

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Case No. 08-MD-1945 (RJH)

This Document Relates To:

APOGEE ENTERPRISES, INC., ON
BEHALF OF THE APOGEE
ENTERPRISES, INC. 401(K)
RETIREMENT PLAN,

Plaintiff,

Case No. 09-CV-1899 (RJH)

v.

REDACTED FOR PUBLIC FILING

STATE STREET BANK AND TRUST
COMPANY; AND ING
INSTITUTIONAL PLAN SERVICES
LLC, FORMERLY KNOWN AS
CITISTREET LLC,

Defendants.

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ING
INSTITUTIONAL PLAN SERVICES LLC'S (F/K/A CITISTREET, LLC)
MOTION TO DISMISS**

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January 15, 2010

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ARGUMENT

I.

APOGEE'S ERISA CLAIMS SHOULD BE DISMISSED

A. Apogee's ERISA Claims (Claims 1-3) Fail Because CitiStreet Was Not a Fiduciary

As shown in CitiStreet's moving brief, the facts alleged in the Complaint show that CitiStreet performed no more than ministerial tasks for the Plan, and thus was not a fiduciary under ERISA. (Def. Mem. at 9-15.) Apogee's response does not point to any allegations showing that CitiStreet exercised discretionary authority over any Plan assets or provided investment advice for a fee—the predicates for status as a fiduciary. (*Id.* at 14-15.) Instead, Apogee argues that CitiStreet was a fiduciary because (a) CitiStreet “misrepresent[ed] to Apogee how long it would take to withdraw from the Fund and thereby discourage[ed] Apogee from withdrawing Plan assets from that Fund” (Pl. Mem. at 11-12); and (b) it “attend[ed] PIC meetings and reported on the performance and strategy of the Plan's investment funds” (*id.* at 11).

Under governing Department of Labor regulations and settled case law, such alleged conduct does not make CitiStreet a fiduciary. Apogee ignores the Second Circuit and New York district court cases cited in CitiStreet's moving brief that hold that the services provided by CitiStreet do not make it a fiduciary. (Def. Mem. at 10-13.) Apogee does not even cite or attempt to distinguish *New York State Teamsters Council v. Centrus Pharmacy Solutions*, 235 F. Supp. 2d 123 (N.D.N.Y. 2002), which is “on point.” (Def. Mem. at 13.) And, although Apogee asserts that “CitiStreet took on a greater role than that of a third-party administrator” (Pl. Mem. at 12), it fails to address the specific provision of the regulation that “[p]reparation of reports concerning participants' benefits” or “[m]aking recommendations to others for decisions

with respect to plan administration” does not give rise to fiduciary status. 29 C.F.R. § 2509.75-8 (quoted in Def. Mem. at 10-11).

The cases on which Apogee relies are inapposite. In *Briscoe v. Fine*, 444 F.3d 478 (6th Cir. 2006), the principal case on which Apogee relies (Pl. Mem. at 12), the defendant “had the power to write checks on the plan account . . . and exercised the power before and after its contractual relationship with the Company ended.” *Briscoe*, 444 F.3d at 494. The Complaint does not and cannot allege that CitiStreet had anything like such control over the Plan’s assets. Indeed, the Complaint itself concedes that it was the Apogee PIC— not CitiStreet— that decided to stay invested in the Bond Market Fund. (¶ 86.)¹

Likewise, Apogee’s contention that “a party may become a fiduciary by ‘actively assum[ing] the duty to communicate with Plan participants’” (Pl. Mem. at 10 (citation omitted)) is irrelevant, because CitiStreet is not alleged to have assumed any duty to communicate with the Plan participants. And the principal case on which Apogee relies in this respect, *Landry v. Air Line Pilots Ass’n International*, 901 F.2d 404 (5th Cir. 1990) (cited in Pl. Mem. at 11), is inapposite, because the court there relied on “indications” that the authority of the plan administrator who had been hired by the defendant union was “subordinated to and dependent upon the decisions by [the union].” *Id.* at 420. Apogee does not allege that it was “subordinated

¹ Apogee’s reliance on 29 C.F.R. § 2550.404c-1(b) and *In re Westar Energy, Inc., ERISA Litig.*, Case No. 03-4032, 2005 U.S. Dist. LEXIS 28585, at *10 n.14 (D. Kan. Sept. 29, 2005) (Pl. Mem. at 12.) is similarly inapposite. The regulation Apogee cites merely sets forth the requirements for an ERISA 404(c) plan, and the *In re Westar* court cites the regulation for the requirements for “a finding that participants had ‘independent control’ of their investments” under ERISA § 404(c). Section 404(c) has no bearing on whether CitiStreet was a plan fiduciary.

to” any decisions by CitiStreet. Courts frequently have dismissed ERISA claims in similar circumstances. (Def. Mem. at 9-15.)²

B. In Any Event, the Complaint Does Not Plead a Claim Against CitiStreet for Violation of ERISA § 404(a)(1)

Even if the Complaint had adequately alleged that CitiStreet was a fiduciary of the Plan, Apogee’s ERISA claims still should be dismissed because the Complaint fails to identify any untrue statements by CitiStreet or any facts showing that CitiStreet knew of any change in how State Street managed the Bond Market Fund. (See Def. Mem. at 15-17.) Apogee asserts that such a claim can be based on its allegations that CitiStreet reported to the Plan’s PIC and was a “conduit of information between State Street and Apogee.” (Pl. Mem. at 16.)³ But what is absent is any allegation that CitiStreet knew or had access to any information about the Bond Market Fund beyond what it disclosed to Apogee. Absent such an allegation, there is no basis to conclude that CitiStreet should have known that the information supplied to it was false.⁴

Apogee also contends that because its Investment Policy Statement requires investment managers or their representative to inform the PIC of “information relating to any changes in investment philosophy, ownership structure, or financial condition” (Pl. Mem. at 14), and that because Apogee never learned from CitiStreet that State Street had changed its

² Not only are the majority of cases cited by Apogee from outside the Second Circuit, but they also involved—unlike here—detailed factual allegations that defendants had discretion and control over the plan’s assets. (See Pl. Mem. at 7-9.)

³ Apogee’s assertion that CitiStreet functioned as the “sole conduit of information between Apogee and State Street” (Pl. Mem. at 8 (emphasis added)) is contradicted both by the Complaint itself (¶64, 80, 81, 87, 89, 90) and the extrinsic information submitted by Apogee (Krypel Aff. Ex. I (Saarinen Tr. 36:14-16)), all of which show repeated direct communications between Apogee and State Street.

⁴ The cases cited by plaintiff are in accord, as in each of them the defendants were alleged to have had actual knowledge of the falsity of information. (Pl. Mem. at 15-16.)

investment strategy, CitiStreet thereby breached its fiduciary duties. Courts do not hold defendants liable in such circumstances where, as here, there are no facts showing that the defendant knew or should have known that the information it received from another party was allegedly inaccurate. *See, e.g., Silverman v. Mut. Ben. Life Ins. Co.*, 138 F.3d 98, 103 (2d Cir. 1998) (granting summary judgment where defendant “had no reason to be suspicious of” the other fiduciary’s fraudulent actions).⁵

C. CitiStreet is Not Liable for State Street’s Alleged Breach of Fiduciary Duty

Apogee alleges that even if CitiStreet is not a fiduciary it is liable for State Street’s alleged fiduciary breach by “knowingly participat[ing]” in State Street’s breach of its duties. (Pl. Mem. at 12-13.) But, Apogee does not allege any facts that indicate that CitiStreet knew or even should have known about State Street’s breach. Where, as here, Apogee has failed to allege that CitiStreet “knew or should have known” of State Street’s breach, courts dismiss claims like those asserted by Apogee. *DeLaurentis v. Job Shop Tech. Servs., Inc.*, 912 F. Supp. 57, 64 (E.D.N.Y. 1996) (granting motion to dismiss where plaintiffs failed to “explain how or why [defendants] knew or should have known [of co-defendant’s breach of fiduciary duty], or why [defendants] would practice such a deception”).

D. The Materials Submitted by Apogee Underscore the Complaint’s Pleading Deficiencies

In apparent recognition that the Complaint fails to state a claim under ERISA, Apogee has submitted over 250 pages of materials extrinsic to the Complaint. These documents fall into none of the categories of documents that a court is permitted to consider on a motion to dismiss, and should be disregarded. *See Fed. R. Civ. P. 12(d); Global Network Commc’n, Inc. v.*

⁵ The cases cited by plaintiff all are in accord as each imposes a duty to disclose only when the defendant knew or had reason to know of the other party’s alleged breach. (Pl. Mem. at 14-

City of New York, 458 F.3d 150, 155 (2d Cir. 2006) (reversible error for district court to consider extrinsic evidence on a motion to dismiss); *Kelly v. Huntington Union Free Sch. Dist.*, Case No. 09-CV-2101, 2009 WL 4981182, at *4 (E.D.N.Y. Dec. 23, 2009) (“[T]he Court cannot consider defendants’ evidentiary submissions in deciding the instant motion to dismiss.”).⁶

In any event, the extrinsic materials Apogee has submitted add nothing to its claims; if anything, they demonstrate that, despite the millions of pages of documents that have been produced by CitiStreet and State Street, Apogee has found no evidence to support its allegations of wrongdoing by CitiStreet. For example, Apogee repeatedly cites Exhibit L in its submissions as evidence that CitiStreet knew of subprime exposure in the Bond Market Fund and agreed to hide such information from Apogee (Pl. Mem. at 6, 13, 22), and that it knew that other clients were liquidating their positions in the Bond Market Fund in less than 60 to 90 days (*id.* at 7). But, this document does no such thing.

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(Krypel Aff. Ex. L at 1653 (emphasis added).)⁷ REDACTED

15.)

⁶ Apogee’s reliance on materials extrinsic to the pleadings is particularly inappropriate in view of the Court’s ruling, at the November 23, 2009 pre-motion conference for this motion, permitting CitiStreet to move to dismiss under Fed. R. Civ. P. 12(b)(6) and rejecting Apogee’s contention that CitiStreet should await the completion of discovery and then move for summary judgment. As the parties have advised the Court, they have agreed, subject to the Court’s approval, to stay depositions pending a ruling on the present motion.

⁷ Moreover, as the Complaint acknowledges, REDACTED CitiStreet provided Apogee with information about subprime exposure in the Bond Market Fund. (¶ 76.)

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REDACTED (*Id.*) The document does not support Apogee's claims.⁸

II.

APOGEE'S STATE LAW CLAIMS SHOULD BE DISMISSED

A. Apogee's State Law Claims (Claims 4-7) Are Preempted by ERISA

Where, as here, Apogee's state law claims "relate" to an employee benefits plan, courts routinely hold that such claims are preempted. (Def. Mem. at 17-20.) Despite the plethora of case law to this effect cited in CitiStreet's moving brief, which Apogee almost entirely ignores, Apogee argues that its state law claims are not preempted because (a) "state laws of general application that have only an incidental effect on the administration of ERISA plans" are not preempted (Pl. Mem. at 18), and (b) the "claims relate to defendants' relationship with the plaintiff as a commercial entity" (*id.* at 19). Neither of these arguments is availing.

Plaintiffs ignore the cases from this Circuit and other district courts within this Circuit that have held that state law claims for misrepresentation that "largely reiterate" ERISA claims are preempted (Def. Mem. at 20), and instead rely on cases that stand for the proposition that professional malpractice claims are not preempted because such claims are within a "field[]

⁸ Other "evidence" included by Apogee is similarly unavailing. For example, exhibits P and Q REDACTED do not show what CitiStreet knew when it allegedly told Apogee that it would take 60-90 days to withdraw from the Bond Market Fund on August 9, REDACTED (Pl. Mem. at 7; ¶ 80). Likewise, testimony by a State Street employee that he understood CitiStreet and not State Street had "fiduciary obligations to communicate with clients" (Pl. Mem. at 5 (citing Krypel Aff. Ex. I at 170-71)) is not determinative of CitiStreet's obligations under ERISA as a matter of law.

of traditional state regulation[]” (Pl. Mem. at 18)⁹ or that claims that are not premised on the existence of an ERISA plan are not preempted (*id.* at 18-19).¹⁰ Here, however, Apogee seeks to recoup benefits it believes the Plan should have received, and thus its claims are premised on the existence of an ERISA plan. (Def. Mem. at 19-20.)

In such circumstances, courts have held that the plaintiff’s state law claims are preempted. For example, in *De Pace v. Matsushita Electric Corp. of America*, 257 F. Supp. 2d 543, 569 (E.D.N.Y. 2003), the court held that the plaintiff’s state-law fraud claim was preempted by ERISA because those claims were “premiered on the very existence of the plan,” and required plaintiff to “plead and prove that a pension plan exists, that [defendants] misrepresented the terms of the plan, and that they relied on those misrepresentations.” The court expressly distinguished *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18 (2d Cir. 1996), a case on which Apogee relies heavily (Pl. Mem. at 18), on the ground that in *Geller* no such showing had to be made.¹¹ *De Pace*, 257 F. Supp. 2d at 569. For the same reason, preemption is likewise appropriate here.

Plaintiff’s own cases show that its other theory as to why its state law claims are not preempted—that ERISA does not preempt claims as between “commercial entit[ies]” (Pl.

⁹ See *Gerosa v. Savasta & Co.*, 329 F.3d 317, 323-24 (2d Cir. 2003) (action for actuarial malpractice); *Berlin City Ford, Inc. v. Roberts Planning Group*, 864 F. Supp. 292, 293 (D.N.H. 1994) (action for financial planning professional negligence). This case, by contrast, does not relate to the state’s traditional regulation of specific professions.

¹⁰ *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999) does not, as Apogee argues, stand for the proposition that courts “must” not find state law preempted by ERISA when such a finding would “leave beneficiaries . . . without any remedy at all.” (Pl. Mem. at 18.) Rather, the *Strom* court expressly declined to address preemption. *Strom*, 202 F.3d at 142 n.3.

¹¹ The other cases cited by Apogee (Pl. Mem. at 18-19) are also unavailing in that they pertained to claims wholly unrelated to the existence of a plan.

Mem. at 19)— is inapplicable. In *General American Life Insurance v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993) (Pl. Mem. at 19), the Court explained that claims concerning “commercial” relationships such as those “between the plan and its own employees, or the plan and its insurers or creditors, or the plan and the landlords from whom it leases office space” would evade preemption absent substantive connections to ERISA plans, but held that plaintiff’s state law claim for employee benefits from its insurer was preempted. *Id.* at 1522. Here, plaintiff’s claim, like that in *General American*, relates directly to the plan and the benefits it provides, and thus does not arise from such a purely commercial relationship.

B. The Complaint Does Not Adequately Plead State Law Claims

1. The Complaint Fails to Plead State Law Claims With the Particularity Required by Fed. R. Civ. P. 9(b)

As discussed in CitiStreet’s moving brief, Apogee has not alleged that CitiStreet made statements that were false at the time they were made. (Def. Mem. 20-22.) Although Apogee includes a purported list of misstatements and omissions by CitiStreet (Pl. Mem. at 21), it fails to show that any of CitiStreet’s statements were false at the time they were made.¹² Recasting the alleged misstatements as omissions does not help, because the Complaint likewise does not allege that CitiStreet knew or had reason to know of any allegedly omitted facts. *Malmsteen v. Berdon, LLP*, 477 F. Supp. 2d 655, 664-65 (S.D.N.Y. 2007) (Holwell, J.).

Similarly, although Apogee summarily asserts it “has pleaded . . . that CitiStreet *actually possessed* intent to deceive,” and that therefore it “has adequately pleaded scienter” (Pl. Mem. at 22), it is unable to point to a single allegation in the Complaint reflecting an intent to

¹² Even the assertion that any specific statement was false is absent from the Complaint. Apogee only levied the general allegation that State Street and CitiStreet “made misstatements and omitted to state material facts” (¶¶ 149, 150, 157, 158). “[P]laintiff’s

defraud, as required under Rule 9(b) (Def. Mem. at 22).¹³ Instead, plaintiffs again inappropriately point to material from factual discovery, and draw unsupported conclusions therefrom, using statements made by State Street and its agents to infer the intent of CitiStreet. And, as discussed above (pp. 4-6), even if those materials are considered, they do not support Apogee's claims.

2. The Complaint Fails to State a Claim for Violation of the Minnesota Consumer Fraud Act and False Advertising Act

Minnesota's Consumer Fraud Act requires that plaintiffs plead that CitiStreet made false statements "in connection with the sale of any merchandise." (Def. Mem. at 24.) Apogee argues only that securities are merchandise. (Pl. Mem. at 24.) Regardless, CitiStreet is not alleged to have sold any merchandise to Apogee and the claim should be dismissed. Similarly, Apogee's False Advertising Act claim fails because it has not alleged that CitiStreet made a statement that "amount[s] to commercial advertisement." (Def. Mem. at 24.) In fact,

blanket allegation of falsity here is simply too conclusory." *Global Energy & Mgmt., LLC v. Xethanol Corp.*, No.7 Civ. 11049, 2009 WL 464449, at *3 (S.D.N.Y. Feb. 24, 1999).

¹³ For Apogee's negligent misrepresentation claim it must plead that CitiStreet "has not discovered or communicated certain information that the ordinary person in his or her position" reasonably should have. *Florenzano v. Olson*, 387 N.W. 2d 168, 174 (Minn. 1986). In other words, plaintiffs must allege that defendant "failed to exercise reasonable care or competence in obtaining or communicating the information" that is shown to be false. *Id.* at 175. The Complaint contains no such allegations.

Apogee is incorrect that Minnesota procedural rules rather than Fed. R. Civ. P. 9(b) govern the adequacy of its Complaint. (Pl. Mem. at 22 n.3.) The Federal Rules of Civil Procedure apply to state as well as federal claims asserted in a federal pleading. Indeed, the district court opinion that Apogee itself cites so holds. *In re W. States Wholesale Natural Gas Antitrust Litig.*, Case No. MDL 1566, 2006 WL 2246386, at *2 (D. Nev. Aug. 4, 2006) (cited in Pl. Mem. at 22 n.3).

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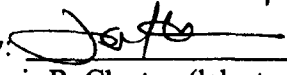
(Pl. Mem. at 25 (citing *Krypel Aff. Exs. N & O*.)¹⁴

CONCLUSION

For the foregoing additional reasons, CitiStreet respectfully submits that its motion to dismiss be granted, and the claims against it in the Complaint be dismissed with prejudice.

Dated: New York, New York
January 15, 2010

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¹⁴ These claims fail for the further reason that they are time barred to the extent that this claim is based on any statements prior to January 26, 2003. (Def. Mem. at 24.) Apogee's argument about events that took place in 2006 is irrelevant.