

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE STATE STREET BANK AND
TRUST CO. FIXED INCOME FUNDS
INVESTMENT LITIGATION

MDL No. 1945

Apogee Enterprises Inc., on behalf of the
Apogee Enterprises, Inc. 401(k)
Retirement Plan,

Plaintiff,

Civil Action No. 09-cv-01899 (RJH)

vs.

REDACTED FOR PUBLIC FILING

State Street Bank and Trust Company; and
ING Institutional Plan Services LLC,
Formerly known as CitiStreet LLC,

Defendants.

**APOGEE'S MEMORANDUM OF LAW IN OPPOSITION TO
CITISTREET'S MOTION TO DISMISS**

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PRELIMINARY STATEMENT OF FACTS

I. THE APOGEE PLAN DOCUMENTS.

Plaintiff Apogee Enterprises, Inc. (“Apogee”) is a Minnesota corporation based in Bloomington, Minnesota. (Compl. ¶ 5.) The Apogee Enterprises, Inc. 401(k) Retirement Plan (the “Plan”) is an ERISA-governed retirement benefit plan. (*Id.* ¶ 6.) Apogee serves as the Plan’s sponsor, plan administrator and one of its named fiduciaries. (*Id.* ¶ 1.)

Redacted

(Affidavit of Justin P. Krypel

Ex. A at 67-68.)

Redacted

(*Id.* at 27-28.) Redacted

(*Id.*)

Redacted

§ 404(c), 29 U.S.C. § 1104(c), which

permits “a participant or beneficiary to exercise control over assets in his account.” (*Id.* at 28.)

To exercise such control, a participant must receive “sufficient information to make informed decisions with regard to investment alternatives available under the plan.” 29 C.F.R.

§ 2550.404c-1(b).

Redacted

(Krypel Aff. Ex. A at 28.)

Redacted

(*Id.* Ex. B.)

Redacted

(*Id.* at 3.) An “investment manager” is an ERISA fiduciary that has

“the power to manage, acquire, or dispose of any asset of a plan.” ERISA § 3(38), 29 U.S.C. § 1002(38).
Redacted

Krypel

Aff. Ex. B at 5),
Redacted

(*Id.* at 6.) These investment reports must contain “strategy statements or prospectuses that describe the investment strategies currently in place,” and “information relating to any changes in their investment philosophy, ownership structure or financial condition within 30 days of such events.” (Compl. ¶¶ 32-33.) The IPS allows the investment manager to assign its investment reporting obligation to a “representative.” (*Id.* ¶ 31.)

II. STATE STREET BECOMES THE INVESTMENT MANAGER OF THE PLAN’S FIXED INCOME SUBFUND.

In 1998, Apogee hired defendant State Street Bank and Trust Company (“State Street”) to serve as a trustee, investment manager and administrative services provider (i.e, recordkeeper) for the Plan. (Compl. ¶¶ 16-24.) Apogee hired State Street based, in part, on State Street’s promise that it could provide all such services “in one bundled defined product,” and would provide “comprehensive, ongoing communications [which will] keep your company and your employees informed.” (*Id.* ¶¶ 17, 19.) To memorialize their relationship, Apogee and State Street entered into a series of contracts effective January 1, 1999, including a Trust Agreement, an Investment Manager Agreement and a Recordkeeping Services Agreement. (*Id.* ¶¶ 20-24.)

Under the Trust Agreement, State Street agreed to act as a Plan trustee Redacted
(Compl. ¶ 22; Krypel Aff. Ex. A at 69.) Under the Recordkeeping Services Agreement (“Recordkeeping Agreement”), State Street agreed to provide recordkeeping and other plan administrative services. (Compl. ¶ 23.) And under the Investment Manager Agreement (“IM Agreement”), State Street agreed to serve as an investment manager for several

of the Plan's subfunds. (Compl. ¶ 24.) One of those subfunds was the SSgA Daily Bond Market Fund Series A (the "Fund"), which served as the Plan's fixed income component. (*Id.*)

Redacted

(Hurwitz Decl.

Ex 2; Krypel Aff. Ex. C.)

Redacted

(Hurwitz Decl. Ex. 2 at 4.)

The IM Agreement and the IPS constitute two of the "plan documents and instruments governing the plan" within the meaning of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). (Compl. ¶ 29.) Accordingly, State Street had a fiduciary duty to comply with those documents. (*Id.*) Specifically, State Street had a fiduciary duty to provide "information relating to any changes in investment philosophy, ownership structure, or financial condition within 30 days of such events." (*Id.* ¶ 33.) This duty will be referred to herein as State Street's "investment reporting obligation." (*Id.*) Notably, and contrary to defendant CitiStreet's representations, these investment reporting obligations arise solely from the IM Agreement and IPS, *not* from the Recordkeeping Agreement. State Street's Retirement Investment Services ("RIS") Group, then part of State Street Global Advisors ("SSGA"), State Street's investment management division, originally performed these investment reporting functions. (*Id.* ¶¶ 35-36; Krypel Aff. Ex. D.)

III. CITISTREET ASSUMES STATE STREET'S FIDUCIARY INVESTMENT REPORTING OBLIGATIONS.

Around December 1999, State Street and Citigroup, Inc. formed a joint venture called CitiStreet, LLC ("CitiStreet"). State Street contributed its RIS Group to CitiStreet and informed Apogee that "CitiStreet will be responsible for the delivery of products and services to you and your participants previously provided through RIS." (Compl. ¶ 37.) State Street advised that the agreements then in place between Apogee and State Street would remain effective as to CitiStreet under the same terms. (*Id.*) Apogee did not execute any written contract with

CitiStreet, nor was Apogee told what obligations CitiStreet would assume. (*Id.* ¶ 38.) Rather, CitiStreet simply began performing the recordkeeping and fiduciary investment reporting services State Street previously provided (*id.* ¶¶ 38-39), **Redacted** (*Compare* Krypel Aff. Ex. D at 4 *with id.* Ex. J.) CitiStreet provided the same quarterly investment reports to the PIC that State Street’s RIS Group had previously. (Compl. ¶¶ 36, 39-42; *compare* Krypel Aff. Ex. D *with id.* Ex. J.) CitiStreet also reported to the PIC on changes in the strategy of the Plan’s investment subfunds (Compl. ¶¶ 41-42), **Redacted** (Krypel Aff. Ex. F.) **Redacted**

(Krypel Aff. Ex. K.)

The fiduciary investment reporting services CitiStreet provided were distinct from the recordkeeping functions it performed, which is reflected in CitiStreet’s assignment of “recordkeeping” functions and “investment reporting” functions among its personnel. (Compl. ¶¶ 41-42.) **Redacted**

(Krypel Aff. Ex. R.)

CitiStreet claims in its Motion to *only* have served as Apogee’s recordkeeper. That is demonstrably false. CitiStreet produced in discovery what it says is its operative agreement with State Street relating to Apogee, the “Client Services Agreement” (“CSA”). (Krypel Aff. Ex. G.)

Redacted

(*Id.* at 1-2 (emphasis

added); *see id.* at Schedule 1.)

Redacted

Redacted

(*Id.* at Schedule 3.)

Redacted

(Krypel Aff. Ex. H.)

State Street has confirmed that CitiStreet took over its fiduciary investment reporting functions. Erik Saarinen –State Street’s relationship manager for the CitiStreet account in 2007 – testified that State Street delegated to CitiStreet its responsibility to communicate with plans and their participants, stating, “[t]he working arrangement that we had with CitiStreet was that . . . they serviced these clients,” meaning “they would communicate and manage *all* communications to those clients with respect to State Street Global Advisors’ products.” (Krypel Aff. Ex. I at 170-71.) Saarinen understood that CitiStreet thereby took on fiduciary obligations to communicate with clients. (*Id.*)

IV. CITISTREET BREACHED ITS FIDUCIARY DUTY TO INFORM THE PIC OF THE CHANGE IN THE STRATEGY OF THE BOND MARKET FUND.

As noted above, Apogee selected the Fund to serve as a standalone fund, as well as the fixed income component of the conservative, moderate and aggressive allocation or “strategy” funds offered by the Plan. (Compl. ¶¶ 45-46.) State Street, and later CitiStreet, represented to Apogee that the Fund was a “conservative,” “stable,” “risk-controlled,” and “well-diversified” “enhanced bond index fund.” (*Id.* ¶¶ 47-52.)

By 2007, this conservative strategy had changed dramatically. State Street began investing ever-greater amounts in risky securities backed by subprime mortgages and used leverage in an ill-fated attempt to increase returns. (*Id.* ¶¶ 54-55.) This increasing use of leverage, and CitiStreet’s failure to reveal it, were damaging. (*Id.* ¶¶ 55-56.) Further, CitiStreet

knew the Fund's strategy had changed.

Redacted

(Krypel

Aff. Ex. L.)

Redacted

(*Id.* at 1647.) Yet, CitiStreet

did not tell Apogee that the Fund's risk profile had changed. (Compl. ¶¶ 72, 117-120.)

In the third quarter of 2007, the bottom fell out of the subprime mortgage market. (*Id.* ¶ 58.)

Redacted

(Krypel

Aff. Ex. M.) Had CitiStreet provided timely and accurate investment reporting to Apogee, the Plan would have exited the Fund earlier than it did. (*See* Compl. ¶¶ 47-53, 72-73, 86, 93-94, 117-20.) Lacking such knowledge, however, Apogee stayed in the Fund. (*Id.* ¶ 53, 86, 94, 121.) And the Fund suffered significant losses as a result of the change in investment strategy. From January 1, 2007 through August 24, 2007 (six days before the Apogee Plan finally exited the Fund) the Bond Market Fund lost 20.86% of its value. (*Id.* ¶ 62.) As a result, the Apogee Plan lost approximately \$5 million, when compared against the appropriate benchmark. (*Id.* ¶ 63.)

V. CITISTREET BREACHED ITS FIDUCIARY DUTY BY MISLEADING THE PIC ABOUT THE TIME IT WOULD TAKE TO EXIT THE BOND MARKET FUND.

In late July and early August of 2007, Apogee (through its investment advisor, SilverOak Wealth Management ("SilverOak")) pushed CitiStreet for information regarding the Fund's underperformance. (*Id.* ¶¶ 76-80.) In an August 9, 2007, call between SilverOak, CitiStreet and State Street, SilverOak was told the Fund was underperforming because of subprime investments. (*Id.* ¶ 80.) During this call, SilverOak asked CitiStreet how long it would take to exit the Fund; CitiStreet's Kevin McGrath said it would take 60 to 90 days. (*Id.* ¶ 81.)

CitiStreet's statement was false and CitiStreet knew of its falsity. (*Id.* ¶¶ 127-129.) In reality, other plan sponsors were allowed to exit State Street funds on as little as two to three days' notice. (*Id.* ¶¶ 89, 129.) Discovery confirms these allegations. As State Street's Erik Saarinen testified, with the Fund "underperforming dramatically" during August 2007, CitiStreet would have known to offer "expedited" timing to exit the Fund. (Krypel Aff. Ex. I at 76-77.)^{Redacted}

Redacted

(*Id.* Ex. L at

1654.)

Redacted

(*See, e.g.*, Krypel Aff. Exs. P and Q.)

CitiStreet's misstatement had the exact effect CitiStreet intended: it caused Apogee to stay in the Fund. (Compl. ¶ 103.) Immediately after learning (at the end of August) that other plan sponsors were exiting the Fund on as little as 48 hours' notice, and that the Fund was now substantially leveraged, the PIC decided to move out of the Fund as soon as possible and transition its investments in that Fund to a passive bond index fund. (*Id.* ¶¶ 93-94.)

Apogee officially exited the Fund on August 30, 2007, three weeks after CitiStreet misrepresented the time it would take to withdraw. (*Id.* ¶ 96.) Those three weeks were critical. From August 9 to August 30, the Fund suffered some of its greatest losses, losing approximately 12.5% of its value (or approximately \$2.9 million in losses to Apogee). (*Id.* ¶ 100.)

ARGUMENT

I. THE COMPLAINT MORE THAN ADEQUATELY ALLEGES THAT CITISTREET IS AN ERISA FIDUCIARY.

Courts have repeatedly recognized that an entity's fiduciary status is a fact-intensive inquiry, not susceptible to resolution on a motion to dismiss. *Rispler v. Sol Spitz Co.*, 2007 U.S.

Dist. LEXIS 41210, at *15 (E.D.N.Y. June 6, 2007); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 827 (S.D. Ohio 2004); *In re Xcel Energy Inc., Sec. Derivative & ERISA Litig.*, 312 F. Supp. 2d 1165, 1180-81 (D. Minn. 2004). As a result, courts have commented that a motion to dismiss based on questions of fiduciary status and fiduciary breach is nothing more than “a veiled attempt to obtain summary judgment at the pleading stage.” *Rankin v. Rots*, 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003). The same is true here. CitiStreet argues it was not and is not a Plan fiduciary because, it claims, it is nothing more than a “recordkeeper.” CitiStreet grossly minimizes its role in administering the Plan, and improperly invites this Court to make factual determinations at this early stage regarding what contracts governed its conduct and what services it performed. However, the facts in this case (as pleaded in Apogee’s Complaint, and as revealed in discovery) are sufficient to state a claim that CitiStreet acted as a Plan fiduciary.¹

A. CitiStreet Is An ERISA Fiduciary Because It Assumed The Investment Reporting Duties Of State Street And Was The Sole Conduit Of Information Between Apogee And State Street.

1. ERISA’s Definition of Fiduciary is to be Broadly Construed.

A person is a plan “fiduciary” under ERISA to the extent:

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

ERISA § 3(21), 29 U.S.C. § 1002(21). CitiStreet urges that by this section, ERISA “strictly define[s]” fiduciary status. (Def. Br. [Dkt. 27] at 9.) To the contrary, ERISA “expand[s] the

¹ Discovery has borne out Apogee’s claims. Thus, should the Court dismiss any portion of Apogee’s Complaint as insufficiently pleaded, it should permit Apogee leave to amend. Leave to amend shall be freely given when justice requires. Fed. R. Civ. P. 15(a). In particular, “this circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under Rule 12(b)(6).” *Porat v. Lincoln Towers Cmty. Ass’n*, 464 F.3d 274, 276 (2d Cir. 2006). Where an amendment might strengthen the viability of the complaint, leave to amend should be granted as a rule. *See Oliver Sch., Inc. v. Foley*, 930 F.2d 248, 251-53 (2d Cir. 1991).

universe of persons subject to fiduciary duties.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). As the Second Circuit has observed, “Congress intended ERISA’s definition of fiduciary ‘to be broadly construed.’” *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997).

ERISA defines a fiduciary “in *functional* terms of control and authority over the plan.” *Mertens*, 508 U.S. at 262 (emphasis added). As such, courts look to “the function performed, rather than . . . the title held,” in determining an entity’s fiduciary status. *Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d Cir. 1987); *see also In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 473 (S.D.N.Y. 2005). Contract language purporting to disclaim liability under ERISA, or stating that a party’s duties are merely ministerial, does not dictate a party’s fiduciary status. *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997); *Briscoe v. Fine*, 444 F.3d 478, 492 (6th Cir. 2006). Indeed, courts have held that ERISA § 3(21) “encompass[es] numerous entities, *including service providers.*” *Rispler*, 2007 U.S. Dist. LEXIS 41210, at *16 (emphasis added). Here, CitiStreet assumed the investment reporting function State Street was obligated to perform as investment manager under the IM Agreement and the IPS, both Plan documents. Accordingly, CitiStreet became a Plan fiduciary.

2. CitiStreet Functioned as a Fiduciary by Undertaking Duties Necessary or Appropriate for Carrying Out an Important Plan Purpose – Namely, Conveying Information About Plan Benefits.

Here, to determine whether Apogee has adequately alleged that CitiStreet acted as a Plan fiduciary, this Court must consider whether CitiStreet performed any “fiduciary activity,” which ERISA defines (in part) as “discretionary acts of plan ‘management’ and ‘administration.’” *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996). As the Supreme Court has observed, “[t]hese words [i.e., management and administration] are not self-defining.” *Id.* Accordingly, the Court looked to the law of trusts, which defines “administration” of a trust as the “perform[ance of] the

duties imposed, or exercise [of] the powers conferred, by the trust documents.” *Id.* (citing *Restatement (Second) of Trusts* § 164 (1957)). Applying this definition, the *Varity* Court found that “[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power ‘appropriate’ to carrying out an important plan purpose.” *Id.*

Other courts have similarly found that a party may become a fiduciary by “actively assum[ing] the duty to communicate with Plan participants.” *Woods v. So. Co.*, 396 F. Supp. 2d 1351, 1375 (N.D. Ga. 2005). This is true whether or not the duty to communicate with plan participants is officially assigned. *Peachin v. Aetna Life Ins. Co.*, 1994 WL 61793, at *5-*7 (N.D. Ill. Feb. 24, 1994). As such, even where a plan formally tasks the plan administrator with communicating with plan participants, another party may become a functional fiduciary if it actually undertakes the plan administrator’s communication role. *See Landry v. Air Line Pilots Ass’n Int’l, AFL-CIO*, 901 F.2d 404, 420-21 (5th Cir. 1990).

These cases apply here. As the Complaint alleges, State Street agreed under the IM Agreement to provide certain investment management services (Compl. ¶ 24) – **Redacted**
(Hurwitz Decl. Ex. 2.)

Apogee also alleged in its Complaint – consistent with *Varity* – that “[a]mong the fiduciary duties State Street owed the Plan and its participants was the duty to act in accordance with the documents and instruments governing the Plan.” (Compl. ¶ 28.) Those documents, Apogee has alleged, include the IM Agreement as well as the IPS. (*Id.* ¶¶ 29-33.)

When CitiStreet was formed, it assumed some of the responsibilities that State Street had previously agreed to undertake on behalf of the Plan. (*Id.* ¶ 38.) As Apogee pleaded, “[a]mong the fiduciary services CitiStreet assumed was performance of State Street’s investment reporting

obligations.” (*Id.* ¶ 39.) To this end, CitiStreet began attending PIC meetings and reported on the performance and strategy of the Plan’s investment funds. (*Id.* ¶¶ 39-42.) Discovery has borne out these pleadings, and shows that CitiStreet took on the responsibility to be the sole conduit of information between State Street and its clients (including Apogee).

CitiStreet’s actions mirror those of the defendant in *Landry*. In *Landry*, the Fifth Circuit examined whether a complaint adequately alleged that the defendant union became a functional fiduciary when it took control over the flow of information to the plan administrator, even though the applicable plan documents did not expressly assign the union this task. 901 F.2d at 420. The court concluded that the complaint adequately pleaded that the union was a functional fiduciary, because the complaint adequately alleged that the plan administrator’s ability to effectively manage the plan had been subordinated to the union as a result of the union’s control over information flow. *Id.* at 420-21. So too, here, as the above facts show.

B. CitiStreet Is An ERISA Fiduciary Of The Apogee Plan Because It Exercised Control Over The Disposition Of Apogee Plan Assets By Misleading Apogee Regarding The Amount of Time It Would Take To Withdraw From The State Street Bond Market Fund.

Not only was CitiStreet the sole conduit of information between Apogee and State Street, but CitiStreet also exercised control over the disposition of Plan assets, by misrepresenting to Apogee how long it would take to withdraw from the Fund and thereby discouraging Apogee from withdrawing Plan assets from that Fund. CitiStreet thus became a Plan fiduciary.

ERISA’s definition of fiduciary states that an entity may become a fiduciary not just by exercising *discretionary* authority, but also by “exercis[ing] *any* authority or control respecting management or disposition of its assets.” ERISA § 3(21), 29 U.S.C. § 1002(21) (emphasis added). “The plain language of the statute establishes that it imposes fiduciary duties not only on those entities that exercise *discretionary* control over the disposition of plan assets, but also

imposes such duties on entities or companies that exercise ‘*any* authority or control’ over the covered assets.” *Briscoe*, 444 F.3d at 490-91.

CitiStreet urges that this provision does not apply to it, pointing to a Department of Labor regulation stating that a party that performs “purely ministerial functions” is not a fiduciary because such a party does not meet ERISA’s definition of a fiduciary. (Def. Br. [Dkt. 27] at 10 (quoting 29 C.F.R. § 2509.75-8).) Here, CitiStreet took on a greater role than that of a third-party administrator, but even if its role were so limited, this DOL regulation does not insulate CitiStreet. As the *Briscoe* court held, “a third-party administrator performing the tasks described in the DOL regulation can nevertheless acquire fiduciary status where, in addition to its other actions, it exercises control over plan assets.” *Briscoe*, 444 F.3d at 494. This is precisely what Apogee has pleaded here. (Compl. ¶¶ 43, 74-104.) Indeed, DOL regulations require that participants receive sufficient information about their investments, so that they may control such investments. 29 C.F.R. § 2550.404c-1(b). Without this information, any such control must reside with the fiduciary responsible for providing the information. *Cf. In re Westar Energy, Inc., ERISA Litig.*, 2005 U.S. Dist. LEXIS 28585, at *10 n.14 (D. Kan. Sept. 29, 2005).

As Apogee’s Complaint alleges, CitiStreet exercised control over the disposition of Plan assets when it told Apogee it would take 60 to 90 days to withdraw Plan assets from the Fund. (Compl. ¶¶ 43, 74-104.) This representation was “calculated to (and did) delay Apogee’s move out of the Fund – during a period when losses in State Street’s bond funds were mounting daily.” (*Id.* ¶ 103.) Accordingly, the Complaint adequately alleges that CitiStreet was a Plan fiduciary.

C. Even If CitiStreet Were Not A Fiduciary, Its Knowing Participation In State Street’s Fiduciary Breaches Renders It Liable For Such Breaches.

Under binding Second Circuit precedent, even if CitiStreet is not a Plan fiduciary, it may still be liable for State Street’s fiduciary breaches, because “[p]arties who knowingly take part in

fiduciary breaches may be liable under ERISA to the same extent as fiduciaries.” *Bouton v. Thompson*, 764 F. Supp. 20, 23 (D. Conn. 1991) (citing *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987)). Here, Apogee pleaded – and documents between State Street and CitiStreet show – that CitiStreet knowingly participated in State Street’s breach of fiduciary duty, that being, the duty to inform Apogee that the Plan’s investment strategy had changed. (Compl. ¶ 122.)

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(Krypel Aff. Ex. L (emphasis added).) CitiStreet, dutifully, assisted State Street in withholding this information from Apogee. (Compl. ¶ 122.) Accordingly, even if CitiStreet were not a Plan fiduciary, CitiStreet may nevertheless be held liable for State Street’s fiduciary breaches.

II. CITISTREET BREACHED ITS ERISA FIDUCIARY DUTIES.

Apogee has adequately pleaded that CitiStreet breached its fiduciary duties to Apogee and, as several courts have held, “whether a fiduciary breached his duty to an ERISA plan is inherently a factual analysis, and one that is not properly addressed in a motion to dismiss.” *Rispler*, 2007 U.S. Dist. LEXIS 41210, at *9-10.

A. CitiStreet Did Not Follow The Relevant Plan Documents.

As Apogee pleaded, CitiStreet breached its fiduciary duties by (among other things) failing to abide by Plan documents. ERISA requires a fiduciary to act “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions” of ERISA. 29 U.S.C. § 1104(a)(1)(D). Failure to follow relevant plan documents is thus a breach of fiduciary duty. *Dardaganis v. Grace Capital, Inc.*, 889 F.2d

1237, 1241-42 (2d Cir. 1989); *see also In re Polaroid ERISA Litig.*, 362 F. Supp. 2d at 474.

“[T]he trustees of an ERISA plan cannot waive the right of the beneficiaries to have fiduciaries comply with section 1104(a)(1)(D).” *Dardaganis*, 889 F.2d at 1241.

The IM Agreement and IPS, under which CitiStreet was to report to Apogee regarding the Plan’s State Street investments, constitute plan documents. In *Dardaganis*, an ERISA plan entered into an investment management agreement with a third party, under which that party agreed to “manage the [Fund’s] Account in strict conformity with the investment guidelines promulgated by the Trustees from time to time and with all applicable Federal and State laws and regulations.” *Id.* at 1239. The court held that the third party had a fiduciary duty to abide by both the investment management agreement and the investment guidelines as “plan documents”. *Id.* at 1240-42; *see Alco Indus. v. Wachovia Corp.*, 527 F. Supp. 2d 399, 404 (E.D. Pa. 2007).

Similarly, here, the Complaint sufficiently alleges that CitiStreet breached its fiduciary duties by failing to abide by the IPS and the IM Agreement. Specifically, CitiStreet failed to tell Apogee of the Fund’s change in the strategy. CitiStreet does not address this central allegation, contending only that Apogee fails to allege any affirmative misstatements or that CitiStreet knew the Fund’s strategy had changed. (Def. Br. [Dkt. 27] at 15-16.) But Apogee need only allege that CitiStreet failed to follow Plan documents, which require CitiStreet to accurately report on Apogee’s State Street investments. Apogee has done so. (*See, e.g.*, Compl. ¶¶ 72-73, 117-25.)

Moreover, it is no defense that CitiStreet failed to acquire the information necessary to inform Apogee about the Fund’s change in strategy. Indeed, CitiStreet’s duty was to report to Apogee “information relating to any changes in investment philosophy, ownership structure, or financial condition within 30 days of such events.” (Compl. ¶ 33.) CitiStreet thus had a contractual and fiduciary duty to keep apprised of the investment strategy State Street used and

report that information to Apogee. *In re Dynege, Inc., ERISA Litig.*, 309 F. Supp. 2d 861, 890 (S.D. Tex. 2004) (fiduciary has “duty . . . to investigate before [it] speak[s]”).

B. CitiStreet Breached Its Fiduciary Duties To The Apogee Plan By Making Material Misstatements And Failing To Disclose Information Material To The Plan’s Investment Decisions.

In its Motion, CitiStreet concedes – as it must – that it has an affirmative duty to disclose information that Apogee “must know for its own protection.” (Def. Br. [Dkt. 27] at 15.) As the Second Circuit has found, there exists a broad duty to disclose information that might cause harm to a plan or its participants. *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001); *In re Long Island Lighting Co.*, 129 F.3d 268, 271 (2d Cir. 1997); *Dobson v. Hartford Fin. Servs. Group, Inc.*, 389 F.3d 386, 401 (2d Cir. 2004). ERISA fiduciaries, like CitiStreet, also must not make material misrepresentations to a plan or its participants. *Polaroid*, 362 F. Supp. 2d at 478; *Cress v. Wilson*, 2007 U.S. Dist. LEXIS 42632, at *28 (S.D.N.Y. June 7, 2007).

Rather than contest the existence of this duty, CitiStreet argues a duty to disclose attaches only where the fiduciary has actual knowledge of information that is unknown to the plan sponsor. To support its argument, CitiStreet cites to an unpublished decision from another district and a Second Circuit decision that does not even address the question.² CitiStreet’s argument misses the point. The Complaint alleges that, regardless of whether CitiStreet *actually*

² CitiStreet’s citation to *In re CitiGroup ERISA Litig.*, 2009 WL 2762708, at *25 (S.D.N.Y. Aug. 31, 2009) is unavailing. There the Court concluded that the Complaint failed to “provide any facts in support” of its allegation that the defendants “knew *or should have known*” of CitiGroup’s subprime exposure, which ultimately caused large losses. *Id.* Apogee, by contrast, alleges that “CitiStreet failed to disclose to Apogee and the Plan’s participants that beginning in or about 2006: (a) The Daily Bond Market Fund was no longer a ‘conservative,’ ‘stable,’ ‘risk-controlled,’ and ‘well-diversified’ ‘enhanced bond index fund’; (b) State Street had undertaken an investment strategy for the Daily Bond Market Fund which involved substantial investment in high-risk securities, including securities backed by subprime mortgage loans; (c) State Street was using large amounts of leverage.” (Compl. ¶ 117.) Discovery has shown that CitiStreet knew this information, and in any event, Apogee adequately pleads that given its investment reporting obligations, CitiStreet should have known of such information.

knew of the information in question, it *should have known* about it because (1) CitiStreet assumed the duty to know as part of its investment reporting obligations; and (2) it functioned as the sole conduit of information between State Street and Apogee. As one court observed in a similar case, where a service provider stands between the plan sponsor and investment manager, the service provider assumes a duty to “possess[] the expertise to know that the investment could not comply” with the plan’s Statement of Objectives, and to convey that information to the plan sponsor. *Toledo Blade Newspaper Unions-Blade Pension Plan v. Inv. Performance Servs., LLC*, 565 F. Supp. 2d 879, 890 (N.D. Ohio 2008).

In any event, Apogee has pleaded and can show that CitiStreet actually knew (1) it would take far less than 60 to 90 days to withdraw from the Fund; and (2) by at least July 2007, the Fund’s strategy had changed. CitiStreet had a duty to disclose this information, where it knew “that its failure to do so *might* cause harm.” *Devlin*, 274 F.3d at 88 (emphasis added).

Finally, CitiStreet’s argument that Apogee fails to make a “plausible” argument that CitiStreet’s misrepresentation of the time required to get out of the Fund harmed Apogee rings hollow. The Complaint alleges that CitiStreet made misrepresentations that “were calculated to (and did) delay Apogee’s move out of the Fund” (Compl. ¶ 103), and that Apogee was “actively discouraged” from exiting the fund in late July and early August 2007. (*Id.* ¶ 101.) The Complaint further alleges that this delay materially harmed Apogee because of the heavy losses the Fund sustained in July and August 2007. (*Id.* ¶¶ 99-101.) CitiStreet essentially asks this Court to make a factual determination that Apogee could not have suffered the harm it has alleged; such a request is improper on a motion to dismiss.

C. Apogee's Claims Contain A Viable Claim For Relief.

CitiStreet asserts that Apogee may not recover monetary damages arising from any fiduciary breach, contending such relief is unavailable under ERISA § 502(a)(3). But Apogee's request for monetary relief arising from its fiduciary breach claims is asserted under ERISA § 502(a)(2). (*Id.* ¶¶ 125, 137.) ERISA § 502(a)(2) allows a plan fiduciary or its participants to sue on behalf of the plan for breach of fiduciary duty, and to pursue the remedies outlined in ERISA § 409. *See* 29 U.S.C. § 1132(a)(2). ERISA § 409, meanwhile, "requires fiduciaries who breach their duties 'to make good to such plan the losses to the plan resulting from such breach.'" *Evans v. Akers*, 534 F.3d 65, 74 (1st Cir. 2008) (quoting 29 U.S.C. § 1109(a)). Such "losses," of course, are necessarily monetary. *See Register v. Cameron & Barkley Co.*, 467 F. Supp. 2d 519, 529 (D.S.C. 2006); *Faulman v. Sec. Mut. Fin. Life Ins. Co.*, 2006 WL 2482926, at *7 (D.N.J. Aug. 28, 2006), *aff'd*, 2009 WL 4367311 (3d Cir. Dec. 3, 2009) ("[a]lthough Defendant contends that Plaintiffs cannot seek relief for monetary damages under ERISA § 502(a)(3), . . . the Court notes that Plaintiffs can seek such relief through ERISA § 502(a)(2)").

III. ERISA DOES NOT PREEMPT APOGEE'S STATE LAW CLAIMS.

Should this Court conclude that Apogee cannot establish CitiStreet acted as a Plan fiduciary, then the Court should further conclude that Apogee's state law claims –pled in the alternative – are not preempted as they do not create an alternative ERISA enforcement mechanism. Further, a holding that ERISA preempts Apogee's state law claims would eviscerate Congress's intent in enacting ERISA, because it would make CitiStreet immune from *any prosecution* by an ERISA plan while subjecting Apogee to a betrayal without remedy.

"The purpose of Congress is the ultimate touchstone in determining whether a federal law preempts a state law." *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 144 (2d Cir. 1989) (citations

omitted). Congress's intent with ERISA "was not to foreclose every state action with a conceivable effect upon ERISA plans, but to maintain exclusive federal control over the regulation of such plans." *N.Y. State Health Maint. Org. Conference v. Curiale*, 64 F.3d 794, 803 (2d Cir. 1995). Thus, while ERISA preempts state laws that "relate to" an employee benefit plan, the term "relate to" is not meant to be "taken to extend to the furthest stretch of its indeterminacy." *N.Y. State Conf. of Blue Cross Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Accordingly, "state actions [that] affect employee benefit plans in too tenuous, remote, or peripheral a manner" cannot be said to "relate[] to" such plans, and are not preempted. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

"Generally, state laws that provide alternative cause(s) of action for beneficiaries seeking to collect or enforce plan benefits have been deemed preempted," as such claims clearly "relate to" an ERISA plan. *Berlin City Ford, Inc. v. Roberts Planning Group*, 864 F. Supp. 292, 295 (D.N.H. 1994). "On the other hand, state laws of general application that have only an incidental effect on the administration of ERISA plans and that do not affect relationships between a plan's fiduciaries and its beneficiaries have been ruled to be not preempted." *Id.* This is because ERISA does not preempt state law claims that "do[] not rely on the [ERISA] plan's operation or management." *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 22-23 (2d Cir. 1996). Further, courts must "avoid construing ERISA in a manner that would leave beneficiaries . . . without any remedy at all." *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 149 (2d Cir. 1999).

Here, Apogee's claims for fraud, negligent misrepresentation and violations of the Consumer Fraud Act and Deceptive Trade Practices act arise from laws of general application and do not constitute alternative ERISA enforcement mechanisms. As such, they are not preempted. See *Gerosa v. Savasta & Co.*, 329 F.3d 317 (2d Cir. 2003) (negligence claim against

non-fiduciary not preempted); *Geller*, 86 F.3d at 23 (fraud claim not preempted); *DaPonte v. Manfredi Motors Inc.*, 157 Fed. Appx. 328, 330 (2d Cir. 2005) (negligent and fraudulent misrepresentation claims not preempted); *Engler v. Cendant Corp.*, 434 F. Supp. 2d 119 (E.D.N.Y. 2006) (fraud, negligent misrepresentation and breach of contract claims not preempted); see *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 698, 701-02 (6th Cir. 2005) (third-party recordkeeper subject to breach of contract claim).

Moreover, it is immaterial that an ERISA plan is the entity bringing the claim. See *Trustees of the AFTRA Health Fund v. Biondi*, 303 F.3d 765, 777-79 (7th Cir. 2002); *LeBlanc v. Cahill*, 153 F.3d 134, 147-48 (4th Cir. 1998); *Ariz. State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 723-24 (9th Cir. 1997). ERISA “doesn’t purport to regulate those relationships where a plan operates just like any other commercial entity.” *Gen. Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1522 (9th Cir. 1993). Thus, where plaintiff’s claims relate to defendants’ relationship with the plaintiff as a commercial entity, and not as participants or beneficiaries, the claim is not preempted. *Donald I. Galen, M.D., Inc. v. McAllister*, 833 F. Supp. 761, 764 (N.D. Cal. 1992). Should the Court conclude that CitiStreet was not a fiduciary, then CitiStreet’s relationship with Apogee could only have been as a commercial entity. And ERISA does not preempt “garden variety” state law claims brought against *non-fiduciary service providers* (like CitiStreet) based on professional services rendered to an ERISA plan. See, e.g., *Gerosa*, 329 F.3d at 324; *Burger v. Empire Blue Cross & Blue Shield*, 2000 WL 1425101, at *2 (S.D.N.Y. Sept. 27, 2000); *Pedre Co. v. Robins*, 901 F. Supp. 660, 665-66 (S.D.N.Y. 1995).

CitiStreet argues that Apogee’s state law claims are preempted because they arise “from the administration of the Plan” and because such claims seek “to recoup benefits [Apogee] believes the plan should have received.” (Def. Br. [Dkt. 27] at 18, 19.) This misconstrues

Apogee's claims. Further, CitiStreet cites cases involving third-party administrators that actually affect (or "administer") the operation of an ERISA plan (such as by administering a claim for ERISA welfare benefits). For instance, CitiStreet cites *Wasmund v. Meritain Health, Inc.*, 2008 WL 4415199 (W.D.N.Y. Sept. 24, 2008), for its holding that plaintiffs' "state law claims alleged here duplicate, supplement or supplant ERISA's civil remedies, [and] hence are preempted." *Id.* at *4. There, plaintiffs (who, notably, were plan beneficiaries, not the plan itself) sought recovery of medical benefits from a third-party administrator charged with enforcing a plan's coverage provisions. Such a claim for benefits is expressly governed by ERISA § 502(a)(1)(B).

Here, by contrast, CitiStreet's actions in failing to properly report to Apogee and misrepresenting the time to exit the Fund did not constitute administration of the Plan, as these actions did not construe or enforce any Plan provisions. Similarly, the relief Apogee seeks here is not recovery of Plan *benefits* (as was the case in *Wasmund*), but is recovery of *losses* the Plan sustained as a result of CitiStreet's wrongdoing. And if this Court finds that CitiStreet is not a Plan fiduciary, then ERISA provides no civil remedy for CitiStreet's wrongdoing, and Apogee's state law claims are not preempted.

IV. APOGEE ADEQUATELY PLEADS ITS STATE LAW CLAIMS.

A. Apogee Satisfies The Requirements Of Rule 9(b).

In its 46-page Complaint, Apogee sufficiently pleads its claims for fraud, negligent misrepresentation, and violation of Minnesota's statutory fraud schemes with the particularity required by Rule 9(b). A plaintiff states a claim for fraud when it alleges misstatements *or omissions* of material fact. *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001); *see also Exeter Bancorporation, Inc. v. Kemper Secs. Group, Inc.*, 58 F.3d 1306, 1314 (8th Cir. 1995); *Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1064 (D. Minn. 2001).

CitiStreet argues that Apogee (1) “failed to identify any misstatement by CitiStreet”; and (2) “failed to attribute a misstatement to a defendant.” (Def. Br. [Dkt. 27] at 21.) CitiStreet is simply incorrect. In its Complaint, Apogee alleges misstatements and omissions *on the part of CitiStreet* with respect to (1) the time required to get out of the Bond Market Fund; and (2) the change in strategy of the Bond Market Fund. For example, Apogee alleges:

- “... during this August 9 phone conference CitiStreet’s McGrath stated it would take 60 to 90 days to exit the Fund.” (Compl. ¶ 81.)
- “. . . SilverOak’s King had a follow-up phone call with CitiStreet’s Kevin McGrath, and asked him again how long it would take for a plan sponsor to exit the Fund. McGrath initially repeated that it would take 60 to 90 days, but then subsequently told King that CitiStreet could let a plan sponsor out on as little as 48 hours’ notice.” (Compl. ¶ 91.)
- “At all times material herein, State Street and CitiStreet represented to Apogee and the participants of its Plan that the Daily Bond Market Fund was a “conservative,” “stable,” “risk-controlled,” and “well-diversified” “enhanced bond index fund.” (Compl. ¶ 47; *see also id.* ¶¶ 48-52.)
- “. . . [N]either State Street nor CitiStreet ever advised Apogee of State Street’s change in investment strategy for the . . . Fund until just a few days before Apogee decided to exit the Fund on August 28, 2007.” (Compl. ¶ 72.)
- “CitiStreet failed to disclose to Apogee and the Plan’s participants that beginning in or about 2006: (a) The Daily Bond Market Fund was no longer a ‘conservative,’ ‘stable,’ ‘risk-controlled,’ and ‘well-diversified’ ‘enhanced bond index fund’; (b) State Street had undertaken an investment strategy for the Daily Bond Market Fund which involved substantial investment in high-risk securities, including securities backed by subprime mortgage loans; (c) State Street was using large amounts of leverage” (Compl. ¶ 117.)

As discussed above, discovery has revealed these allegations to be accurate. (*See* Krypel Aff. Exs. I at 76-77, 118 and Ex. L.)

B. Apogee Adequately Pleads Scienter.

CitiStreet’s argument that Apogee fails to plead the requisite intent under Rule 9(b) is unavailing. As an initial matter, Apogee does not need to demonstrate intent to defraud to prove

its claims for negligent misrepresentation and violation of Minnesota's statutory fraud schemes. *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986); *Reinsurance Ass'n of Minn. v. Timmer*, 641 N.W.2d 302, 315 (Minn. App. 2002); *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1086 (D. Minn. 2001); *see also* Minn. Stat. § 325F.67.

Moreover, Apogee has adequately pleaded scienter in its fraudulent misrepresentation claim. For scienter to exist, "the representor must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false." *Florenzano*, 387 N.W.2d at 174 (citations omitted); *compare Powers v. British Vita, P.L.C.*, 57 F.3d 176, 184 (2d Cir. 1995) (citing *Beck v. Mfrs. Hanover Trust Co.*, 820 F.2d 46, 49 (2d Cir. 1987)).³ Under Minnesota law, "[a] bad motive is not an essential element of fraud." *Spiess v. Brandt*, 41 N.W.2d 561, 566 (Minn. 1950).

Apogee has pleaded, and can prove, that CitiStreet *actually possessed* intent to deceive Apogee.

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(*See, e.g.*, Krypel Aff. Exs. L at 1654 and I at 76-77.)

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(*See, e.g., id.* Exs. L and I at 118.)

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(*Id.* Ex. L at 1653 (emphasis added).) **Redacted**

³ CitiStreet's citation to New York law with respect to Apogee's common law fraud claim should be rejected. While a transferee court in a case transferred to it by operation of 28 U.S.C. § 1407(a) may apply its law with respect to federal claims, it must apply the law of the transferor court with respect to state law claims. *In re W. States Wholesale Natural Gas Antitrust Litig.*, 2006 U.S. Dist. LEXIS 54696, at *4-5 (D. Nev. Aug. 3, 2006), *rev'd on alternate ground*, 243 Fed. Appx. 328 (9th Cir. 2007)).

C. CitiStreet's Purported Additional Bases For Dismissing Apogee's CFA And FSAA Claims Lack Merit.

1. Apogee's Statutory Fraud Claims Are Not Time Barred.

Apogee's claims under the Minnesota Consumer Fraud Act ("CFA") and False Statement in Advertising Act ("FSAA") are not time barred. A cause of action accrues under Minnesota's statutory fraud schemes when all elements of the cause of action exist, including the alleged misrepresentation. *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 2002 WL 1023150, at *1 (D. Minn. May 17, 2002); *Klehr v. A. O. Smith Corp.*, 875 F. Supp. 1342, 1352-53 (D. Minn. 1995) (*aff'd*, 87 F.3d 231 (8th Cir. 1996)). Under Minnesota statute, the term "misrepresentation" includes half-truths and omissions. *See, e.g., Johnson v. Hewlett-Packard Co.*, 2002 WL 1050426, at *5 (Minn. Ct. App. May 22, 2002); *Minn. ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 967 (D. Minn. 2001); *Taylor Inv. Corp.*, 169 F. Supp. 2d 1046. Thus, a cause of action for violation of the CFA or FSAA does not accrue until the time of the alleged omission.

Here, Apogee alleges misrepresentations by both commission and omission, as articulated above. Apogee alleges (and can prove) that CitiStreet made knowing misrepresentations to Apogee in *August 2007* about the time required to get out of the Fund. Similarly, Apogee alleges (and can prove) that CitiStreet made misrepresentations by omission when, at least by July of 2007, it failed to inform Apogee that the Fund's strategy had changed. Indeed, CitiStreet concedes that the Complaint alleges the omissions at issue did not occur until 2006 at the earliest. (Def. Br. [Dkt. 27] at 25.) Thus, Apogee's claims under the CFA and FSAA did not accrue until 2006, when CitiStreet made false statements and omissions.

CitiStreet's attempt to frame 1999 as the date of the "sale" in question for purposes of the CFA is incorrect as a matter of law. January 1999 is merely the date when Apogee made the

Fund available to Plan participants. But the sales themselves were made to individual Plan participants throughout the period from January 1999 through August 2007. Thus, CitiStreet ran afoul of the CFA (and Apogee's cause of action accrued) when CitiStreet failed to disclose the change in the Fund's strategy in 2006 and, in effect, misrepresented to Plan participants that the Fund was still a "conservative", "stable", "risk-controlled", or "well-diversified" investment.

2. The Consumer Fraud Act Contemplates Sales Of Securities.

Under the CFA, "[m]erchandise is broadly defined as 'any objects, wares, goods, commodities, intangibles, real estate, loans, or services.'" *Twardy v. L.B. Sales, Inc.*, 2000 WL 821662, at *2 (Minn. App. June 27, 2000) (citing Minn. Stat. § 325F.68, subd. 2). Minnesota courts have found that securities and related instruments fall within this definition of merchandise. *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 728 (Minn. 1983)⁴ (*unrelated section superseded by statute*, Minn. R. Prof. Con. 1.9(a)); *LeSage v. Norwest Bank Calhoun-Isles, N.A.*, 409 N.W.2d 536 (Minn. App. 1987); *Meyer v. Dygert*, 156 F. Supp. 2d at 1086.

3. CitiStreet Made False Statements In Advertisements It Disseminated To Apogee Plan Participants.

CitiStreet made false or deceptive statements in connection with advertising in two ways. First, CitiStreet made false statements in advertisements that it distributed or caused to be distributed to Plan participants in 2006 – when, as the Complaint alleges, the Fund's strategy had changed – and thereafter. *See* Minn. Stat. § 325F.67. **Redacted**

⁴ In *Jenson*, the Minnesota Supreme Court held that "the statute applies to the sale of investment contracts, since the term 'merchandise' is defined in the act as including both 'commodities' and 'intangibles.'" 335 N.W.2d at 728. Though the Minnesota Court of Appeals held otherwise in an unreported decision, *Loop Corp. v. McIlroy*, 2004 WL 2221619, at *6 (Minn. App. Oct. 5, 2004), this case should not be considered good law because it contradicts and ignores *Jenson*.

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(Krypel Aff. Exs. N and O.)

Second, CitiStreet's failure to correct the previous advertisements it disseminated when it knew such advertisements became false, constitutes a separate and distinct violation of the FSAA. As alleged in the Complaint, CitiStreet failed to correct the statements made in its advertisements until August 2007, causing damage to Apogee Plan participants. (Compl. ¶¶ 64, 72.) Thus, Apogee states a claim for violation of the FSAA.

CONCLUSION

CitiStreet's Motion to Dismiss inappropriately asks this Court to determine fact questions, and understates CitiStreet's role in the administration of the Plan. Its Motion should be denied in its entirety.

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