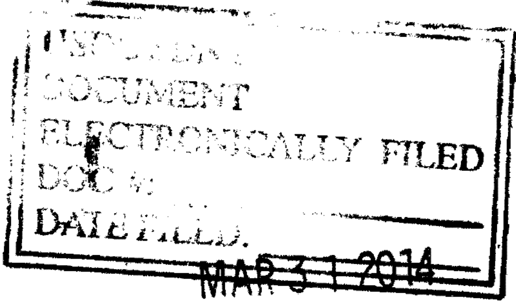

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: JPMORGAN CHASE & CO. ERISA LITIGATION

MEMORANDUM DECISION AND ORDER

12 Civ. 04027 (GBD)

GEORGE B. DANIELS, United States District Judge:

This consolidated class action is brought by participants in and beneficiaries of the JPMorgan Chase 401(k) Savings Plan (the "Plan") against JPMorgan Chase Bank, N.A. ("JPMC Bank"), JPMorgan Chase & Co. ("JPMorgan"), the Employee Plan Investment Committee ("EPIC"), several members of the EPIC, Bernadette Barnosky née Ulissi, the Plan's Administrator and an EPIC member, Douglas Braunstein, JPMorgan's CFO, and members of the Compensation & Management Development Committee (collectively, the "Defendants").

Plaintiffs allege Defendants violated their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") from between December 20, 2011, and July 12, 2012 (the "Class Period"). In particular, Plaintiffs allege that Defendants (1) breached their fiduciary duties of loyalty and prudence in managing and administering the Plan (Count I); (2) failed to adequately monitor other fiduciaries and provide them with accurate information (Count II); (3) breached their duty to avoid conflicts of interests (Count III); and (4) are liable as co-fiduciaries (Count IV).

Defendants filed a Motion to Dismiss the Third Amended Class Action Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Docket No. 37. Defendants' motion to dismiss is GRANTED.

Background

This consolidated class action was commenced with the filing of a complaint by Plaintiff Gregory Scrydoff on behalf of himself and all others similarly situated. 12 Civ. 04027. Plaintiff Matt L. Ward subsequently filed an additional complaint. 12 Civ. 07091. By order of this Court, these actions were consolidated pursuant to Fed. R. Civ. P. 42(a) under Docket Number 12 Civ. 04027. ECF No. 18. Zamansky & Associates LLC was appointed interim lead counsel on behalf of the putative class. Id. Plaintiffs filed their First Amended Complaint on December 5, 2012, a Second Amended Complaint on February 14, 2013, and the operative Complaint on April 30, 2013. ECF Nos. 23, 27, 31.

I. FACTUAL ALLEGATIONS[1]

As noted, this action is brought by and on behalf of similarly situated JPMorgan employees and former employees who purchased and held JPMorgan shares in their retirement accounts through the Plan during the Class Period. Compl. ¶¶ 25-26.

A. The Plan

The Plan is a defined contribution benefit plan providing each participant an individual account and, as such, constitutes an eligible individual account plan ("EIAP").[2] Compl. ¶ 1. Under the Plan, eligible participants who are full-time employees, or part-time employees after 90 days,

[1] The following factual allegations are taken from the Complaint (or documents attached to it or incorporated by reference) and are deemed to be true for the purposes of a motion to dismiss. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

[2] An "individual account plan" is a "pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). An "eligible individual account plan" is defined as "an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; [or] (ii) an employee stock ownership plan." 29 U.S.C. § 1107(d)(3)(A).

may contribute up to 50% of their pre-tax income. The Plan participants' contributions are held in trust with the Plan's trustee, JPMC Bank. Certain Plan participants also are eligible for a matching contribution of up to five percent, which is vested for all employees hired before May 1, 2009, and subject to three year vesting for employees hired subsequently. Id. ¶ 51. The Plan is governed by the JPMorgan 401(k) Savings Plan effective January 1, 2010, and reflecting all amendments through December 31, 2010. JPMorgan's Board adopted the First Amendment to the Plan on July 11, 2011 (the "Amendment"), before the start of the Class Period (December 20, 2011). Id. ¶¶ 55, 68.

Plan participants make their contributions through payroll deductions and can direct how their contributions are invested in their accounts. As of December 31, 2011, the Plan offered 31 investment options, including 22 core investment funds and nine target-date investment funds. One of the Plan's investment options is the JPMorgan Chase Common Stock Fund, which invests predominantly in JPMorgan common stock. Id. ¶ 52. The Plan provides that:

> The Employee Plan Investment Committee, in its sole discretion, shall designate the funds, *other than the JPMorgan Chase Common Stock Fund*, that shall be established and maintained by the Trustee under the Declaration of Trust as Investment Funds for the investment of Plan Accounts. The Employee Plan Investment Committee can change or modify Investment Funds, *other than the JPMorgan Chase Common Stock Fund*, or their managers in its discretion.

First Amendment to Plan § 6.1(a) (emphasis added). In addition, the Plan provides the EPIC with discretion to remove investment options, "other than the JPMorgan Chase Common Stock Fund over which they have no discretion." Plan § 12.2(b).

B. Plaintiffs' Allegations

The Complaint alleges that Defendants breached their fiduciary duties under ERISA by continuing to offer Plan participants the option to invest in the Company Stock Fund during the Class Period, despite knowing that JPMorgan was in "dire financial condition" due to warnings of sizeable derivative trading losses. Compl. ¶ 95; see also id. ¶ 11. In support of this allegation,

Plaintiffs point to losses incurred by JPMorgan's Chief Investment Office's ("CIO") synthetic credit portfolio that were disclosed on May 10, 2012, and to JP Morgan's restatement of its first quarter 2012 earnings that was announced on July 13, 2012. See id. ¶¶ 206-212, 220-221. Plaintiffs also allege that Defendants "fail[ed] to provide complete and accurate information to Plan participants about the risk and prudence of investing for retirement in JPMorgan stock." Id. ¶ 16. In particular, they contend that Defendants made false and misleading statements between January and April 2012 in JPMorgan's SEC filings and on an April 13, 2012 conference call with analysts. See id. ¶¶ 187-204.

II. THE APPLICABLE LEGAL STANDARDS

A. Rule 12(b)(6)

On a motion to dismiss pursuant to Rule 12, all factual allegations are accepted as true, and all inferences are drawn in favor of the pleader. See Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 235–36 (1974)).

However, while the pleading standard set forth in Rule 8 of the Fed. R. Civ. P. is a liberal one,

> the pleading standard Rule 8 announces ... demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal citations omitted). Thus, a complaint must allege sufficient factual matter to "state a claim to relief that is plausible on its face." Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In meeting this "plausibility standard," the plaintiff must demonstrate more than a "sheer possibility" of unlawful action; pleading facts that are "'merely consistent with' a defendant's liability ... 'stops short of the line between possibility and

plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557); see also Reddington v. Staten Island Univ. Hosp., 511 F.3d 126, 131 (2d Cir. 2007) ("Although the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice. To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level.") (internal citations omitted); Gavish v. Revlon, Inc., No. 00–CV–7291, 2004 WL 2210269, at *10 (S.D.N.Y. Sept. 30, 2004) ("[B]ald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations and will not defeat a motion to dismiss.").

B. ERISA Claims for Breaches of Fiduciary Duties

ERISA "'protect[s] beneficiaries of employee benefit plans' ..., by imposing fiduciary duties of prudence and loyalty on plan fiduciaries." In re Citigroup ERISA Litig., 662 F.3d 128, 135 (2d Cir. 2011) (quoting Slupinski v. First Unum Life Ins. Co., 554 F.3d 38, 47 (2d Cir. 2009)). With respect to the duty of prudence, ERISA requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). With respect to the duty of loyalty, fiduciaries must act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).

III. PLAINTIFFS HAVE NOT ADEQUATELY PLED AN IMPRUDENCE CLAIM

A. The Moench Presumption Applies to the Plan

The Second Circuit has adopted the Moench presumption "of compliance with ERISA when an ESOP [or an EIAP, the type of plan at issue here] fiduciary invests assets in the employer's stock." Citigroup, 662 F.3d at 137, 138 (citing Moench v. Robertson, 62 F.3d 553 (3rd Cir.1995)). Under the Moench presumption, a plan fiduciary "is entitled to a presumption that it acted consistently with ERISA by virtue of th[e] decision" to "continue investing in employer securities."

Id. at 571. After examining a plan's terms and determining that they require or strongly favor investing in employer stock, a court applies the presumption. Citigroup, 662 F.3d at 140; In re GlaxoSmithKline ERISA Litig., No. 11–2289, 2012 WL 3798260, at *1 (2d Cir. Sept.4, 2012). Under this presumption of prudence, "[a]n ESOP or EIAP fiduciary's decision to continue to offer plan participants the opportunity to invest in employer stock [is] reviewed for an abuse of discretion." Citigroup, 662 F.3d at 138.

The Moench presumption "serve[s] as a 'substantial shield' that should protect fiduciaries from liability where 'there is room for reasonable fiduciaries to disagree as to whether they are bound to divest from company stock.'" Id. at 140 (quoting Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 256 (5th Cir. 2008), and Quan v. Computer Scis. Corp., 623 F.3d 870, 882 (9th Cir. 2010)). "[T]he abuse of discretion standard ensures that a fiduciary's conduct cannot be second-guessed so long as it is reasonable." Citigroup, 662 F.3d at 140. Nonetheless, "judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest." Citigroup, 662 F.3d at 138 (citation omitted). Therefore, once a court examines the plan's terms and determines those terms "require or strongly favor investment of company stock, ... only circumstances placing the employer in a dire situation that was objectively unforeseeable by the settlor could require fiduciaries to override the plan terms" and divest an EIAP or ESOP of employer stock. In re GlaxoSmithKline, 2012 WL 3798260, at *1 (quoting Citigroup, 662 F.3d at 140) (alterations omitted); see also Gearren v. The McGraw-Hill Companies, Inc., 660 F.3d 605, 610 (2d Cir. 2011).

Because the JPMorgan Company Stock Fund was a designated investment option and the EPIC had no discretion to eliminate or curtail investment in the Company Stock Fund, the Moench presumption applies to the Plan. The terms of the Plan expressly designate the "JPMorgan Chase Common Stock Fund" as an investment option and provide that the EPIC's discretion to designate and eliminate the various investment funds available to Plan participants does not apply to the

Common Stock Fund. Plan §§ 1.49, 6.1(a). Specifically, the Plan provides that the "JPMorgan Chase Common Stock Fund" is "the Investment Fund so designated, which is an employee stock ownership plan ('ESOP') that invests primarily in shares of [JPMorgan] Common Stock." Plan § 1.49. The Plan expressly states that the EPIC is "the named fiduciary with respect to the selection of the Investment Funds (*other than the JPMorgan Chase Common Stock Fund over which they have no discretion*)." Id. § 12.2(b) (emphasis added).

Plaintiffs argue that the Moench presumption is inapplicable because they contend the Plan gave fiduciaries the discretion to invest in Company stock. In support of this claim, Plaintiffs argue that a "fair reading" of the Amendment "is that the Plan fiduciaries retained the authority and discretion to limit or restrict the continued offering or investment in JPMorgan stock as a Plan option." Compl. ¶ 69. Plaintiff's reading of Section 6.1(a) is contrary to the Section's plain language and the explanation provided with the Amendment. After the amendment, Section 6.1(a) stated that the EPIC had the "discretion" to "designate," "change and modify" the various investment funds available to Plan participants, "*other than the JPMorgan Chase Common Stock Fund.*" Plan § 6.1(a) (emphasis added). Furthermore, the purpose of the Amendment was "to clarify that the Employee Plans Investment Committee has had no discretion with respect to the JPMorgan Chase Common Stock Fund." First Amendment to Plan at p. 4 § 6.1(a). The language of the Amendment and the Plan make it clear that the EPIC did not have discretion with respect to the JPMorgan Chase Common Stock Fund. See Plan §§ 1.49, 6.1(a), 12.2(b).

In addition, Plaintiffs argue that the July 2011 amendment to Section 6.1(a) of the Plan "was legally ineffective" because the Amendment "was not disclosed to Plan participants by way of a summary of material modification (SMM)" and that this failure renders the amendment "a nullity." Compl. ¶ 68. Plaintiffs' contention is contrary to ERISA. An SMM is required only if there is a "material modification in the terms of the plan." 29 U.S.C. § 1022(a)(1); see also 29 U.S.C. §

1024(b)(1). Here, the Amendment was not a material modification and its only purpose was to clarify that the EPIC previously had and continues to have no discretion with respect to the JPMorgan Common Stock Fund. See, e.g., Enright v. N.Y. City Dist. Council of Carpenters Welfare Fund, 2013 U.S. Dist. LEXIS 92209, at *41-42 (S.D.N.Y. July 1, 2013) ("While ERISA does not define the term 'material modification'... where an amendment merely clarifies the language in the Plan and does not effect substantive changes, the amendment is not a material modification.") (citation omitted). Accordingly, Defendants' actions are thereby entitled to the Moench presumption of prudence.

B. Applying the Moench Presumption

"[T]o overcome the presumption of prudence," Plaintiffs must plead "circumstances placing the employer in a 'dire situation.'" Citigroup, 662 F.3d at 140 (quoting Edgar v. Avaya, Inc., 503 F.3d 340, 348); accord Gearren, 660 F.3d at 610 ("Plan fiduciaries are only required to divest [an ERISA plan] of employer stock where the fiduciaries know or should know that the employer was in a 'dire situation.'") (citation omitted). "Although proof of the employer's impending collapse may not be required to establish liability, 'mere stock fluctuations, even those that trend downhill significantly, are insufficient to establish the requisite imprudence to rebut the Moench presumption.'" Citigroup, 662 F.3d at 140 (citation omitted). Moreover, an allegation that a company "made bad business decisions is insufficient to show that the company was in a 'dire situation.'" Id. As the Second Circuit emphasized, "we 'cannot say that whenever plan fiduciaries are aware of circumstances that may impair the value of company stock, they have a fiduciary duty to depart from ESOP or EIAP plan provisions.'" Id. at 141 (quoting Kirschbaum, 526 F.3d at 256).

Plaintiffs have not pled sufficient facts to overcome the presumption of prudence because there are no allegations of when, or even that, JPMorgan was in dire circumstances. First, Plaintiffs' allegation that JPMorgan's stock price dropped 24% during the Class Period, from $45

per share to $34.04 per share, Compl. ¶¶ 89-90, is insufficient to plead the requisite "dire situation." In Citigroup, Gearren and UBS, the Second Circuit rejected duty of prudence claims based on much larger declines in stock prices. See Citigroup, 662 F.3d at 141 (affirming dismissal of claim based on "drop of just over 50%"); Gearren, 660 F.3d at 609-10 (affirming dismissal of claim because 64% stock drop failed to "establish that defendants knew or should have known that McGraw-Hill was in a dire situation"); Taveras v. UBS AG, No. 12-1662-cv, 2013 U.S. App. LEXIS 4016, at *7-8 (2d Cir. Feb. 27, 2013) (affirming dismissal of claim because 30% stock drop during class period and 74% stock drop overall, coupled with "the write-downs and bailout funds the company received, are insufficient to demonstrate that UBS faced a 'dire situation'"). In Fisher, the Second Circuit similarly rejected a duty of prudence claim, even though "JP Morgan's stock fell approximately 55% over the course of the class period." Fisher v. JP Morgan Chase & Co., 469 F. App'x 57, 59 (2d Cir. 2012). As the court explained, "even when the stock was at its lowest price—$15 per share—it still retained significant value." Id. Finally, this Court recently held that "[a]llegations of Nokia Corp.'s operating losses and declining stock prices [of approximately 74%] are . . . insufficient to show that Nokia Corp. was in a dire situation." In re Nokia ERISA Litig., No. 10-cv-03306, 2012 U.S. Dist. LEXIS 132720, *7-8 (S.D.N.Y. Sept. 13, 2012) ("[c]ourts in the Second Circuit have dismissed comparable claims based upon other corporations' stock declines," including stock drops of 78% and 83%).

Additionally, no dire situation existed because even if Defendants could have foreseen that JPMorgan would sustain significant financial losses, JPMorgan's market capitalization was several times larger than any potential losses. See Citigroup, 662 F. 3d at 141 (finding that even if Defendants could foresee that Citigroup would "lose tens of billions of dollars," the company had a "market capitalization of almost $200 billion"; therefore, the losses would not have "compelled" the Defendants to find the company was in a dire situation). Similarly, after JPMorgan announced that

it was restating its financial results for the first quarter of 2012, JPMorgan announced that the firm's previously reported net income for the first quarter 2012 would be reduced by $459 million, and that the CIO's synthetic credit portfolio had incurred $4.4 billion of losses. Compl. ¶¶ 220-221. Since JPMorgan's market capitalization was $136 billion in the middle of 2012, (Second Quarter 2012 Form 10-Q at 3), $459 million in write-downs and $4.4 billion in losses in the synthetic credit portfolio would not compel Defendants to find the Company was in a dire situation. See Citigroup, 662 F.3d at 140-41; see also GlaxoSmithKline, 2012 WL 3798260, at *2; In re Morgan Stanley ERISA Litig, No. 07-cv-11285, 2013 U.S. Dist. LEXIS 48042, at *19 (S.D.N.Y. Mar. 28, 2013).

Moreover, JPMorgan's circumstances during the Class Period were wholly unlike those circumstances which courts have found sufficient to overcome the Moench presumption. See In re Fannie Mae ERISA Litig., No. 09 Civ. 1350, 2012 WL 5198463, at *4–5 (S.D.N.Y. Oct. 22, 2012) (determining the defendants knew of a 99% decline in the value of the plan's assets); In re AIG, Inc. ERISA Litig. II, No. 08 Civ. 5722, 2011 WL 1226459, at *7 (S.D.N.Y. Mar. 31, 2011) (determining the defendants knew of various circumstances that warranted further investigation before the stock fell 99%); Veera v. Ambac Plan Admin. Comm., 769 F. Supp. 2d 223, 229–30 (S.D.N.Y. 2011) (determining the defendants knew of the dire circumstances due to a 99% price drop and public announcements detailing the company's demise). Since no dire circumstances existed during the Class Period, Defendants did not breach their duty of prudence by maintaining investment in Company stock.

IV. PLAINTIFFS HAVE NOT ADEQUATELY PLED A DISCLOSURE CLAIM

Plaintiffs claim that Defendants breached their duties of loyalty and prudence by (1) "failing to provide complete and accurate information regarding the Company's true financial condition and/or the Company's concealment of the same"; and (2) disseminating "false statements and misleading SEC filings in the communications to Plan participants." Compl. ¶¶ 342-345.

A. Duty to Provide Information

Although ERISA sets forth a "comprehensive set of 'reporting and disclosure' requirements," Curtiss–Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995) (citing 29 U.S.C. §§ 1021–1031), ERISA does not require fiduciaries "to provide participants with information regarding the expected future performance of [company] stock." Citigroup, 662 F.3d at 142. ERISA does not "create a duty to provide participants with non-public information pertaining to specific investment options." Id. at 143; Gearren, 660 F.3d at 610. Accordingly, Plaintiffs' allegation that Defendants breached their duties of loyalty and prudence by not providing Plan participants with non-public information concerning JPMorgan's expected financial performance fails because they had no duty to communicate such information. Id.

B. Alleged Misstatements

Plaintiffs allege the Defendants breached their fiduciary duties because JPMorgan's "SEC filings, annual reports, press releases, Plan documents, the SPD and other newsletters,"[3] Compl. ¶ 344, "contained numerous false and misleading statements and omissions about the CIO trades." Compl. ¶ 186. Plaintiffs also allege that JPMorgan's SEC filings were incorporated into the SPD, prospectus, and any applicable Form S-8 registration statements. Id. ¶ 345. Plaintiffs further allege that the statements by Dimon,[4] and Braunstein during an April 2012 conference call with investors were false and misleading. Id. ¶¶ 197-198.

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[3] Such communications also allegedly included Braunstein's certification of JPMorgan's Form 10-Ks, Compl. ¶ 193, and Jamie Dimon's letter to JPMorgan's employees, Compl. ¶ 212.

[4] Dimon is not named as a defendant in the Complaint, and Plaintiffs do not allege that he was a Plan fiduciary. Any communications by Dimon to JPMorgan employees thus were not made in an ERISA fiduciary capacity. See Citigroup, 662 F.3d at 144 ("Citigroup and [CEO] Prince therefore spoke to Plan participants as employers and not as Plan fiduciaries. They cannot be held liable, at least under ERISA, for any alleged misstatements made to Citigroup employees."); Bank of Am., 756 F. Supp. 2d. at 358 (rejecting allegation that CEO "Lewis also directed statements directly to employee-Plan participants pumping up the Company and its prospects" because "[u]nder [plaintiffs'] rationale, . . . any statement made by a CEO about the financial health of a company could be deemed a fiduciary communication").

Plaintiffs' claim fails as a matter of law because ERISA applies only to communications made in a fiduciary capacity. "ERISA . . . only holds fiduciaries liable to the extent that they were 'acting as a fiduciary . . . when taking the action subject to the complaint." Gearen, 660 F.3d at 611; see also Citigroup, 662 F.3d at 143-144 (holding that defendant was not "a Plan administrator responsible for communicating with Plan participants, [and] therefore [did not] act[ ] as a Plan fiduciary when making the statements at issue."); UBS, 2013 U.S. App. LEXIS 4016, at *10 (statements "in SEC filings and press releases . . . were all made by defendants in their corporate fiduciary capacities, not their ERISA fiduciary capacities").[5] Plaintiffs here similarly do not challenge any communications made by the Plan Administrator or any defendant in an ERISA fiduciary capacity. None of the allegedly false communications mention the plan or Plan benefits, and none were directed to Plan participants, but rather to the investing public. Plaintiffs cannot hold defendants liable under ERISA based entirely on corporate statements made to the public at large. See Citigroup, 662 F.3d at 611.

Plaintiffs have also argued that the Defendants who were allegedly responsible for the SPD violated their fiduciary duties under ERISA because the SPD "incorporated SEC filings," and therefore those Defendants were "responsible for the veracity of that communication." Opp'n at 30; see also Compl. at ¶ 345. Specifically, Plaintiffs allege that the SPD violated ERISA because (i) its explicit warnings regarding the risks of the Company Stock Fund were insufficient "to give notice that the...Fund might be subject to artificial inflation in value based on unfettered risk-taking and

[5] Plaintiffs note that "CFO David [sic] Braunstein, a Plan fiduciary, certified the Form 10-K." Compl. ¶ 193. Mr. Braunstein's fiduciary duties, however, were limited to serving as a member of the Selection Committee responsible for appointing the members of the EPIC. His membership on that committee did not transform his signing of JPMorgan's SEC filings or any other actions taken in a corporate capacity into ERISA communications. Plaintiffs "overlook . . . that only the plan administrator is responsible for meeting ERISA's disclosure requirements and therefore for communicating with Plan participants" and that a defendant "is only liable under ERISA for actions [he] takes while acting as an ERISA fiduciary." Citigroup, 662 F.3d at 144 (emphasis added); see also Bell v. Pfizer, Inc., 626 F.3d 66, 74 (2d Cir. 2010) ("employers assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA") (internal quotation marks omitted); Bear Stearns, 763 F. Supp. 2d at 578 ("statements made by the Company and these persons, be they SEC filings, press releases, or speeches, are not statements made while 'acting as a fiduciary' for which they are liable under ERISA").

market misrepresentations," Opp'n at 29; and (ii) the SPD purportedly "incorporated JPMorgan's SEC filings by reference and encouraged participants to rely on those filings in making their investment decisions." Id. at 3.

Under settled Second Circuit precedent, SEC filings can become communications subject to ERISA fiduciary duties only through "the express incorporation of SEC filings into an ERISA-mandated SPD." Rinehart v. Akers, 722 F.3d 137, 152 (2d Cir. 2013) (citations omitted). Plaintiffs' allegation that the SPD's prospectus incorporated JPMorgan's SEC filings is contradicted by the SPD itself: "the prospectus is a separate document unrelated to this summary plan description, and the financial statements referred to by it, and incorporated by reference therein, have not been prepared pursuant to fiduciary duties imposed by ERISA." SPD at 2. Because Plaintiffs' assertions about the SPD are refuted by the SPD's own language, their allegation that JPMorgan's SEC filings were ERISA communications fails as a matter of law.[6] See, e.g., Anderson v. Davis Polk; 850 F. Supp. 2d 392, 411(S.D.N.Y. 2012) (court may disregard "conflicting pleadings that . . . are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely") (internal quotation marks and citation omitted).

Plaintiffs' allegation that the SPD breached Defendants' fiduciary duties under ERISA also fails because Plaintiffs do not allege that Plan Administrator Ulissi was aware of any purported misstatement in JPMorgan's SEC filings. Statements "concerning a company's financial condition become subject to ERISA fiduciary duties only if they are made . . . by the plan administrator and are intentionally connected to statements regarding a plan's benefits." Gearren v. McGraw-Hill Cos., 690 F. Supp. 2d 254, 272 (S.D.N.Y. 2010) (internal quotation marks omitted). Because "[p]laintiffs have not provided any specific allegations as to how [Ulissi] knew or should have

[6] Plaintiffs' additional argument that the warnings in Plan communications concerning the Company Stock Fund were too "generalized," id. at 29, is contrary to ERISA, which requires only a "general description of the investment objectives and risk and return characteristic of each such alternative.'" Citigroup, 662 F.3d at 142 (quoting 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(ii)).

known that [JPMorgan's] . . . SEC filings contained misstatements or omissions," they fail to state a claim. Gearren, 660 F.3d at 611.

Here, Ms. Ulissi, as Plan Administrator, was responsible for distributing the SPD to Plan participants. See Plan § 12.1. Under Gearren, Ms. Ulissi cannot be held liable under ERISA for allegedly false or misleading statements in communications with Plan participants unless she knew "'those statements [were] false or lack[ed] a reasonable basis in fact.'" 660 F.3d at 611 (citation omitted). Plaintiffs make no specific allegations that Ms. Ulissi – who is not alleged to have played any role in the CIO losses – "knew or should have known that . . . [JPMorgan's] SEC filings contained misstatements." Id. Rather, the Complaint makes general allegations that all of the "Defendants also breached their duties of loyalty and prudence by failing to provide complete and accurate information regarding the Company's true financial condition," and that "Defendants also had actual knowledge that the Plan's participants did not have full and complete information about the Company." Compl. ¶¶ 342-343. Thus, Plaintiffs have not adequately alleged that the Plan Administrator "made any intentional or knowing misstatements to Plan participants," and Plaintiffs' misrepresentation claim fails for this reason. Gearren, 660 F.3d at 611 ("While plaintiffs do allege in conclusory fashion that all of the defendants 'knew or should have known of the material misrepresentations' contained in the SEC filings, they provide no basis for this conclusion, especially as it is applied to [the plan administrator], who served as McGraw-Hill's Vice President for Employee Benefits.").

V. PLAINTIFFS' REMAINING CLAIMS

Because Plaintiffs have failed to plead any antecedent or underlying breach of fiduciary duty claims against any of the Defendants, their claims for failure to monitor (Count II), conflict of interest (Count III), and co-fiduciary liability (Count IV), also fail. See, e.g., In re Pfizer, 2013 U.S. Dist. LEXIS 45868, at *34 ("Plaintiffs' remaining claims—for failure to monitor, failure to inform,

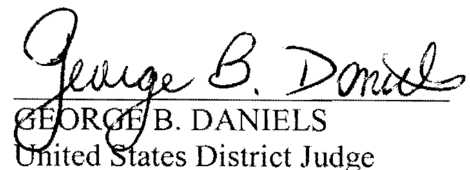
failure to investigate, co-fiduciary liability and knowing participation in breaches of duty—are similarly derivative of their claims that Defendants breached their fiduciary duty of prudence."); Nokia, 2012 U.S. Dist. LEXIS 132720, at *10 ("Because Plaintiffs have failed to plead any antecedent or underlying breach of fiduciary duty claims against the Plan Committee and its members, their claims for failure to monitor and co-fiduciary liability against Nokia Inc. and the Director Defendants also fail."); In re SLM Corp. ERISA Litig., No. 08-cv-4334, 2010 U.S. Dist. LEXIS 109775, at *28 (S.D.N.Y. Sept. 24, 2010) (dismissing "breach of the duty to avoid conflicts of interest and failure to monitor other fiduciaries [as] derivative of Plaintiffs' prudence and loyalty claim[s]"), aff'd, 2012 U.S. App. LEXIS 26325 (2d Cir. Dec. 26, 2012); see also Gearren, 660 F.3d at 611 ("plaintiffs have conceded that these secondary claims [conflicts of interest and failure to monitor] fail if plaintiffs are unable to survive Rule 12(b)(6) as to their primary claims").

Conclusion

The Defendants' motion to dismiss is GRANTED. The Complaint is DISMISSED. The Clerk of the Court is directed to close motion #37 on docket 12-cv-04027.

Dated: March 31, 2014
New York, New York

SO ORDERED:



GEORGE B. DANIELS
United States District Judge