir. 1999); Anweiler v. Am. Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993); Braden, 2009 WL 4062105, at *10-*11; Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995); Eddy v. Colonial Life Ins. Co. of Am., 919 F.2d 747, 750-51 (D.C. Cir. 1990). This duty originates in the law of trusts. See Restatement (Second) of Trusts § 173, cmt. c-d (1959) (beneficiaries are "always entitled to such information as is reasonably necessary to enable [them] to enforce [their] rights under the trust or to prevent or redress a breach of trust"); Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 489 (N.Y. 1918) (Cardozo, J.) ("A beneficiary, about to plunge into a ruinous course of action, may be betrayed by silence as well as the spoken word."). Fiduciaries likewise operate under an obligation to disclose their knowledge to other fiduciaries, particularly where necessary to correct misconceptions that at least some of the fiduciaries allegedly helped disseminate, as is alleged here. See, e.g., Glaziers and Glassworkers Union Local 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171, 1181-82 (3d Cir. 1996). Given these well-established duties, the district court erred in holding that the plan fiduciaries had no affirmative duty to disclose, either to participants or to other fiduciaries, material information about the Plans' employer stock investments.

The court likewise erred in dismissing the claims alleging that the company and Director defendants violated ERISA by misleading plan participants. The plaintiffs allege that "Citigroup representatives … had mandatory town hall meetings … where they would assemble Citigroup employees … and encourage employees to invest in Citigroup stock through the Plans." They also allege that the Director defendants and Citigroup disseminated material through email and plan documents touting the company as a good investment. A-100. Taking all this as true, as one must on a motion to dismiss, the overall message, specifically directed at employees, clearly represented that the Citigroup stock was a safe plan investment when it was not.

As in Varity, the defendants' "statements about the security of benefits amounted to an act of plan administration." 516 U.S. at 505; see also Flanigan v. Gen Elec. Co., 242 F.3d 78, 84 (2d Cir. 2001). The defendants directed their communications to plan participants about plan investment decisions. It is abundantly clear that a fiduciary may not actively mislead plan participants about their retirement benefits.[5] E.g., Mullins v. Pfizer, 23 F.3d 663, 669 (2d Cir. 1994); Ballone, 109 F.3d at 124. Moreover, given the duty to correct, even to the extent

[5] Such a disclosure duty is not limited to benefit claims. See In re Unisys Sav. Plan Litig., 74 F.3d 420, 442 (3d Cir. 1996). For individual account plans, accurate valuation of plan investments is inextricably tied to the value of plan benefits. See, e.g., Chao v. Hall Holding Co., Inc., 285 F.3d 415, 444 (6th Cir. 2002).

the director-defendants thought they were speaking in their corporate capacities, they cannot hide behind their corporate status and "remain silent" knowing that the participants "labor[] under a material misunderstanding," "especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions." Griggs, 237 F.3d at 381. Certainly, based on the alleged facts, "reasonable employees could have believed that" the defendants were communicating as both an employer and as a plan fiduciary about the employees' plan investments. See Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 65-66 (2d Cir. 2006) (citing Varity, 516 U.S. at 503).

The district court leaned heavily on Bd. of Trs. of CWA/ITU Negotiated Pension Plan v. Weinstein, 107 F.3d 139 (2d Cir. 1997), and on statements from Avaya, 503 F.3d at 350, that ERISA does not impose "a duty to 'give investment advice' or 'to opine on' the stock's condition" (quoting Unisys, 74 F.3d at 443), to conclude that fiduciaries have no duty to disclose nonpublic financial information about plan investments. SPA-38-42. But no such conclusion follows from either opinion.

This case is not, of course, about investment advice or the defendants' opinions concerning the employer stock; it alleges, instead, that the defendants knew of the heavy losses that the company would inevitably sustain from subprime loans but misled investors, specifically including plan participants, about

Citigroup's loss exposure. The Third Circuit's dicta in Avaya about investment advice is irrelevant, and its holding, that the fiduciaries there had adequately informed the participants about the potential risks associated with the employer stock fund, as a factual matter, does not support the district court's conclusion in this case that the fiduciaries had no duty as a matter of law. 503 F.3d at 350. Indeed, Avaya relied on the Unisys decision in which the court permitted a claim similar to the one alleged here that the fiduciaries had failed to disclose material information pertaining to plan investments to survive summary judgment. Id. (citing Unisys, 74 F.3d at 443).

This Court's Weinstein decision likewise fails to support the district court's conclusion that the fiduciaries in this case had no disclosure duties with regard to the employer stock. In Weinstein, plan administrators sought a declaratory judgment that they were not required to disclose voluminous actuarial reports to plan participants that were largely duplicative of information in the plan's annual reports. 107 F.3d at 140. This Court was concerned with extending a fiduciary's duties to include the disclosure of such information without any showing that it affects the participant or that anybody was misled in any way. Id. at 144-45. Moreover, Weinstein primarily claimed that he was entitled to the reports because, under ERISA section 104(b)(4), they constituted an "instrument under which the plan [was] operated or maintained." 29 U.S.C. § 1024(b)(4). 107 F.3d at 142.

Having concluded that the reports were not "instruments," this Court declined to interpret section 404 of ERISA to impose a duty that section 104(b)(4) of ERISA did not impose. Id. at 146-47. This Court did not consider whether section 404 could give rise to a duty to disclose in other circumstances.

Furthermore, contrary to the district court's reasoning, SPA-40, the Supreme Court's Varity decision made clear that fiduciaries' obligations are not limited to ERISA's specific disclosure provisions. The obligations of prudence and loyalty are broad obligations that apply to all fiduciary activities, including communications with participants. "[T]he primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime." Varity, 516 U.S. at 504. See also Jordan v. Federal Express Corp., 116 F.3d 1005, 1012 (3d Cir. 1997) ("[i]t would appear that the Supreme Court has also determined that fiduciary duties operate both independently from and in conjunction with ERISA's specifically delineated requirements"). Under this well-established and uniform case-law, the plaintiffs plausibly allege that the defendants breached their duties by failing to disclose material information affecting the company stock investment's value and by misleading the plan participants in this regard.

CONCLUSION

For these reasons, the Secretary requests that the district court's decision be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(7)(B) and.(C), Fed. R. App. P., I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains seven thousand (7,000) words.

Dated: December 28, 2009

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<u>CERTIFICATE OF SERVICE</u>

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