

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.

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

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December 8, 2009

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Defendant ING Institutional Plan Services LLC (f/k/a CitiStreet LLC)

(“CitiStreet”) submits this memorandum of law in support of its motion, pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b), to dismiss the claims asserted against it by plaintiff Apogee Enterprises, Inc. (“Apogee”).

### PRELIMINARY STATEMENT

Apogee asserts claims in this action under ERISA<sup>1</sup> and Minnesota state law arising from losses allegedly suffered by its employee retirement plan from investing in a fund (called the “Daily Bond Market Fund”; hereinafter the “Bond Fund” or the “Fund”) managed by defendant State Street Global Advisors (together with defendant State Street Bank and Trust Company, “State Street”). Apogee alleges that, although the Bond Fund was presented as a conservative, risk-controlled investment vehicle, State Street changed the Fund’s investment strategy in 2006 by making undisclosed high-risk investments, such as securities backed by subprime mortgages, and employing increased leverage.

CitiStreet provided administrative services for Apogee in connection with its retirement plan, including allegedly reporting on the plan’s investments. CitiStreet had nothing to do with the management or investment strategy of the Bond Fund. It is not alleged to have been—and was not—responsible for deciding to invest plan assets in the Bond Fund, or to have exercised any discretionary control over any of the plan’s assets. It is not alleged to have given—and did not give—investment advice to Apogee about the Bond Fund or anything else. Nevertheless, although State Street has now agreed to a substantial settlement with a class of ERISA plaintiffs similarly situated to Apogee, Apogee now seeks to hold CitiStreet liable for its losses in the Bond Fund, principally on the basis of a single phone call, and without alleging any

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<sup>1</sup> Employee Retirement Security Income Act of 1976, 29 U.S.C. §§ 1001 et seq. (2006).

facts showing either that CitiStreet was an ERISA fiduciary to Apogee or that anything it did caused Apogee damages.

Apogee's claims should be dismissed for at least the following reasons:

*First*, Apogee's claims under ERISA should be dismissed because CitiStreet was not an ERISA fiduciary (a necessary predicate to Apogee's ERISA claims). Under ERISA, a party is deemed a fiduciary only if it is named a fiduciary in the applicable plan documents—which CitiStreet admittedly is not—if it exercises discretion over plan assets, or if it provides investment advice to the plan for a fee. Here, plaintiff alleges no facts—but only insufficient conclusory labels—that CitiStreet exercised any discretionary authority over any plan assets or provided investment advice for a fee. Applicable Department of Labor regulations make clear that purely administrative functions such as those performed by CitiStreet (including reporting functions) do not create fiduciary status under ERISA. Moreover, the controlling Recordkeeping Agreement expressly provides that State Street (CitiStreet's predecessor under that agreement) is not a fiduciary for the plan.

*Second*, even if CitiStreet were a fiduciary—which it is not—the Complaint fails to allege a breach of fiduciary duty or that Apogee was injured by such a breach. The Complaint does not identify any allegedly false statements made by CitiStreet about the Bond Fund or its alleged change in strategy—indeed, it does not identify *any* statements by CitiStreet to Apogee about the Bond Fund after the alleged change in strategy except indisputably accurate statements in mid-2007 about the Fund's losses. Nor does the Complaint allege that CitiStreet was aware of the alleged change in strategy. Likewise, while the Complaint alleges that CitiStreet erroneously told Apogee in August 2007 that it would take 60 to 90 days to exit the Bond Fund, it does not

allege that Apogee was harmed by that statement; on the contrary, it alleges that after that statement was made Apogee elected to *remain* in the Fund.

*Third*, to the extent Apogee seeks monetary damages, its ERISA claims should be dismissed because the relevant provisions of ERISA permit only equitable relief.

*Finally*, Apogee's state law claims for fraud and misrepresentation should be dismissed because they are preempted by ERISA; because they have not been pleaded with the particularity required by Fed. R. Civ. P. 9(b); and because they do not state a claim.

### SUMMARY OF PLAINTIFF'S ALLEGATIONS<sup>2</sup>

#### A. The Parties

Apogee is a Minnesota corporation with its principal place of business in Bloomington, Minnesota. (Compl. ¶ 5; herein cited by paragraph number only.) Apogee offers its employees a 401(k) Retirement Plan (the "Plan"), and "is the sponsor, named fiduciary and plan administrator" of the Plan. (¶ 6.) Apogee's Plan Investment Committee ("PIC") is responsible for administering the Plan. During the relevant period, Ernst & Young and SilverOak Wealth Management served as the Plan's investment advisors. (¶¶ 70, 75.)

State Street Bank and Trust Company ("SSBT") is a Massachusetts trust company and wholly-owned subsidiary of State Street Corporation ("State Street Corp."), with its principal place of business in Boston, Massachusetts. State Street Global Advisors ("SSGA" and together with SSBT "State Street") is SSBT's investment management division. (¶ 7-8.) SSGA "manages and offers a number of mutual funds and related products" including the Bond Fund. (¶ 9.) At

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<sup>2</sup> Solely for purposes of this motion under Fed. R. Civ. P. 12(b)(6), and for no other purpose, CitiStreet does not dispute the well-pleaded allegations of the Complaint, except to the extent that they are inconsistent with the contents of documents of which the Court may take judicial notice. "[I]f the allegations of a complaint are contradicted by documents made a

all times material to this matter State Street has provided “trustee, investment management and other fiduciary services, as well as administrative services, to the Plan.” (¶ 10.)

CitiStreet was allegedly formed in or about December 1999 as a joint venture between State Street Corp. and Citigroup, Inc. (¶¶ 11, 13, 37.) During the relevant period, CitiStreet provided administrative and alleged investment reporting services to Apogee. (¶¶ 38-39.)<sup>3</sup> Apogee does not allege (except in purely conclusory terms, *e.g.*, ¶ 44) that CitiStreet ever managed or had any type of discretionary control over the Plan or any of the Plan’s assets.

**B. CitiStreet Had No Control Over the Bond Fund or Discretionary Control Over the Plan**

The relevant agreements, which are cited and relied upon throughout the Complaint, make clear that CitiStreet did not manage the Bond Fund or any other State Street investment fund and had no discretionary authority over any Plan assets. The Complaint alleges that Apogee and State Street entered into three different agreements, each of which became effective January 1, 1999: the “Defined Contributions Plans Master Trust Agreement” (the “Trust Agreement”), the “Investment Manager Agreement,” and the “Recordkeeping Services Agreement” (the “Recordkeeping Agreement”). (¶¶ 20-24; Declaration of Jonathan Hurwitz, dated December 8, 2009, Ex. 1, 2, 3 (all exhibits are attached to the Hurwitz declaration and are herein cited by exhibit number only.))<sup>4</sup>

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part thereof, the document controls and the court need not accept as true the allegations of the complaint.” *Sazerac Co., Inc. v. Falk*, 861 F. Supp. 253, 257 (S.D.N.Y. 1994).

<sup>3</sup> The Complaint repeatedly states that CitiStreet performed “fiduciary and administrative services” to the Plan (¶ 12; *see also* ¶ 38), but does not specify the nature of any alleged “fiduciary . . . services” that it claims CitiStreet performed.

<sup>4</sup> Because the Complaint specifically cites and relies upon these agreements, the Court may take judicial notice of their contents on this motion. *McCarthy v. The Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007) (on a motion to dismiss, a court may consider the Complaint, attached exhibits, and documents incorporated into the Complaint by reference).

In the Recordkeeping Agreement—which by its terms governs the plan administrative services performed by State Street and later allegedly undertaken by CitiStreet—

## Redacted

While the Investment Manager Agreement and the Trust Agreement imposed on State Street additional obligations to the Plan (Ex. 2, § 2; Ex. 1, §§ 3.1-3.4), the Complaint does not allege that CitiStreet was a party to those agreements or performed any investment management or trust services for Apogee thereunder.

**C. Apogee Nowhere Alleges that CitiStreet Made Any False Statements About the Bond Fund's Strategy**

In 1999, before CitiStreet came into existence, Apogee chose, allegedly at State Street's recommendation, to invest in the Bond Market Fund. (¶¶ 1, 45-46.) Apogee avers that since 1999, "defendants" have represented that the Bond Fund "was a 'conservative,' 'stable,' 'risk-controlled,' and 'well-diversified' 'enhanced bond index fund'" (¶47), but it does not specify any alleged statements by CitiStreet to this effect.

The Complaint further alleges that in 2006, State Street changed the strategy of the Bond Market Fund without disclosing that change to Apogee. (¶ 2.) Specifically, Apogee alleges that State Street began "investing ever greater amounts of the Fund's assets in high-risk investments, including securities backed by subprime mortgage loans" and that State Street also "applied leverage in making these investments, which had the effect of adding greater risk to the Fund." (*Id.*; see also ¶ 54 (alleging this change in strategy had occurred "by 2007")). The Complaint does not allege that CitiStreet was responsible for or even aware of these alleged

changes in the Fund's investment strategy. Nor does the Complaint identify any alleged false statements by CitiStreet regarding the Bond Market Fund or State Street's investment strategy after the alleged change in strategy. While the Complaint attributes to CitiStreet two statements in 2001 and 2004 to the effect that the Fund was risk controlled (§§ 51-52), it does not allege that these statements were inaccurate at the time they were made.

**D. Apogee Does Not Allege that CitiStreet Knowingly Misrepresented the Time to Exit the Bond Fund, that Apogee Relied on CitiStreet's Statement, and that It Incurred Losses as a Result**

According to the Complaint, Apogee first learned of the alleged changed strategy on July 31, 2007. (§ 76.) In early August, Apogee learned that the Fund had lost 3-4% in the month of July, a loss Apogee viewed as "huge." (§§ 78, 84.) On August 9, 2007, Apogee's outside investment advisor, SilverOak Wealth Management, spoke with representatives of State Street and CitiStreet about the Bond Fund's performance. (§§ 80-81.) Allegedly on that call, a CitiStreet employee "stated that it would take 60 to 90 days to exit the Fund" if Apogee chose to do so. (§81.) Despite Apogee's alleged "concern[]" about losses in the Bond Fund and despite being told that it would take between two to three months to exit the fund, at a August 13 meeting, Apogee made the decision to remain in the Fund. (§86.)

Seven days later, on August 21, 2007, CitiStreet and State Street reported to SilverOak that the Bond Fund's assets had dropped from \$292 million to \$160 million – a 45% decline. (§ 87.) On August 24, SilverOak and State Street allegedly had another conference call, without CitiStreet, during which State Street stated that "other plan sponsors" were exiting the fund and that they were "being allowed out . . . within two to three days." (§ 89.) On August 27, 2007, State Street advised Apogee that "there were only 11 participants remaining in the Fund (four of which, it turned out, were the four funds in the Apogee 401(k) Plan that were invested in the Daily Bond Market Fund) . . . ." (§ 90.) Upon receiving this letter, SilverOak called

CitiStreet to ask how long it would take to exit the Bond Market Fund, and consistent with what it had been told by State Street, it was told by CitiStreet that it could exit the Fund “on as little as 48 hours’ notice.” (¶ 91.) Three days later, on August 30, 2007, Apogee exited the Bond Fund. (¶ 97.)

#### **E. Apogee’s Claims**

Apogee asserts six claims for relief against State Street and CitiStreet, as well as a seventh against State Street alone. Apogee’s first two claims arise under ERISA and rest on its allegation that CitiStreet was an ERISA fiduciary. In particular, Apogee alleges that CitiStreet violated its alleged fiduciary duties to Apogee under ERISA by (a) failing to disclose to Apogee State Street’s alleged change in the strategy and risk profile of the Bond Fund beginning in 2006 (¶117); and (b) incorrectly advising Apogee on August 9, 2007 that it would take 60 to 90 days to exit the Fund, and failing to inform Apogee that other plan sponsor investors were being allowed to exit the fund in less time (¶ 127).

Apogee also asserts “in the alternative” four claims under Minnesota state law—for fraudulent and negligent misrepresentation, breach of the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69, and violation of the Minnesota False Statement in Advertisement Act, Minn. Stat. § 325F.67—in all cases “[i]n the event that either State Street or CitiStreet denies that it acted as an ERISA fiduciary . . . .” (¶ 147; *see* ¶¶ 148-177.)

#### **ARGUMENT**

Dismissal of a complaint or cause of action for failure to state a claim is appropriate when a complaint does not “contain sufficient factual matter . . . to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quotation omitted); *see also Haas v. Rhody*, No. 07 Civ. 1021, 2007 WL 2089282, at \*2 (S.D.N.Y. Jul. 20, 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007)).

As the Supreme Court held in *Iqbal*, to survive a motion to dismiss, a plaintiff must plead “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949. “Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Iqbal*, 129 S. Ct. at 1949-50 (punctuation omitted); *Twombly*, 127 S. Ct. at 1974 (where plaintiffs “have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed”); see also *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir.) (complaint must be dismissed where plaintiff fails to “provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level” (quotation marks omitted)), *cert. denied*, 128 S. Ct. 2964 (2008). Moreover, 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 assertion[s]’ devoid of ‘further factual enhancements.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555, 557) (citations omitted).<sup>5</sup>

The Complaint does not satisfy these standards. It fails to allege facts showing that CitiStreet was a fiduciary under ERISA—and the governing Recordkeeping Agreement states expressly that it was not—and thus Apogee’s claims under ERISA are precluded as a matter of law. The Complaint also fails to plead, beyond conclusions and labels, that CitiStreet breached any fiduciary duties. Finally, as we discuss below, as a matter of law, Apogee’s state law claims are preempted by ERISA as a matter of law.

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<sup>5</sup> As the Second Circuit has held that “a transferee federal court should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit,” CitiStreet has cited to cases from the Second Circuit and its district courts for interpretations of ERISA. *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993); *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 90 (2d Cir. 2007).

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

To be held liable under ERISA, a defendant must be a fiduciary for the plaintiff. *Maney v. Fischer*, No. 96 Civ. 0561 (KMW), 1998 WL 151023, at \*4 (S.D.N.Y. March 31, 1998) (“[T]o establish personal liability of individual defendants . . . plaintiffs must first show that these defendants meet the fiduciary definition under [ERISA] § 3(21)(A).”).

Fiduciary status under ERISA is strictly defined. Under the statute, a fiduciary is one who “exercises any discretionary authority or discretionary control” with respect to the management or administration of a plan. 29 U.S.C. § 1002(21)(A)(i). Accordingly, the threshold question of any ERISA claim is whether the entity “has or exercises the described authority or responsibility.” *Flanigan v. Gen. Electric Co.*, 242 F.3d 78, 87 (2d Cir. 2001) (defendant was not a fiduciary where it “had no control over” whether or not the company entered into the bill or the plan trustee’s decision to go forward with it); *see also LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) (granting motion to dismiss claim under ERISA where Complaint did not adequately allege that defendant was a fiduciary). Where—as here—a party such as CitiStreet has not been named as a fiduciary in plan documents, the party may be deemed a “functional” fiduciary by virtue of the services it performs on behalf of a plan. *See* 29 U.S.C. § 1002(21)(A).<sup>6</sup> Where investments are concerned, such services must involve either (1) the exercise of discretion in managing the plan’s investments, or (2) the provision of advice concerning the plan’s investments in exchange for a fee. *Id.*

Conclusory assertions that a defendant was a functional fiduciary or exercised “discretion” or “control” over a plan are not enough to survive a motion to dismiss. *See Haber v.*

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<sup>6</sup> A party is also considered an ERISA fiduciary if it is named as a fiduciary in plan documents. *See* 29 U.S.C. § 1102(a). Apogee admits that it is the named fiduciary of the Plan. (¶ 1.) It does not and cannot allege that CitiStreet was a named fiduciary.

*Brown*, 774 F. Supp. 877, 879 (S.D.N.Y. 1991) (granting motion to dismiss where “[b]eyond these conclusory statements, not a single fact is alleged” to invoke ERISA fiduciary duties) (emphasis omitted). As we now show, the Complaint here does not satisfy this standard.

**1. CitiStreet Did Not Exercise Discretionary Authority Over the Plan’s Assets**

“ERISA . . . states that a person is a fiduciary with respect to a plan ‘to the extent’ that he or she exercises discretion over the management of the plan.” *Harris Trust & Savings Bank v. John Hancock Mut. Life. Ins. Co.*, 302 F.3d 18, 27 (2d Cir. 2002) (quoting 29 U.S.C. § 1002(21)). “[T]he management or disposition language in ERISA refers to the common transactions in dealing with a pool of assets: selecting investments, exchanging one instrument or asset for another, and so on.” *Id.* at 28 (punctuation and quotations omitted).

By contrast, purely administrative functions that do not involve the exercise of discretion over plan assets—such as CitiStreet is alleged to have performed here—do not establish fiduciary status. According to governing regulations issued by the Department of Labor (“DOL”) (the agency charged with administering ERISA),

*a person who performs purely ministerial functions . . . for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.*

29 C.F.R. § 2509.75-8. Thus, according to the DOL, such administrative functions as “[p]reparation of reports concerning participants’ benefits;” the “[p]reparation of employee communications material;” the “[a]pplication of rules to determine eligibility for participation or benefits;” “[c]alculat[ing] services and compensation credits for benefits;” “[m]aintain[ing]

participants' service and employment records;" and "[m]aking recommendations to others for decisions with respect to plan administration" do not create fiduciary status. *Id.*

Courts have similarly recognized that such administrative functions do not constitute the discretionary authority needed to render a defendant a fiduciary. *See LoPresti v. Citigroup, Inc.*, No. 02 CV 6492, 2005 WL 195521, at \*5 (E.D.N.Y. Jan. 18, 2005) (holding that "[m]erely . . . providing advice . . . is not sufficient to establish status as a fiduciary if the entity performing these tasks has no decision-making authority"); *Seneca Beverage Corp. v. Healthnow New York, Inc.*, No. 04-CV-6081, 2004 WL 2075429, at \*6 (W.D.N.Y. Sept. 15, 2004) (granting motion to dismiss where "[a]t best, [defendants] might be said to be in a position to indirectly affect the plan's finances" and "[a]n indirect financial impact on a plan is an insufficient basis upon which to justify finding that defendants are ERISA fiduciaries"); *Georgas v. Kreindler & Kreindler*, 41 F. Supp. 2d 470, 474 (S.D.N.Y. 1999) (holding that defendant was not an ERISA fiduciary where agreements were clear that other parties had "exclusive" decision making authority); *see also Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 292 (7th Cir. 1989) ("merely . . . propos[ing] investments" to a plan administrator is not discretionary authority); *Schloegel v. Boswell*, 994 F.2d 266, 271 (5th Cir. 1993) ("Mere influence over the trustee's investment decisions, however, is not effective control over plan assets.").

Under these standards, the functions CitiStreet is alleged to have performed—including "administrative" functions (¶ 12) and "report[ing] on the performance and strategy of the investment funds" (¶ 39)—do not as a matter of law make CitiStreet a fiduciary. Apogee does not allege that CitiStreet had discretionary authority over the Plan's investments; that it selected the Bond Market Fund as an investment option for Apogee or had the authority to

remove Apogee from the Fund; or that it had the ability to decide how much to invest in the Fund or whether and when to exit the Fund. Indeed, as noted (p. 5, above), the Recordkeeping Agreement—the agreement that governed CitiStreet’s relationship with Apogee—expressly provides that State Street (CitiStreet’s predecessor under that agreement— was not a fiduciary. (See Ex. 3, §§ 2.5, 3.4.)

In similar circumstances, courts have concluded that a defendant was not an ERISA fiduciary. See, e.g., *Vengurlekar v. HSBC Bank USA*, No. 03 Civ. 243(LTS)(DFE), 2009 WL 362003 at \*4 (S.D.N.Y. Feb. 11, 2009) (defendant was not a fiduciary where “there is no evidence that [the defendant] had any decision-making authority with respect to how [the company] was to disburse its general assets at any relevant time”); *New York State Teamsters Council Health & Hosp. Fund v. Centrus Pharmacy Solutions*, 235 F. Supp. 2d 123, 128 (N.D.N.Y. 2002) (dismissing claim because “[d]efendant was merely performing ministerial tasks virtually identical to those set forth in 29 C.F.R. § 2509.75-8 within a framework of policies made by the Fund and, therefore, is not an ERISA fiduciary”). Where as here, “[p]laintiff has failed to allege any exercise of control and discretion by Defendant . . . or to set forth any facts or allegations suggesting that Defendant . . . acted in the manner of a fiduciary. . . .” plaintiff’s claim should be dismissed. *LoPresti v. Citigroup, Inc.*, No. 02 CV 6492, 2005 WL 195521, at \*6 (E.D.N.Y. Jan. 18, 2005); see also *Finkel v. Romanowicz*, 577 F.3d 79, 86-87 (2d Cir. 2009) (affirming dismissal of cause of action for breach of ERISA fiduciary duty because corporate officer’s maintenance of plan assets did not rise to the level of fiduciary tasks); *Hecker v. Deere & Co.*, 556 F.3d 575, 583-84 (7th Cir. 2009) (affirming dismissal of suit for breach of ERISA fiduciary duty and holding that defendant was not a fiduciary because Plan sponsor, not

defendant, had “final say” on selecting funds for the Plan, despite fact that defendant advised Plan sponsor on which funds to select).

*New York State Teamsters* is on point. The defendant in that case administered a prescription drug program on behalf of the plaintiff ERISA plan, and was alleged to have improperly reduced co-payments depriving the plan of 50% of the payments it was owed on drug claims it processed. After reviewing the services the defendant was required to provide to the plan—including, among other things, “[p]rovid[ing] reports to the Fund”—the court concluded that the defendant was not an ERISA fiduciary. *New York State Teamsters*, 235 F. Supp. 2d at 125, 128. This was so, the court held, because “it is clear that the Fund bears ultimate responsibility for all decisions and that defendant is merely carrying out its ministerial obligations under the Agreement, subject to the Fund’s control.” *Id.* at 127. The court also noted that the governing agreement provided that defendant was not a “Trustee of the Trust Fund as a result of entering into this Agreement.” *Id.* The court concluded:

It is clear . . . that the Fund retained control over the management and administration of the plan. Each of the duties imposed upon defendant under the Agreement . . . were purely ministerial and did not involve the exercise of discretion regarding the management or administration of the plan, the disposition of plan assets, or the rendering of investment advice for a fee or compensation. Defendant was merely performing ministerial tasks virtually identical to those set forth in 29 C.F.R. 2509.75-8 within a framework of policies made by the Fund, and, therefore, is not an ERISA fiduciary.

*Id.* at 128.

So too here. CitiStreet is alleged to have performed purely ministerial tasks within the framework of policies made by Apogee. It is not alleged to have exercised discretion regarding the management or administration of the plan or the investment or disposition of any

plan assets. Accordingly, it is not an ERISA fiduciary, and Apogee's claims against it under ERISA should be dismissed.

**2. CitiStreet Did Not Provide Investment Advice for a Fee**

The Complaint likewise does not establish that CitiStreet was a fiduciary by virtue of rendering investment advice for a fee under ERISA § 3(21)(A). (*See* p. 9, above.) Under applicable Department of Labor regulations, a party without discretionary authority with respect to purchasing or selling securities can only become an investment advice fiduciary if it (i) renders advice regarding the advisability of purchasing or selling securities, (ii) it does so on a regular basis "pursuant to a mutual agreement, arrangement, or understanding, . . . that such services will serve as *a primary basis for investment decisions with respect to plan assets,*" and (iii) its advice is individualized to the needs of the plan. 29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (emphasis added).

The Complaint does not allege any of these elements. The Complaint does not contain a single allegation that CitiStreet provided *any* investment advice to Apogee regarding the advisability of purchasing or selling securities; that any mutual agreement for such services existed; that CitiStreet would provide advice that would serve as a "primary basis" for Apogee's investment decisions; or that CitiStreet would provide investment advice individualized to the needs of the plan. The Complaint's allegations that CitiStreet provided administrative services to Apogee and "reported on the performance and strategy of the investment funds held by the Plan" (¶ 39) does not come close to satisfying the terms of 29 C.F.R. 2510.3-21(c). For this reason, too, Apogee's ERISA allegations should be dismissed. *See, e.g., Elliot v. Mitsubishi Cement Corp.*, No. 07-03509, 2008 WL 4286985, at \*6 (C.D. Cal. Sept. 15, 2008) (dismissing complaint where plaintiffs "fail[ed] to allege even the existence of any mutual understanding regarding investment advice."); *Brown v. Roth*, 729 F. Supp. 391, 397 (D.N.J. 1990) (granting summary

judgment where “[i]n the absence of a mutual agreement or understanding between the parties that [defendant’s] advice would be the primary basis for the Trust’s investing decisions . . . the Court finds that [defendant]’s provision of advice on two occasions is too infrequent to raise the inference that advice was provided on a regular basis to the Trust.”).

**B. Even if CitiStreet were an ERISA Fiduciary, The Complaint Does Not Plead a Claim against CitiStreet for Violation of ERISA § 404(a)(1)**

Even apart from its failure to allege that CitiStreet was a fiduciary, Apogee’s ERISA claims should be dismissed because the Complaint fails to allege any breach of fiduciary duty by CitiStreet or that any such alleged breach harmed Apogee.

ERISA has been interpreted to “impose[] a ‘legal duty to disclose to the beneficiary only those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection.’ *In re Bausch & Lomb Inc. ERISA Litig.*, No. 06-CV-6297, 2008 WL 5234281, at \*9 (W.D.N.Y. Dec. 12, 2008) (dismissing claim for failure to adequately plead breach of a fiduciary duty) (citation omitted); *see also Young v. Gen. Motors Inv. Mgmt Corp.*, 325 Fed. Appx. 31 (2d Cir. 2009) (affirming dismissal of claims and holding that “ERISA section 404(a)(1) . . . provides that a fiduciary must act ‘with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims’”).

Apogee alleges that CitiStreet breached fiduciary duties by failing “to disclose to Apogee and the Plan’s participants that beginning in or about 2006” State Street had changed the Bond Fund’s investment strategy and by failing to disclose at any point between August 9 and August 24 that “other plan sponsor investors were being allowed to exit the Fund on a much shorter time table.” (¶ 127.) But Apogee does not allege that CitiStreet made any statements to

Apogee about the Bond Fund's investment strategy that were untrue at the time they were made. (E.g., ¶¶ 54-55.) Nor does the Complaint allege that CitiStreet knew of any change in the Bond Fund's strategy or any other facts about the Bond Fund's strategy that it did not disclose to Apogee. In the absence of such allegations, Apogee's claim that CitiStreet breached its fiduciary duties by failing to disclose this alleged information should be dismissed. *See In re Citigroup ERISA Litig.*, No. 07 Civ. 9790, 2009 WL 2762708, at \*25 (S.D.N.Y. Aug. 31, 2009) (“[P]laintiffs’ claim against the [defendants] nonetheless fails because the complaint does not contain facts showing that [defendants] knew or should have known anything about Citigroup’s potential losses related to subprime mortgages. Nor does the complaint contain facts showing that the [defendants] knew or should have known anything about the allegedly false and misleading information in Citigroup’s SEC filings.”).

The Complaint likewise fails to allege plausibly (as required by *Iqbal*) that CitiStreet’s alleged statement on August 9, 2007 that it would take 60 to 90 days to exit the Bond Fund harmed Apogee. As noted (p. 6, above), the Complaint alleges that even *after* hearing that it would take 60-90 days to exit the Bond Fund, the Plan’s fiduciaries decided “to remain in the fund, while monitoring it closely.”<sup>7</sup> (¶ 86.) Any losses Apogee suffered after August 9, 2007 from declines in the value of the Bond Fund were thus the result of Apogee’s own decision to remain in the Fund, and were not suffered because of any reliance on CitiStreet’s statements. Because Apogee has failed to allege that it relied on CitiStreet’s alleged statements to its detriment, its claims for breach of fiduciary duty regarding the time to withdraw from the Bond

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<sup>7</sup> While the Complaint alleges in conclusory fashion that this decision was somehow “based on the representations of State Street and CitiStreet” (¶ 86), this allegation makes no sense. If Apogee believed, as it alleges, that the Bond Market Fund was being mismanaged and that it would take 69-90 days to withdraw from the Fund, the only logical action would have been to submit a request to withdraw from the Fund immediately, not to remain in the Fund.

Fund should be dismissed. *See, e.g., Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 459-60 (3d Cir. 2003) (affirming dismissal where “there is no reasonable reading of [the] complaint— even under the liberal pleading requirements contained in Rule 8 of the Federal Rules of Civil Procedure— pursuant to which [the plaintiff] can be said to have alleged a material misrepresentation by [the defendant] upon which she relied to her detriment”); *Henkin v. AT&T Corp.*, 80 F. Supp. 2d 1357, 1363 (N.D. Ga. 1999) (holding that “the putative class members could not have suffered any injury as a result of their reliance on such a misrepresentation” because “[p]laintiffs did not quit their jobs in reliance on statements by Defendants”).

**C. To the Extent Apogee Seeks Monetary Damages, Its Claim Should be Dismissed**

Plaintiffs allege that “defendants caused the Plan to lose more than \$5 million” (¶ 4), and that it is entitled to relief pursuant to ERISA § 502(a)(3). (¶¶ 125, 137.) “[E]quitable relief under § 502(a)(3) refers to ‘those categories of relief that were typically available in equity,’ . . . and does not generally include money damages, which are ‘the classic form of legal relief’ . . . .” *See In re State Street Bank & Trust Co. ERISA Litig.*, 07 Civ. 8488 (RJH), Docket No. 87 (S.D.N.Y. Sept. 30, 2008) (Holwell, J.) (citation omitted). Further, “[f]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant’s possession.” *Id.* For the reasons set forth in this Court’s prior opinion in the related *Prudential* matter, to the extent that Apogee’s claim seeks “restitution and disgorgement,” its claims should be dismissed because ERISA § 502(a)(3) permits only equitable relief, and Apogee’s complaint seeks monetary relief, which is a legal claim and is unavailable under ERISA § 502(a)(3). *See id.*

**D. Apogee’s Minnesota Law Claims (Claims 4-7) Are Preempted by ERISA**

Apogee asserts that if CitiStreet “denies that it acted as an ERISA fiduciary” then it should be held liable under Minnesota state law. (¶ 147.) But whether or not CitiStreet was an

ERISA fiduciary, each of Apogee's state law claims arises from the administration of the Plan, and thus is preempted by ERISA.

"Section 514(a) of ERISA explicitly preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.'" *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 9 (2d Cir. 1992) (citing 29 U.S.C. § 1144(a)). "The United State Supreme Court . . . confirmed that a state law 'relates to' an employee benefit plan if it 'has a connection with or reference to such plan,' whatever the state's underlying intent." *Billinger v. Bell Atlantic*, 240 F. Supp. 2d 274, 286 (S.D.N.Y. 2003) (citing *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990)); see also *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) ("[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted."); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989) ("[L]aws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee."). "Indeed, even state law claims that do not explicitly refer to employee benefit plans, but which merely arise from the administration of such plans, whether directly or indirectly, are preempted. Therefore, 'a state law may "relate to" a benefit plan, and thereby be preempted even if the law is not specifically designed to affect such plans or the effect is only indirect.'" *Billinger*, 240 F. Supp. 2d at 286 (citation omitted); see also *Gianetti v. Blue Cross & Blue Shield of Connecticut, Inc.*, No. 3:07cv01561 (PCD), 2008 WL 1994895, at \*3 (D. Conn. May 6, 2008) ("[I]f the alleged liability is derived from or dependent upon the existence and administration of an ERISA-regulated benefit plan, then the

state-law claims are not ‘entirely’ independent of the federally regulated contract itself,’ and are therefore preempted.” (citation omitted)).

As such, “[a] state common law action which merely amounts to an alternative theory of recovery for conduct actionable under ERISA is preempted.” *New York Dist. Council of Carpenters Pens. Fund v. Perimeter Interiors, Inc.*, No. 06 Civ. 6377 (WHP), 2009 WL 362640 (S.D.N.Y. Feb. 13, 2009) (citation and quotation omitted) *see also Henry v. Dow Jones*, No. 08 Civ. 5316 (NRB), 2008 WL 210680, at \*4 (S.D.N.Y. Jan. 28, 2009) (holding that plaintiff’s state law claims were preempted because he was “seeking to secure benefits under an ERISA plan through the use of ‘alternate enforcement mechanisms’”).

It is immaterial for preemption purposes that CitiStreet is not an ERISA fiduciary. In determining whether or not a claim is preempted, courts “do not consider . . . which defendants would be liable for any damages, for no matter where liability rests, these claims ‘relate to’ an ERISA plan and are preempted.” *Gustafson v. Bell Atl. Corp.*, 171 F. Supp. 2d 311, 328 (S.D.N.Y. 2001); *see also Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992) (holding that ERISA preempted state law claims even if it would leave the plaintiff with no remedy for his state law claims); *Wasmund v. Meritain Health, Inc.*, No. 08-CV-498, 2008 WL 4415199 (W.D.N.Y. Sept. 24, 2008) (holding that plaintiff’s claim was preempted by ERISA and dismissing ERISA claim because defendant was not a fiduciary).

Here, in its state law claims, Apogee seeks to recoup benefits it believes the plan should have received, had participants’ money been invested as defendants allegedly represented it would. Further, as the Complaint makes explicit, these state law claims are premised on exactly the same allegations on which Apogee’s ERISA claims are based. (¶ 147.) Recently, another court in this district held that a plaintiff’s fraudulent inducement claim was preempted

because the state law claims “largely reiterate and are duplicative of the ERISA claims . . . , which allege, *inter alia*, that defendants ‘fraudulently induce[ed] and encourage[d] Plaintiffs and the Class members to opt for [a certain retirement option],’ and that defendants ‘failed to disclose . . . the disadvantages of . . .’” that option. *Watson v. Consolidated Edison of New York*, 594 F. Supp. 2d 399, 408 (S.D.N.Y. 2009) (alterations in original). Apogee’s state law claims for misrepresentation, consumer fraud, and false advertising, are merely alternative theories of recovery and are thus preempted by ERISA. *See Smith*, 959 F.2d at 8 (negligent misrepresentation claims preempted by ERISA); *Gianetti*, 2008 WL 1994895 at \*5-6 (holding that ERISA preempted state law claims for misrepresentation); *Aken v. Xerox Corp.*, No. 07-CV-6253, 2008 WL 2858731 at \*3-4 (W.D.N.Y. July 22, 2008) (negligent misrepresentation claim was preempted); *Gustafson*, 171 F. Supp. 2d 311 (misrepresentation claim preempted).

**E. Even if They Are Not Preempted, Apogee’s State Law Claims Should be Dismissed Because they Have Failed to Plead Plausible Claims**

**1. Apogee has Failed to Plead Its State Law Claims With the Particularity Required by Fed. R. Civ. P. 9(b)**

All of Apogee’s state law claims must be pleaded with the particularity required by Federal Rule of Civil Procedure 9(b). *Madera v. Metropolitan Life Ins. Co.*, 2002 WL 1453827, at \*8 (S.D.N.Y. 2002) (“Such a claim [of negligent misrepresentation] must be plead [sic] in accordance with the particularity requirement of Fed. R. Civ. P. 9(b).”); *see also Trooien v. Mansour*, Civil No. 06-3197(JRT/FLN), 2008 WL 2202720, at \*8 (D. Minn. May 23, 2008) (“[Plaintiff]’s negligent misrepresentation claim is similarly subject to the particularity requirements of Rule 9(b).”); *Moua v. Jani-King of Minnesota, Inc.*, 613 F. Supp. 2d 1103, 1112 (D. Minn. 2009) (applying pleading requirement of Rule 9(b) to Minnesota State False Statement

in Advertising Act and finding that standard not met).<sup>8</sup> To comply with Rule 9(b), a complaint “must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) (quotations omitted).

To the extent that Apogee alleges that CitiStreet either fraudulently or negligently misrepresented the Bond Market Funds’ strategy, the complaint should be dismissed because Apogee has failed to identify any misstatement by CitiStreet. As noted (pp. 5-6, above), Apogee alleges that State Street changed the strategy of the Bond Market Fund in 2006 (¶ 2), but it identifies no statements by CitiStreet about the Fund’s strategy after that alleged change. The only post-2006 statements attributed to CitiStreet were accurate disclosures concerning the problems with the Bond Fund. (*See, e.g.*, ¶¶ 61, 76, 80.) Where, as here, plaintiff has failed to attribute a misstatement to a defendant, courts dismiss plaintiffs’ fraud claims. *See, e.g., Skydell v. Ares-Serono S.A.*, 892 F. Supp. 498, 502 (S.D.N.Y. 1995) (dismissing fraud claim because

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<sup>8</sup> To properly plead a claim for fraudulent misrepresentation under Minnesota law, plaintiffs must plead that CitiStreet: “(1) made a representation (2) that was false (3) having to do with a past or present fact (4) that is material (5) and susceptible of knowledge (6) that the representor knows to be false or is asserted without knowing whether the fact is true or false (7) with the intent to induce the other person to act (8) and the person in fact is induced to act (9) in reliance on the representation (10) that the plaintiff suffered damages (11) attributable to the misrepresentation.” *Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1061 (D. Minn. 2001). To plead a claim for negligent misrepresentation, Apogee must plead “(1) a duty of reasonable care in conveying information; (2) breach of that duty by negligently giving false information; (3) reasonable reliance on the misrepresentations, which reliance is the proximate cause of physical injury; and (4) damages.” *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 923 (8th Cir. 2004). To state a claim for Consumer Fraud under Minn. Stat. 325F.69 plaintiffs must plead that CitiStreet engaged in “fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice with the intent that others rely on the allegedly improper statements or conduct.” Further, Apogee must plead that CitiStreet knew that the statements were false when made. *Taylor Inv. Corp.*, 169 F. Supp. 2d at 1063-64. Finally, Minnesota’s False Advertising Act “makes it illegal for a person or corporation to make a false or misleading representation in an advertisement to the public.” *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 68 F. Supp. 2d 1064, 1070 (D. Minn. 1999).

“[t]he complaint fails to allege that [defendant] committed any misstatements or non-disclosures, but rather attributes all of the complained-of statements or omissions to” another defendant)

Apogee also has failed to plead particular “facts that give rise to a strong inference of fraudulent intent.” *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 2004); *see also Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (“because ‘we must not mistake the relaxation of Rule 9(b)’s specificity requirement regarding condition of mind for a license to base claims of fraud on speculation and conclusory allegations[,] ... plaintiffs must allege facts that give rise to a strong inference of fraudulent intent.’” (citation omitted)). To create a “strong inference” of fraudulent intent, a plaintiff may allege facts showing a motive, or “[w]here motive is not apparent, . . . by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.” *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001) (quotation omitted).

Apogee has not pleaded facts showing a motive because it has not alleged that CitiStreet stood to benefit from the changes in the Bond Fund’s investment strategy. “Motive would entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged.” *Jaufman v. Levine*, 2007 WL 2891987, at \*7 (N.D.N.Y. Sept. 28, 2007) (citing *Shields*, 25 F.3d at 1130). The Complaint does not contain a single allegation that CitiStreet stood to benefit from Apogee’s investment in the Bond Market Fund, or that it stood to lose money by Apogee’s exit from the Fund. As the Complaint does not plead facts showing fraudulent intent, Apogee’s fraud claims should be dismissed.

**2. Apogee Has Failed to Plead a Plausible claim for Violation of the Minnesota Consumer Fraud Act and False Advertising Act**

(a) *Apogee's Minnesota Consumer Fraud and False Advertising Claims are Time Barred*

Apogee's consumer fraud claim is based on its allegation that CitiStreet made misstatements to Apogee "in connection with the sale of units in the Daily Bond Market Fund to Apogee and Plan participants." (¶ 163.) Similarly, the False Statement in Advertising Act is based on Apogee's nonspecific allegation that "CitiStreet's advertising of the Daily Bond Market Fund contained material assertions, misrepresentations, or statements of fact which were untrue, deceptive and/or misleading." (¶ 172.) Both Minnesota's Consumer Fraud and False Advertising statutes are subject to a six year statute of limitation. *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 926 (8th Cir. 2004); *Parkhill v. Minnesota Mutual Life Ins. Co.*, 174 F. Supp. 2d 951, 956 (D. Minn. 2000). "[S]tatutory fraud claims accrue at the time the alleged statutory violation occurred." *Parkhill*, 174 F. Supp. 2d at 957; *see also Tuttle*, 277 F.3d at 926 (holding that the statute of limitations for the statutory actions do not include "discovery allowance as does the statute of limitations applicable to fraud claims").

As discussed above, CitiStreet did not exist in 1999 when Apogee made the decision to invest in the Bond Market Fund. Further, Apogee does not ever suggest that CitiStreet had any communications with plan participants about the Bond Market Fund's strategy. Apogee filed this Complaint on January 26, 2009. To the extent that this claim is based on any statements by CitiStreet that were made prior to January 26, 2003, including Apogee's decision in 1999 to include the Bond Market Fund and CitiStreet's 2001 and 2002 presentations to the PIC, the claims are time barred.

(b) *Additional Basis for Dismissing the Consumer Fraud Claim*

Finally, Apogee's Consumer Fraud claim fails because in order to plead a claim under Minn. Stat. 325F.69, plaintiffs must plead that the allegedly false statements were made "in connection with the sale of any merchandise." *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 68 F. Supp. 2d 1064, 1069 (D. Minn. 1999) ("[T]o sustain their consumer fraud . . . claim[], Plaintiffs must allege that Defendants made fraudulent or misrepresentative statements in connection with a sale of goods."). The statute defines merchandise as "any objects, wares, goods, commodities, intangibles, real estate, loans, or services." Minn. Stat. 325F.68. Securities are noticeably absent from this definition. At least one Minnesota appellate court has held that "the fact that the legislature created a separate statutory scheme to address securities violations – Minnesota Securities Act, . . . supports the district court's conclusion that securities are not included in the definition of merchandise." *Loop Corp. v. Mcllcroy*, No. A04-362, 2004 WL 2221619, at \*6 (Minn. App. Dec. 22, 2004).

Moreover, even if investments in the Bond Fund are included within the definition of merchandise, the claim must still be dismissed because CitiStreet did not exist at the time that Apogee entered into the Bond Fund and thus could not have made any statement in connection with the sale of the Bond Fund to Apogee. For that reason, too, Apogee's Consumer Fraud claim should be dismissed.

(c) *Additional Basis for Dismissal of the False Advertising Claim*

In order to plead a claim under Minnesota Statute 325F.67 a party must identify a statement that "amount[s] to commercial advertising." *Grp Health Plan, Inc.*, 58 F. Supp. 2d at 1070. Although Apogee vaguely alleges that "CitiStreet advertised the Daily Bond Market Fund" it does not specifically identify any commercial advertisements by CitiStreet, let alone any with a false statement. (¶ 171.) Further, while the complaint does allege that in 2004, CitiStreet,

along with State Street, “provided Apogee with additional information describing SSgA’s ‘Core Aggregate Strategy,’” it also alleges that the strategy did not change for the Bond Market fund until 2006. (¶¶ 2, 52.) Thus, at the time that CitiStreet allegedly made a statement about the Bond Fund’s strategy in 2004, it was not false or deceptive. Because Apogee has not identified any false advertisements by CitiStreet, Apogee’s False Statement in Advertising claim should be dismissed.

### CONCLUSION

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

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