No. 11-4232

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE LEHMAN BROTHERS ERISA LITIGATION [11-4232]

(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 PLAINTIFFS-APPELLANTS REQUESTING REVERSAL

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Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for Plan Benefits Security

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ALEX E. RINEHART, JO ANNE BUZZO, MARIA DESOUSA, LINDA DEMIZIO, and MONIQUE FONG MILLER,

Plaintiffs-Appellants,

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, LOCALS 302 & 612 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS EMPLOYERS CONSTRUCTION INDUSTRY RETIREMENT TRUST, CITY OF SOUTH SAN FRANCISCO, CITY OF LONG BEACH, COUNTY OF TUOLUMNE, CITY OF FREMONT, NEW JERSEY CARPENTERS HEALTH FUND, BOILMAKERS-BLACKSMITH NATIONAL PENSION TRUST, NEW JERSEY CARPENTERS HEALTH FUND, on behalf of itself and all others similarly situated, AMERICAN NATIONAL INSURANCE COMPANY, AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS, COMPREHENSIVE INVESTMENT SERVICES INC, THE MOODY FOUNDATION, WASHINGTON STATE INVESTMENT BOARD, CHRISTOPHER CORADO, individually and on behalf of all others similarly situated, SYLVIA REMER, ED DAVIS, JUAN TOLOSA, ARTHUR SIMONS, RALPH ROSATO, TRUSTEE J. HARRY PICKLE, ZENITH INSURANCE CO., ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, AMERICAN EUROPEAN INSURANCE COMPANY, GOVERNMENT OF GUAM RETIREMENT FUND, INTER-LOCAL PENSION FUND GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, MARSHA KOSSEFF, NORTHERN IRELAND LOCAL GOVERNMENTAL OFFICERS SUPERANNUATION COMMITTEE, OPERATING ENGINEERS LOCAL 3 TRUST FUND, OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION LOCAL 262 ANNUITY FUND, individually and on behalf of all others similarly situated, POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT, TEAMSTERS ALLIED BENEFIT FUNDS, THE CITY OF EDINBURGH COUNCIL as Administering Authority of the Lothian Pension Fund, THE PENSION FUND GROUP, BROCKTON CONTRIBUTORY RETIREMENT SYSTEM, RICK FLEISCHMAN, STEPHEN GOTT, ISLAND MEDICAL GROUP, KARIM KANO, MICHAEL KARFUNKEL, ANN LEE, FRANCISCO PEREZ, RONALD PROFILI, SHEAEDWARDS LIMITED PARTNERSHIP, FRED TELLING, GRACE WANG, ZAHNISER TRUST, ANTHONY PEYSER, on behalf of himself and all others similarly situated, STEPHEN P. GOTT, on behalf of himself, STEPHEN P.

GOTT, and all others similarly situated, BELMONT HOLDINGS CORP., individually and on behalf of all others similarly situated, KATHY ROONEY, on behalf of themselves and all others similary situated, JEFFREY STARK, on behalf of themselves and all others similarly situated, STANLEY TOLIN, ENRIQUE AZPIAZU, STUART BREGMAN, ROBERTA CIACCI, ROBERT FEINERMAN, IRWIN INGWER, PHYLLIS INGWER, CHRISTOPHER LEWIS, on behalf of himself and The Entertainment Group, ISLAND MEDICAL GROUP PENSION PLAN, f/b/o Irwin Ingwer, FRANKLIN KASS, AURORA PEREZ, CUAUHTEMOC PEREZ, DIANA PEREZ, TRUSTEE J. HARRY PICKLE, GASTROENTEROLOGY ASSOCIATES PROFIT SHARING TRUST FBO CHARLES M. BROOKS, M.D., ALEJANDRO SILVA, DAVID SOSNA, MORTGAGE TRUST 2007-6, ALASKA ELECTRICAL PENSION FUND, on behalf of itself and all others similarly situated, and MADELINE DIMODICA,

Plaintiffs,

v.

JOHN F. AKERS, MICHAEL L. AINSLIE, THOMAS H. CRUIKSHANK, MARSHA EVANS JOHNSON, CHRISTOPHER GENT, ROLAND A. HERNANDEZ, HENRY KAUFMAN, JOHN D. MACOMBER, MARY PAT ARCHER, AMITABH ARORA, MICHAEL BRANCA, EVELYNE ESTEY, ADAM FEINSTEIN, DAVID ROMHILT, ROGER S. BERLIND, JERRY A. GRUNDHOFER, RICHARD S. FULD, JR., and WENDY M. UVINO,

Defendants-Appellees,

LANA FRANKS, EDWARD GRIEB, RICHARD MCKINNEY, KRISTINE SMITH, JAMES J. SULLIVAN, SAMIR TABET, MARK L. ZUSY, ERNST & YOUNG LLP, A.G. EDWARDS & SONS, INC., MOODY'S CORP., BNY CAPITAL MARKETS, INC., BBVA SECURITIES INC., CITIGROUP INC., RBS SECURITIES INC., UBS SECURITIES LLC, DZ FINANCIAL MARKETS LLC, WILLIAMS CAPITAL GROUP, L.P., ABN AMRO HOLDING N.V., THE MCGRAW-HILL COMPANIES, INC., MOODY'S INVESTORS SERVICE, INCORPORATED, ANZ SECURITIES, INC., BANC OF AMERICA SECURITIES LLC, BBVA SECURITIES INC., M.R. BEAL & COMPANY, BNP PARIBAS S.A., BNY MELLON CAPITAL MARKETS, LLC, CABRERA CAPITAL MARKETS LLC, CHARLES SCHWAB & CO., INC., CIBS WORLD MARKETS CORP., CITIGROUP

GLOBAL MARKETS INC., COMMERZBANK CAPITAL MARKETS CORP., DNB NOR MARKETS INC., DZ FINANCIAL MARKETS LLC, FIDELITY CAPITAL MARKETS SERVICES, FORTIS SECURITIES, LLC, BMO CAPITAL MARKETS CORP., HSBC SECURITIES (USA) INC., ING FINANCIAL MARKETS LLC, LOOP CAPITAL MARKETS, LLC, MELLON FINANCIAL MARKETS, LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MIZUHO SECURITIES USA, INC., MORGAN STANLEY & CO. INC., MURIEL SIEBERT & CO., INC., NABCAPITAL SECURITIES, LLC, NATIONAL AUSTRALIA BANK LIMITED, NATIXIX BLEICHROEDER INC., RAYMOND JAMES & ASSOCIATES, INC., RBC CAPITAL MARKETS CORP., SANTANDER INVESTMENT SECURITIES INC., SCOTIA CAPITAL (USA) INC., SG AMERICAS SECURITIES LLC, SOVEREIGN SECURITIES CORPORATION LLC, STANDARD CHARTERED BANK, SUNTRUST ROBINSON HUMPHREY, INC., TD SECURITIES (USA) LLC, UBS SECURITIES, LLC, UTENDAHL CAPITAL PARTNERS, L.P., WACHOVIA CAPITAL MARKETS LLC, WACHOVIA SECURITIES, LLC, WELLS FARGO SECURITIES, LLC, THE WILLIAMS CAPITAL GROUP, L.P., ZIONS DIRECT, INC., CALYON SECURITIES (USA) INC., RBS SECURITIES INC., THE MCGRAW HILL COMPANIES, INC., MORGAN STANLEY & CO., INC., RBC CAPITAL MARKETS CORP., WACHOVIA CAPITAL MARKETS, LLC, PIPER JAFFRAY & CO., and ABN AMRO INC., J.P. MORGAN SECURITIES, INC.,

Defendants,

ABN AMRO HOLDING N.V., ANZ SECURITIES, INC., BBVA SECURITIES INC., BANC OF AMERICA SECURITIES LLC, CIBC WORLD MARKETS CORP., CABRERA CAPITAL MARKETS LLC, CAJA DE AHORROS Y MONTE DE PIEDAD DE MADRID, ERIN CALLAN, CITIGROUP GLOBAL MARKETS INC., DAIWA SECURITIES SMBC EUROPE LIMITED, DNB NOR MARKETS, JOSEPH M. GREGORY, HVB CAPITAL MARKETS, INC., HARRIS NESBITT CORP., LEHMAN BROTHERS HOLDINGS, INC., LOOP CAPITAL MARKETS, LLC, IAN LOWITT, MELLON FINANCIAL MARKETS, LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MORGAN STANLEY & CO. INC., CHRISTOPHER M. O'MEARA, RBC DAIN RAUSCHER INC., RBS GREENWICH CAPITAL, SG CORPORATE & INVESTMENT BANKING, SANTANDER INVESTMENT SECURITIES INC., SIEBERT CAPITAL MARKETS, SOVEREIGN SECURITIES CORPORATION, LLC, SUNTRUST ROBINSON HUMPHREY, INC., UBS SECURITIES LLC, UTENDAHL CAPITAL PARTNERS, L.P., WACHOVIA

CAPITAL MARKETS, LLC, WELLS FARGO SECURITIES, LLC, WILLIAM CAPITAL GROUP, L.P., NABCAPITAL SECURITIES, LLC, BNY MELLON CAPITAL MARKETS, LLC, CALYON SECURITIES (USA) INC., DNB NOR MARKETS, BMO CAPITAL MARKETS CORP., NATIONAL AUSTRALIA BANK LIMITED, RBC CAPITAL MARKETS CORP., SG AMERICAS SECURITIES LLC, WACHOVIA SECURITIES LLC, THE WILLIAMS CAPITAL GROUP, L.P., BNP PARIBAS S.A., CHARLES SCHWAB & CO., INC., COMMERZBANK CAPITAL MARKETS CORP., EDWARD D. JONES & CO., L.P., FIDELITY CAPITAL MARKETS SERVICES, HSBC SECURITIES (USA) INC., INCAPITAL LLC, ING FINANCIAL MARKETS LLC, M.R. BEAL & COMPANY, MURIEL SIEBERT & CO. INC., NABCAPITAL SECURITIES, LLC, NATIXIS BLEICHBROEDER INC., RAYMOND JAMES & ASSOCIATES, INC., SCOTIA CAPITAL (USA) INC., TD SECURITIES (USA) LLC, UBS FINANCIAL SERVICES, INC., ABN AMRO INC., B.C. ZIEGLER AND COMPANY, CREDIT SUISSE SECURITIES (USA) LLC, D.A. DAVIDSON & CO., DAVENPORT & COMPANY LLC, FERRIS BAKER WATTS & INCORPORATED, FIFTH THIRD SECURITIES, INC., FIXED INCOME SECURITIES, INC., H & R BLOCK FINANCIAL ADVISORS, INC., CAPITAN RONALD HERNANDEZ, JACKSON SECURITIES LLC, JANNEY MONTGOMERY SCOTT LLC, KEEFE, BRUYETTE & WOODS, INC., KEYBANC CAPITAL MARKETS, INC., MAXIM GROUP LLC, MESIROPW FINANCIAL, INC., MORGAN KEEGAN & COMPANY, INC., NATIONAL FINANCIAL SERVICES LLC, OPPENHEIMER & CO., INC., PIPER JAFFRAY & CO., ROBERT W. BAIRD & CO. INCORPORATED, SMH CAPITAL INC., SCOTT & STRINGFELLOW, STIFEL, NICOLSUS & COMPANY INCORPORATED, SONE & YOUNGBERG LLC, TD AMERITRADE HOLDING CORPORATION, VINING SPARKS IBG, LP, ZIONS DIRECT, INC., BNC MORTGAGE LOAN TRUST 2006-1, BNC MORTGAGE LOAN TRUST 2006-2, FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF12, FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF2, FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FFA, FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FFB, GREENPOINT MORTGAGE FUNDING TRUST SERIES 2006-AR4, GREENPOINT MORTGAGE FUNDING TRUST SERIES 2006-AR5, GREENPOINT MORTGAGE FUNDING TRUST SERIES 2006-AR7, GREENPOINT MORTGAGE FUNDING TRUST, SERIES 2006-AR6, GREENPOINT MORTGAGE FUNDING TRUST, SERIES 2006-AR8, GREENPOINT MORTGAGE FUNDING TRUST, SERIES 2007-AR1, GREENPOINT MORTGAGE FUNDING TRUST, SERIES 2007-AR3, LEHMAN MORTGAGE TRUST 2006-2, LEHMAN MORTGAGE TRUST

2006-5, LEHMAN MORTGAGE TRUST 2006-6, LEHMAN MORTGAGE TRUST 2006-7, LEHMAN MORTGAGE TRUST 2006-8, LEHMAN MORTGAGE TRUST 2006-8, LEHMAN MORTGAGE TRUST 2006-9, LEHMAN MORTGAGE TRUST 2007-1, LEHMAN MORTGAGE TRUST 2007-2, LEHMAN MORTGAGE TRUST 2007-3, LEHMAN MORTGAGE TRUST 2007-4, LEHMAN XS TRUST 2005-5N, LEHMAN MORTGAGE TRUST 2007-5, LEHMAN XS TRUST 2005-4, LEHMAN XS TRUST 2005-6, LEHMAN XS TRUST 2005-7N, LEHMAN XS TRUST 2005-8, LEHMAN XS TRUST 2005-9N, LEHMAN XS TRUST 2006-1, LEHMAN XS TRUST 2006-11, LEHMAN XS TRUST 2006-13, LEHMAN XS TRUST 2006-14N, LEHMAN XS TRUST 2006-15, LEHMAN XS TRUST 2006-16N, LEHMAN XS TRUST 2006-17, LEHMAN XS TRUST 2006-18N, LEHMAN XS TRUST 2006-19, LEHMAN XS TRUST 2006-20, LEHMAN XS TRUST 2006-2N, LEHMAN XS TRUST 2006-3, LEHMAN XS TRUST 2006-4N, LEHMAN XS TRUST 2006-5, LEHMAN XS TRUST 2006-GP1, LEHMAN XS TRUST 2006-GP2, LEHMAN XS TRUST 2007-1, LEHMAN XS TRUST 2007-10H, LEHMAN XS TRUST 2007-11, LEHMAN XS TRUST 2007-12N, LEHMAN XS TRUST 2007-2N, LEHMAN XS TRUST 2007-4N, LEHMAN XS TRUST 2007-5H, LEHMAN XS TRUST 2007-6, LEHMAN XS TRUST 2007-7N, LEHMAN XS TRUST 2007-9, LEHMAN XS TRUST SERIES 2005-5N, LEHMAN XS TRUST SERIES 2005-7N, LEHMAN XS TRUST SERIES 2005-9N, LEHMAN XS TRUST SERIES 2006-16N, LEHMAN XS TRUST SERIES 2006-2N, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-10, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-11, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-12, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-2, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-3, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-4, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-8, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2006-9, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2007-1, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2007-2, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2007-3, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2007-4, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2007-5, STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST 2007-6, STRUCTURED ASSET INVESTMENT LOAN TRUST 2006-2, STRUCTURED ASSET INVESTMENT LOAN TRUST 2006-BNC1, STRUCTURED ASSET INVESTMENT LOAN TRUST 2006-BNC3, STRUCTURED ASSET SECURITIES CORPORATION, STRUCTURED

ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-BC1, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-BC2, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-BC3, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-BC4, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-BC5, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-BC6, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-S1, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-S3, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-S4, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-WF1, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-WF3, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2007-BC1, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2007-BC2, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2007-BC3, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2007-EQ1, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2007-OSI, STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2007-WF1, DOES 1-20, GREENPOINT MORTGAGE FUNDING GRANTOR TRUST 1-A1A, SERIES 2006-AR6, GREENPOINT MORTGAGE FUNDING GRANTOR TRUST 1-A2A2, SERIES 2006-AR5, GREENPOINT MORTGAGE FUNDING GRANTOR TRUST 1-A3A2, SERIES 2006-AR5, GREENPOINT MORTGAGE FUNDING TRUST 1-A2A2, SERIES 2006-AR6, GREENPOINT MORTGAGE FUNDING TRUST 1-A2B, SERIES 2006-AR6, GREENPOINT MORTGAGE FUNDING TRUST 1-A3B, SERIES 2006-AR6, GREENPOINT MORTGAGE FUNDING TRUST, SERIES 2006-AR2, LEHMAN BROTHERS, INC, LEHMAN MORTGAGE TRUST 2007-6, and LEHMAN MORTGAGE TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-4,

Consolidated-Defendants.

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STATEMENT OF INTEREST

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). The statute promotes these interests primarily by imposing several stringent duties on plan fiduciaries, including a duty of care grounded in trust law's prudent man standard. 29 U.S.C. § 1104(a)(1)(B). Although the Secretary has authority to enforce these standards, participants and beneficiaries play a primary role in policing ERISA plan fiduciaries. Thus, ERISA gives participants standing to bring private actions to remedy losses caused by fiduciary breaches and to obtain appropriate equitable relief. See id. § 1132(a)(2), (3). Moreover, one of ERISA's express purposes is to provide participants with "ready access to the Federal courts." Id. § 1001(b). By presuming the prudence of the fiduciaries' conduct with regard to the Plan's Lehman stock investments despite the looming catastrophe at the company, and consequently dismissing the case on the pleadings, the district court's decision threatens to make the presumption of prudence for employer stock investments an irrebutable one and thus to greatly impair ERISA's core congressional purposes. The Secretary has a strong interest in urging this Court to correct that error. She has authority to file this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing the case on the pleadings based on its conclusion that plaintiffs did not plead facts plausibly alleging that the fiduciaries breached their duty of prudence by failing to take any action to limit the pension plan's investments in Lehman stock in the months leading up to the company's bankruptcy.

2. Whether plaintiffs plausibly allege that Lehman's directors breached their duty to monitor the members of the company's Benefit Committee, whom the directors appointed, and to provide the Committee members with information they needed to adequately perform their duties as the fiduciaries charged with controlling and managing plan investments.

STATEMENT OF THE CASE

1. This is a putative class action by participants in the employer stock component of the now-defunct Lehman Brothers Holdings, Inc. Savings Plan (Plan), which Lehman sponsored as a defined contribution plan under ERISA section 3(34), 29 U.S.C. § 1002(34). A-177. Among the Plan's investment options was the Lehman Stock Fund, which held only Lehman stock, cash, and short-term fixed income investments, and which the Plan document designated as an Employee Stock Ownership Plan (ESOP). A-179. Although the Plan document stated that the Plan "shall" include a Lehman Stock Fund, the document gave the

Benefit Committee discretion "to eliminate or curtail investments in Lehman Stock . . . if and to the extent that the Committee determines that such action is required in order to comply with the fiduciary duty rules of" ERISA. A-172.

Plaintiffs sued three partially-overlapping groups of corporate officials who all served in some capacity as fiduciaries to the Plan: (1) Lehman's former directors, whom the Plan document charged with appointing a Benefit Committee; (2) the former members of Lehman's Compensation Committee (composed of board members), to whom the board delegated the power to appoint the Benefit Committee; and (3) the members of the Benefit Committee. A-168-69. The Plan document granted the Benefit Committee complete authority and discretion to control and manage the Plan and designated the Benefit Committee as named fiduciary and plan administrator. A-169-70.

Plaintiffs detail a series of events culminating in Lehman's bankruptcy that allegedly alerted or should have alerted the Benefit Committee to Lehman's dire financial situation and thus to the imprudence of the Plan's continued investment in Lehman stock. Plaintiffs begin by outlining the advent of the financial crisis of 2008, describing the explosive growth of subprime lending and the investment vehicles – mortgage-backed securities and complex derivatives – that fed off of that lending. A-193-200. They explain that as the housing market declined, increasing numbers of borrowers defaulted, and the market for mortgage-backed investments began to collapse. A-201, 205, 237, 251.

Against this backdrop, plaintiffs allege that developments at Lehman revealed the company's grim financial outlook. These developments included Lehman's investment strategy, which positioned it as a top underwriter of mortgage bonds and left the company uniquely exposed to catastrophic losses, A-205-06; Lehman's decision to increase risk exposure and repeatedly exceed self-imposed risk limits, A-222-23; Lehman's use of "Repo 105" transactions, which the company used to hide its poor financial health,[1] A-209-14; prominent investors' public statements raising serious questions about Lehman's accounting, A-247, 251-53; and reports from Mercer Investment Consulting that should have alerted the Benefit Committee members to Lehman's deteriorating condition, A-220, 232-

[1] According to the plaintiffs, Repo 105 transactions, like all "repurchase agreements," were essentially short-term loans. A-208-09. In exchange for collateral, typically in the form of securities, Lehman received cash at a fixed interest rate from a counterparty. A-208. But unlike ordinary repurchase agreements, where a company records the transactions as "financing," Lehman counted Repo 105 transactions as "sales," allowing Lehman to temporarily remove inventory from its balance sheet without disclosing its obligation to repay the loans. A-209-10. Meanwhile, Lehman used the cash proceeds from the transactions to pay down existing debts. A-209. As a result, Repo 105 accounting reduced Lehman's reported net leverage ratios at the end of its reporting periods – making the company appear more financially healthy than it actually was – without reducing the company's actual risk. A-209-11. Shortly after the reporting periods ended, Lehman repaid the Repo 105 counterparties with interest, and the collateralized assets returned to Lehman's balance sheet, re-upping Lehman's leverage ratio. A-209.

33, 249, 263, 266. But the watershed event that plaintiffs allege made plain Lehman's dire situation was Bear Stearns's collapse on March 16, 2008. A-43-44. By that time, Lehman was the nation's most heavily leveraged private financial institution, and, plaintiffs allege, it "was or should have been apparent" that Lehman was also at grave risk for financial failure. A-241.

According to plaintiffs, several developments after Bear Stearns's collapse reinforced Lehman's dire status. Publicly, these included Lehman's lowered credit ratings, A-254, 258; billions of dollars in second and third quarter 2008 losses, A-256, 270-71; the firing of Lehman's chief financial and chief operating officers, A-259-60; reports that Lehman was exploring a "good bank/bad bank" structure, whereby the company would unload billions of dollars of troubled real estate and mortgage-related assets into a separate, publicly traded "bad bank," and the rest of Lehman – the "good bank" – would carry on with help from outside investors, A-269; various announcements about Lehman's fundraising efforts, A-254, 258, 270-71; and Lehman stock's dramatic and steady loss in value, A-248-49, 263, 266, 270. The most important non-public developments included Treasury Secretary Henry Paulson's push, starting immediately after Bear Stearns's collapse, for Lehman to find a buyer, A-242; Lehman CEO Richard Fuld's series of unsuccessful attempts to sell, A-264-65, 274-75; multiple demands for collateral from partner financial institutions, A-261, 269, 275; and the hiring of a prominent attorney to prepare Lehman for bankruptcy, A-274.

As these events unfolded, the fiduciaries allegedly did nothing to protect Plan participants from the catastrophic losses that followed. The Benefit Committee allegedly met twice after Bear Stearns's collapse and before Lehman filed for bankruptcy, but failed to discuss the prudence of investing in Lehman stock. A-290. And in the week before the bankruptcy filing, the Committee allegedly disregarded the signs that should have alerted it to Lehman's dire situation, purchasing nearly 150,000 shares of company stock. A-291-92. Plaintiffs also claim that the Director Defendants did nothing to monitor the Committee or inform it of critical developments at Lehman. A-306-07.

Lehman filed for Chapter 11 bankruptcy protection on September 15, 2008, listing debts of $613 billion. A-278. It was allegedly the largest bankruptcy filing in U.S. history by a factor of six. Id. Only after the bankruptcy filing did the Committee unload a significant portion of the Plan's Lehman stock holdings, selling 2.33 million shares on September 15 for $403,710, or approximately 17 cents per share. A-291-92. The Committee did not completely liquidate the Plan's Lehman stock holdings until June 10, 2009 – almost nine months later – when the stock was essentially worthless. A-66.

2. On June 20, 2008, before Lehman declared bankruptcy, but after the value of the company's stock had fallen substantially, a Plan participant filed a putative class action against several Plan fiduciaries in the U.S. District Court for the Southern District of New York for breach of fiduciary duties. The Consolidated Amended Complaint (CAC), which consolidated various similar lawsuits, alleged fiduciary breaches by eleven former Lehman directors, four of whom served on the board's Compensation Committee, and by Wendy Uvino, chair of the Benefit Committee. In re Lehman Bros. Securs. and ERISA Litig. (Lehman ERISA I), 683 F. Supp. 2d 294, 296 (S.D.N.Y. 2010). Plaintiffs' main claim was that the fiduciaries breached their duty of prudence by allowing the plan to hold and continue to purchase Lehman stock once it was apparent that the company faced dire financial circumstances. Id. They also claimed, among other things, that the Director Defendants failed to appropriately monitor the Benefit Committee. Id. at 297. Defendants moved to dismiss the suit under Federal Rule of Civil Procedure 12(b)(6). Id. at 296. The district court granted defendants' motions, dismissing all of plaintiffs' claims. Id. at 303.

In dismissing the claim that Uvino acted imprudently, the court relied on the presumption of prudence first elaborated by the Third Circuit in Moench v. Robertson, 62 F.3d 552 (3d Cir. 1995). 683 F. Supp. 2d at 301-03. While acknowledging that, given Lehman's bankruptcy filing, a "corporate collapse was 'imminent' at some prior point in time," the court concluded that the CAC "fail[ed] to allege facts that permit a determination of when Lehman's financial condition reached that point." Id. at 302. The court reasoned that the CAC relied on "conclusory" allegations "that there were 'clear warning signs' of collapse," and "contain[ed] nothing to support the inference" that Uvino knew or should have known that Lehman was on the verge of collapse, that the company's financial statements were misleading, or that another investment bank made a demand for collateral. Id. Concluding that it was only "theoretically conceivable" that Uvino had the requisite knowledge, the court held that the plaintiffs did not satisfy the pleading standard of Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). 683 F. Supp. 2d at 303.

The court also dismissed plaintiffs' remaining claims, including the monitoring claim against the Director Defendants, reasoning that the monitoring claim depended on the claims of primary breach of fiduciary duty that the court had already dismissed. Id. at 300, 303.

After the court dismissed the CAC, Plaintiffs filed a new amended complaint. In re Lehman Bros. Secs. & ERISA Litig. (Lehman ERISA II), No. 09 MD 02017(LAK), 2011 WL 4632885, at *2 (S.D.N.Y. Oct. 5, 2011). The Second Consolidated Amended Complaint (SCAC) differed from the CAC in at least three important respects: it added the rest of Uvino's Benefit Committee colleagues as defendants; it specified March 16, 2008, the date of Bear Stearns's sale to JP Morgan, as the date by which defendants knew or should have known that Lehman was in a dire financial situation; and it contained nearly fifty pages of new factual allegations. Id. at *2-*3. Defendants again moved to dismiss under Rule 12(b)(6). Id. at *1. The court granted the motions, holding that the new allegations did not cure the deficiencies in the CAC. Id. at *8.

Again applying a presumption of prudence, the court held that the plaintiffs alleged insufficient facts to state a plausible claim against the Benefit Committee members. 2011 WL 4632885, at *5. The court held that the allegations that the Committee members knew or should have known about a dire situation at Lehman by virtue of their positions at Lehman did not point to "anything specific that alerted or should have alerted them" to Lehman's allegedly dire situation. Id. at *4. Rejecting plaintiffs' assertion that Mercer's reports put the Committee on notice of a dire situation at Lehman, the court reasoned that the reports were either issued before the class period or contained information that was too general or too speculative to reveal anything about Lehman's financial status. Id. The court also rejected plaintiffs' argument that Uvino's knowledge of the initial complaint put her on notice of Lehman's financial circumstances. Id. at *5. Lastly, the court held that plaintiffs' allegation that Bear Stearns's collapse put defendants on notice of a dire situation at Lehman, rather than being merely "cause for concern," was not plausible. Id. In the court's view, plaintiffs failed to allege facts explaining why the run on Bear Stearns should have alerted Lehman officials that Lehman would "suffer the same fate." Id.

The court also dismissed plaintiffs' additional claims, including the monitoring claim, relying on essentially the same reasons it did previously. 2011 WL 4632885, at *5-*8.

SUMMARY OF ARGUMENT

The district court erred when it held that the SCAC stated inadequate facts to plausibly allege that the Benefit Committee fiduciaries breached their duty of prudence by allowing continued investment in Lehman stock. Although this Court has adopted a presumption of prudence, it has nevertheless held that a plaintiff overcomes the presumption by alleging that a company was "in the sort of dire financial situation that required [the fiduciaries] to override Plan terms and limit the participants' investments" in company stock. In re Citigroup ERISA Litig., 662 F.3d 128, 141 (2d Cir. 2011). The SCAC states numerous specific facts – many a matter of public record – to plausibly allege that, during the applicable class period, Lehman faced a dire financial situation about which the fiduciaries knew or should have known and which required them to act to protect the Plan's substantial holdings in Lehman stock.

The court was also mistaken when it held that plaintiffs failed to state a claim that the Director Defendants breached a duty to monitor the Benefit Committee Defendants. ERISA imposes ongoing duties on appointing fiduciaries to monitor their appointees and, as part of this duty, to provide the appointees with the information they need to adequately perform their fiduciary duties. Because the directors allegedly did nothing to inform their appointees of critical adverse information about Lehman's financial health, plaintiffs have stated a plausible claim that the directors breached this duty.

ARGUMENT

I. PLAINTIFFS PLAUSIBLY ALLEGE THAT THE FIDUCIARIES BREACHED THEIR DUTY OF PRUDENCE BY CONTINUING TO ALLOW INVESTMENT IN LEHMAN STOCK WHEN THEY KNEW OR SHOULD HAVE KNOWN THAT LEHMAN FACED DIRE FINANCIAL CIRCUMSTANCES

ERISA protects the "financial soundness" of employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(a), (b). To that end, ERISA section 404 requires, among other things, that plan fiduciaries act with the same level of care that "a prudent man acting in like capacity and familiar with such matters would use" in similar circumstances. 29 U.S.C. § 1104(a)(1)(B). This standard carries with it the same obligations as those of "'trustees of an express trust – the highest known to the law.'" Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d Cir. 1982)).

In adopting a presumption of prudence in Citigroup, this Court nevertheless rejected the notion that the presumption completely insulates fiduciaries from liability even where plan documents require them to invest in employer stock, because "such a rule would leave employees' retirement savings that are invested in [employer stock] without any protection at all – a result that Congress sought to avoid in enacting ERISA." 662 F.3d at 139 (citing Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995)). Instead, this Court explained that a plaintiff can overcome the presumption by plausibly alleging that a fiduciary "abuse[d] his discretion" by allowing continued investment in employer stock while the employer was in "a 'dire situation' that was objectively unforeseeable by the settlor," and that the fiduciary "knew or should have known" about the dire situation. 662 F.3d at 138-40 (quoting Edgar v. Avaya, Inc., 503 F.3d 340, 348 (3d Cir. 2007)). Allegations of the employer's "impending collapse" are not required. 662 F.3d at 140. Moreover, "judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest" in employer stock, meaning that "a fiduciary's failure to divest from company stock is less likely to constitute an abuse of discretion if the plan's terms require – rather than merely permit – investment in company stock." Id. at 138 (citing Quan v. Computer Scis. Corp., 623 F.3d 870, 883 (9th Cir. 2010)).

Plaintiffs in this case have met their burden to plausibly allege that defendants abused their discretion by not limiting or eliminating the Plan's exposure to Lehman stock when, following Bear Stearns's collapse, they knew or should have known that Lehman faced a dire situation. The district court failed to consider the "full factual picture presented by the complaint" when it held otherwise. See L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 430 (2d Cir. 2011) (citing Iqbal, 129 S. Ct. at 1947-52); see also Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) ("the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible").

A. Plaintiffs allege sufficient facts to plausibly claim that Lehman faced a dire situation during the class period

The financial circumstances Lehman allegedly faced at the time of Bear Stearns's collapse are a paradigmatic example of the "dire situation" this Court envisioned in Citigroup. The district court's conclusion that the facts alleged amounted to nothing more than "cause for concern at Lehman," see Lehman ERISA II, 2011 WL 4632885, at *5, contradicts both common sense and the relevant case law.

Plaintiffs' allegations of publicly-available information about Lehman, if assumed true, suffice to establish that the company faced a dire situation well before it filed for bankruptcy. In July 2007, Bloomberg News reported that Lehman, Bear Stearns, and three other large investment banks were considered "as good as junk" on Wall Street. A-228-29. Meanwhile, the market for mortgage-related investments had begun to falter. A-205, 250-51. Several months before Bear Stearns's failure, which allegedly "started with its exposure" to this market, A-174, Lehman's mortgage-related portfolio had allegedly started to unravel, A-225. And by the date of Bear Stearns's collapse, Lehman, which held thirty times more debt than equity, was allegedly the nation's most heavily leveraged large private financial institution. A-241. Given the confluence of these factors, it is not surprising that the bankruptcy examiner concluded that Bear Stearns's failure made it "clear that Lehman's growth strategy had been flawed, so much so that its very survival was in jeopardy," and that "Lehman was widely considered to be the next bank that might fail." A-242. The district court therefore erred when it held that the complaint lacked "any concrete factual allegations sufficient to make a plausible claim" that, when Bear Stearns collapsed, Lehman faced a dire situation. See Lehman ERISA II, 2011 WL 4632885, at *5.

But even if the publicly known facts that emerged before Bear Stearns's failure were somehow insufficient to establish that Lehman was in a dire situation, plaintiffs allege several facts that emerged publicly later – but well before Lehman filed for bankruptcy – that should have left little doubt about the company's dismal outlook. Notably, plaintiffs allege that Lehman's stock declined precipitously, and, as of September 9, 2008 had lost 85% of its value since the beginning of the year, A-270; Lehman reported enormous second and third quarter 2008 losses ($2.8 and $3.9 billion, respectively), A-256, 270; in response to those losses, Moody's and Standard and Poor's downgraded Lehman's credit ratings, and Lehman fired its CFO and COO, A-254, 258-59; Lehman announced various plans to shore up capital through fundraising, A-254, 258, 270-71; and, in what may have been a last-ditch effort to save the company, Lehman publicly explored the possibility of a "good bank/bad bank" structure, A-269. The district court gave slight – if any – attention to these critical, publicly known-facts. See Lehman ERISA II, 2011 WL 4632885, at *4-*5.

Finally, plaintiffs allege a series of insider facts which, when considered in conjunction with the public information available about the company, puts to rest the question whether Lehman plausibly faced a dire situation well before filing for bankruptcy. Among the most salient of these insider facts was Treasury Secretary Paulson's push for Richard Fuld to find a buyer for Lehman after Paulson and Timothy Geithner, then-president of the Federal Reserve Bank of New York, informed Fuld that the government "had no legal authority to invest capital in an investment bank." A-242. It is inconceivable that Paulson would have encouraged Fuld to take such a drastic step if Paulson did not believe that Lehman was in dire straits. Indeed, the bankruptcy examiner noted that Paulson – along with Geithner, SEC Chairman Christopher Cox, and Federal Reserve Chairman Ben Bernanke – thought at the time that Lehman was likely to be the next big investment bank to fail. A-242. After learning that there would be no government bailout, Fuld allegedly attempted repeatedly – but unsuccessfully – to convince several financial institutions to invest in, buy, or merge with Lehman. A-264-65, 274-75. Similarly damning are plaintiffs' allegations about partner institutions' demands for collateral, A-261, 269, 275, and Lehman's use of Repo 105 transactions, which Lehman allegedly used to mask its heavily leveraged state, understate losses, and exaggerate liquidity, A-209-214.

The situation Lehman allegedly faced leading up to its bankruptcy was worse than circumstances other courts have held were dire enough to rebut the presumption of prudence. The Seventh Circuit, for example, recently upheld a prudence claim against fiduciaries who allowed continued investment in employer stock despite public developments including a regulatory change that "crushed" profits and "foretold further and continuing declines." See Peabody v. Davis, 636 F.3d 368, 375 (7th Cir. 2011) (holding that even if Moench were applicable, the facts would overcome the presumption in any case). The court concluded that where a "widely-known and permanent change in the regulatory environment had undermined [the company's] core business model," company stock was an imprudent investment. Id. Similarly here, taking the allegations as true and construing them in the light most favorable to plaintiffs, Bear Stearns's collapse was a turning point signaling a "permanent change" in the market environment in which Lehman operated. Secretary Paulson's alleged reaction to the events at Bear Stearns – pushing Fuld to sell Lehman, and facilitating a possible sale – confirms that Bear Stearns's fall raised serious doubts about Lehman's viability going forward. Like the regulatory change in Peabody, Bear Stearns's failure called into question Lehman's core business model and revealed a plainly dire situation at the company. See also Quan, 623 F.3d at 882 (a plaintiff rebuts the Moench presumption by "mak[ing] allegations that 'clearly implicate[ ] the company's viability as an ongoing concern'" (quoting Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1099 n.5 (9th Cir. 2004))).

Other courts faced with complaints alleging similar (but arguably less dire) circumstances have held that plaintiffs alleged enough to rebut the presumption of prudence. See, e.g., LaLonde v. Textron, 369 F.3d 1, 6-7 (1st Cir. 2004) (70% decline in earnings per share, restructuring expected to lead to downsizing, artificial inflation of stock price because of concealed internal problems, and underperformance of company stock compared to market as a whole); Veera v.

Ambac Plan Admin. Order Comm., 769 F. Supp. 2d 223, 229-30 (S.D.N.Y. 2011) (billions in losses, drastic drop in share price, credit rating downgrade, and overreliance on structured finance products); Morrison v. Moneygram Int'l, Inc., 607 F. Supp. 2d 1033, 1053-54 (D. Minn. 2009) (stock lost 92% of value after risky investments involving mortgage-backed securities, and company was forced to seek infusion of outside capital); Taylor v. Keycorp, 678 F. Supp. 2d 633, 640 (N.D. Ohio 2009) (overexposure to mortgage and other loan-related losses as mortgage and housing markets faced extreme downturns, and failure to adequately and timely record loss accrual); Dann v. Lincoln Nat'l Corp., 708 F. Supp. 2d 481, 490-92 (E.D. Pa. 2010) (precipitous decline in stock value, hundreds of millions of dollars in losses in mortgage-backed securities portfolio, credit ratings downgrades, and application to participate in Troubled Assets Relief Program).

Lehman's situation was different in kind from the circumstances this and other courts have rejected as insufficiently dire to rebut the Moench presumption on a motion to dismiss. The companies in Citigroup, Gearren v. McGraw Hill Cos., 660 F.3d 605 (2d Cir. 2011), and Edgar v. Avaya – the only circuit decisions to affirm dismissal of a complaint at the pleading stage because of the Moench presumption – did not face the collapse of a similarly situated company like Bear Stearns. Nor were their executives allegedly pressured by high-level government officials to sell the company. None of those companies publicly explored separating into two entities – a good company and a bad company – to avoid a financial collapse. Moreover, as a top underwriter of mortgage-backed securities, Lehman was uniquely exposed to potential losses. Lehman's stock lost more value (85% year to date by September 9, 2008, and almost 100% by the end of the class period) than Citigroup's (50.7%), McGraw-Hill's (64%), or Avaya's (25%).[2] And, of course, unlike Lehman, the companies in all of those cases survived the allegedly difficult circumstances they faced. Finally, Lehman's plan document, unlike Citigroup's, McGraw-Hill's, or Avaya's, expressly granted Plan fiduciaries discretion to discontinue investment in employer stock when such investment violated ERISA's fiduciary duties, suggesting that the Lehman fiduciaries' decision to continue investing in Lehman stock should be subject to at least somewhat greater "judicial scrutiny." See Citigroup, 662 F.3d at 138.

B. Plaintiffs allege sufficient facts to plausibly claim that the Benefit Committee fiduciaries knew or should have known that Lehman faced a dire situation well before the company filed for bankruptcy

The district court also wrongly concluded that plaintiffs inadequately plead knowledge of Lehman's financial circumstances. To reach this conclusion, the court articulated a "knew or should have known" standard, asking not whether a

[2] Although this Court held in Citigroup that a court cannot "rely, after the fact, on the magnitude of the decrease in the employer's stock price" when judging the prudence of a fiduciary's investment decisions, see 662 F.3d at 140, it did not hold that a fiduciary faced with a drop in value that has already occurred need not consider this information when deciding whether employer stock is a prudent investment.

reasonable fiduciary in like circumstances should have known about Lehman's dire situation, but rather whether the plaintiffs alleged facts plausibly establishing that *these particular fiduciaries* knew or should have known about the facts calling Lehman's ongoing viability into question. See Lehman ERISA II, 2011 WL 4632885, at *3-*5.

The standard the district court applied cannot be squared with the language of ERISA section 404, which requires fiduciaries to discharge their fiduciary duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." See 29 U.S.C. § 1104(a)(1)(B). That provision plainly states an objective standard of conduct. See Merino, 452 F.3d at 182 (prudence "'is measured according to the objective prudent person standard developed in the common law of trusts'" (quoting Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984))). The proper inquiry is therefore whether a prudent fiduciary under similar circumstances should have known about the dire situation. See 29 U.S.C. § 1104(a)(1)(B). The subjective standard the district court applied would allow fiduciaries to rely on their ignorance of the facts as a defense, even when their ignorance is unreasonable. In Citigroup, this Court implicitly acknowledged the objective nature of the knowledge inquiry, noting that "[w]e judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision" – as opposed to the information the fiduciary actually had at the time of the decision – and that "we must consider the extent to which plan fiduciaries at a given point in time reasonably could have predicted the outcome that followed." See 662 F.3d at 140. Plaintiffs' allegations more than suffice to establish that an objectively prudent fiduciary would have known about Lehman's dire situation well before the company filed for bankruptcy.

Indeed, as discussed above, the publicly available information about Lehman plausibly called into question Lehman's ongoing viability. At a minimum, this information should have prompted the fiduciaries to investigate the prudence of investing in Lehman stock. Ignorance of the publicly known facts does not satisfy ERISA's standard of care. See Quan, 623 F.3d at 882 ("Plan participants can only rebut the Moench presumption by showing publicly known facts that would trigger the kind of 'careful and impartial investigation' by a reasonable fiduciary that the plan's fiduciary failed to perform." (quoting Moench, 62 F.3d at 572)). Thus, even if the Benefit Committee members did not have actual knowledge of all of the insider facts alleged, the proper question is whether the Committee members should have known about some or all of these facts based on the type of investigation that a prudent fiduciary would pursue. See id.; Moench, 62 F.3d at 572 ("if the fiduciary cannot show that he or she impartially investigated the options [before implementing a challenged transaction], courts should be willing to find an abuse of discretion"); Wright, 360 F.3d at 1097 (a court evaluating a fiduciary's compliance with the duty of prudence must ask if at the time of a challenged transaction the fiduciary "'employed the appropriate methods to investigate the merits of the investment'" (quoting Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983))). Because plaintiffs allege that the Benefit Committee fiduciaries engaged in no investigation at all, A-284-85, 286, 290, the complaint adequately alleges that they acted imprudently. Indeed, plaintiffs have plausibly alleged facts that, if proved, would show that an "'adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident.'" See Citigroup, 662 F.3d at 141 (quoting Kuper, 66 F.3d at 1460).

Even if the standard for knowledge is subjective, plaintiffs' allegations more than suffice to make a plausible claim that the Benefit Committee fiduciaries knew or should have known that Lehman faced a dire situation well before it filed for bankruptcy. Unlike plaintiffs in Citigroup, whose "bald assertion[s], without any supporting allegations" were found insufficient under the Twombly standard to plausibly claim that the fiduciaries knew about Citigroup's subprime activities, see Citigroup, 662 F.3d at 141 (citing Twombly 550 U.S. at 555), plaintiffs in this case make specific factual allegations to support an inference of actual or constructive knowledge. At a minimum, plaintiffs have alleged "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" that the Benefit Committee members had or should have had such knowledge. See Twombly, 550 U.S. at 556.

First, plaintiffs allege that the Benefit Committee members knew or should have known about Lehman's financial circumstances by the nature of their senior positions at the company. A-173-77. In rejecting this allegation as "entirely conclusory," the district court failed to consider that the committee members' positions are relevant not only because the positions may have given the Committee members access to insider information, but also because the positions shed light on the Committee members' financial sophistication. See Lehman ERISA II, 2011 WL 4632885, at *3-*4. It is unlikely that individuals such as Lehman's Global Head of Rates Strategy (who previously served as Chief of Mortgage Research at Morgan Stanley), Lehman's former lead person on real estate transactions, and the company's Managing Director of Equity Research, A-174-76, were unaware of the publicly disclosed facts calling into question Lehman's viability. The public facts at least should have prompted the Committee members – individuals who were allegedly sophisticated enough to understand the implications of these facts – to conduct further inquiry into Lehman's financial condition, see Moench, 62 F.3d at 572, especially considering that the Plan had more than $228 million, or 10.63% of its total assets, invested in the Lehman stock fund at the end of 2007, A-181.

Second, plaintiffs provide sufficient facts for this Court to reasonably infer that the Benefit Committee members were aware or should have been aware of at least some of the alleged insider facts. Specifically, plaintiffs allege that the Committee received various reports from Mercer Investment Consulting, both before and during the class period, including a Third Quarter 2007 Plan evaluation warning of a "Sub Prime Contagion" and the risk the foreclosure crisis posed to financial institutions, A-232-33, and various reports about the declining value of Lehman stock, A-249, 263, 266. Even if these reports "warned of industry-wide risks" and "spoke of possibilities and potential," see Lehman ERISA II, 2011 WL 4632885, at *4, they at least should have prompted the Committee to look into the possibility that Lehman stock was not a prudent investment. Moreover, contrary to the view of the district court, see id., it is irrelevant that the Committee received some of these reports before the start of the class period. The pre-class period facts establish Lehman's financial situation at the time of Bear Stearns's collapse, and the Mercer presentations support plaintiffs' allegation that the Committee members were aware of that situation.

Plaintiffs also allege that reasonable opportunity for further discovery will show that Committee members knew or should have known about Lehman's use of

Repo 105 transactions to mask the company's true financial health. A-216-17. While Lehman's use of Repo 105 was not a matter of public information during the class period, plaintiffs allege that at least two public developments raised serious questions about Lehman's accounting methods: (1) a March 19, 2008 Washington Post article in which Peter Schiff, president of Euro Pacific Capital, is quoted as saying that "[p]eople are going to find out that all these profits they made were phony," A-247; and (2) Greenlight Capital LLC President David Einhorn's May 21, 2008 conference presentation calling into question Lehman's accounting and raising concerns that the company was understating its losses, A-251-53. Moreover, numerous members of Lehman's senior management allegedly admitted to the bankruptcy examiner that they knew Repo 105 amounted to a "sham." A-216. These facts raise a plausible inference that even if the Benefit Committee members did not have actual knowledge of Repo 105, a reasonable investigation of Lehman's financial health would have revealed the practice. The same can be said of Richard Fuld's conversations with Secretary Paulson about the need to find a buyer for Lehman, and Fuld's unsuccessful attempts to sell. Even if the Committee members did not know of these facts, it is plausible that they would have learned of them by talking to Mr. Fuld or other senior management officials. In short, plaintiffs' allegations suffice to plausibly suggest that the Committee members were aware of facts that should have alerted them to Lehman's dire financial situation, or, at a minimum, the need to investigate that situation further.

The Seventh Circuit's decision in Pugh v. Tribune Co., 521 F.3d 686, 700-02 (2008), which held that ERISA charges fiduciaries with a duty to investigate employer stock only when there is some reason to suspect that investing in company stock is imprudent, is not to the contrary. In that case, the "red flags" – an advertiser's lawsuit claiming newspaper circulation figure inflation and the employer's lack of procedures to ensure the reliability of those figures – were inadequate because the company had already investigated the circulation figures and found no wrongdoing and, in any event, it was not clear how procedures would have prevented unscrupulous employees from misstating circulation numbers. Id. at 700. The court also held that the allegation that the fiduciaries should have known about the circulation issue relied on little more than the defendants' job titles – facts which were insufficient to "allege[] that each defendant was in a position to know or learn of the information." Id. at 701 (citing Howell v. Motorola, Inc., 337 F. Supp. 2d 1079, 1089-92 (N.D. Ill. 2004)). In this case, however, plaintiffs have alleged numerous facts, discussed above, that should have prompted an investigation by the Benefit Committee Defendants. Moreover, the allegations related to the Committee members' positions include important information about the type of knowledge that their corporate positions provided them. The allegations therefore plausibly suggest that "each defendant was in a position to know or learn of the information" – both public and non-public – that raised serious doubts about Lehman's ongoing viability. See Pugh, 521 F.3d at 701.

II. PLAINTIFFS PLAUSIBLY ALLEGE THAT THE DIRECTOR DEFENDANTS BREACHED THEIR DUTY TO MONITOR THE BENEFIT COMMITTEE FIDUCIARIES AND TO PROVIDE THEM INFORMATION RELEVANT TO THEIR DUTIES AS THE FIDUCIARIES CHARGED WITH CONTROLLING AND MANAGING PLAN INVESTMENTS

ERISA imposes "ongoing responsibilities" on a fiduciary who has appointed trustees, requiring that "[a]t reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such a manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." 29 C.F.R. § 2509.75-8 at FR-17. Every circuit to address the issue has recognized the duty of appointing fiduciaries to monitor their fiduciary appointees. See Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 736 (7th Cir. 1986); Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996); Martin v. Feilen, 965 F.2d 660, 669-70 (8th Cir. 1992); see also In re Polaroid ERISA Litig., 362 F. Supp. 2d 461, 477 (S.D.N.Y. 2005) ("An appointing fiduciary's duty to monitor his appointees is well-established."). This "duty exists so that a plan administrator or sponsor cannot escape liability by passing the buck to another person and then turning a blind eye." Howell v. Motorola, Inc., 633 F.3d 552, 573 (7th Cir. 2011), cert. denied sub nom. Lingis v. Dorazil, 132 S. Ct. 96; see also, Leigh v. Engle, 727 F.2d 113, 135 (7th Cir. 1984) (appointing fiduciaries cannot "abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust"). The breadth of this duty is necessarily context-dependent. See Leigh, 727 F.2d at 135.

In the context of this case, the duty to monitor included a duty to ensure that the appointed fiduciaries had accurate information about Lehman's financial condition. See, e.g., In re Morgan Stanley ERISA Litig., 696 F. Supp. 2d 345, 366 (S.D.N.Y. 2009) (ERISA section 404(a) requires appointing fiduciaries to "provide the appointees with any adverse information that the fiduciary might possess"); In re Enron Corp. Securs., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 659 (S.D. Tex. 2003) (plaintiffs stated a claim of breach against appointing fiduciaries for failing to "provide material information or correct misleading information essential to prudent administration of the plans"). This duty is especially important where, as here, the appointing fiduciaries were privy to adverse information to which the appointees may have had more limited access.

The duty of appointing fiduciaries to provide information to their appointees is distinct from the duty to provide information to participants that this Court rejected in Citigroup. See 662 F.3d at 143. In declining to read into ERISA a "duty to provide participants with nonpublic information pertaining to specific investment options," this Court did not question fiduciaries' duty to provide their delegatees with information the delegatees need to perform their jobs as fiduciaries. See id. Requiring appointing fiduciaries to give their appointees critical information could not conceivably "'transform [the appointing] fiduciaries into investment advisors.'" See id. (quoting In re Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 WL 2762708, at *22 (S.D.N.Y. Aug. 31, 2009)). Rather, it merely ensures that appointing fiduciaries do not "abdicate their duties" by delegating functions to other fiduciaries who lack access to adequate information to properly do their job. See Leigh, 727 F.2d at 135.

Part and parcel of the fiduciary-directors' fiduciary oversight responsibility was making sure that the Benefit Committee had the necessary tools and information. It is undisputed that the Director Defendants acted in a fiduciary capacity when they appointed the Compensation Committee (composed of directors), which in turn appointed and had the power to remove the Benefit Committee. Lehman ERISA II, 2011 WL 4632885, at *6. These appointments thus gave rise to a duty to monitor, and a corresponding duty to provide information the Benefit Committee members needed to effectively do their jobs as the fiduciaries charged with controlling and managing Plan investments. The failure of the Benefit Committee members to ask their co-fiduciaries about Lehman's financial condition, despite all of the warning signs, was reason for the directors to be concerned about whether the Benefit Committee appointees were properly exercising their fiduciary duties, not an excuse to stand idly by while the Committee acted on false or incomplete information.

Thus, the district court erred in concluding that plaintiffs did not adequately allege that any of the defendants breached their duties because the fiduciaries with the inside information – the directors – did not have the duty to make the investment decisions and the fiduciaries responsible for Plan investments – the Benefit Committee members – were not alleged to possess the information that would have alerted them to Lehman's financial circumstances. See Lehman ERISA II, 2011 WL 4632885, at *3-*5. To the contrary, because the Director Defendants allegedly did nothing to inform the Benefit Committee members of facts which would have alerted the Committee to Lehman's deteriorating condition, A-306-07, plaintiffs plausibly state a claim of fiduciary breach on this basis as well.

CONCLUSION

For these reasons, this Court should reverse the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface, using Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2012, true and correct copies of the foregoing Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants Requesting Reversal were filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system, and served electronically via email to the following counsel at the addresses set forth below:

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