UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRUCE W. CRESS; PETER OCHABAUER; WALTER BOULDEN; MARK A. KNUDSEN; CHRISTOPHER J. PARKYN; AMANDA R. OCHABAUER; and BERNARD C. LARKIN, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

GARY L. WILSON; DOUGLAS STEENLAND; RICHARD ANDERSON; NORTHWEST COMPENSATION COMMITTEE OF THE BOARD OF DIRECTORS; FREDRIC V. MALEK; DENNIS F. HIGHTOWER; GEORGE J. KOURPIAS; V.A. RAVINDRAN; RICHARD C. BLUM; PENSION INVESTMENT COMMITTEE; TERRI L. KEIMIG, TIMOTHY J. MEGINNES; JUDITH A. MUNZENRIDER; and UNKNOWN FIDUCIARIES 1-100,

Defendants.

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06 Civ. 2717 (JGK)

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiffs, a number of participants in Northwest Airlines' defined benefit pension plans for pilots and for contract employees, bring this putative class action pursuant to section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, against various defendants who are alleged to be fiduciaries of the airline's pension plans. The defendants include members of Northwest's Board of Directors and the Board's Compensation Committee; Northwest's Pension

Investment Committee (whose individual members are unknown to the plaintiffs); several employees who are alleged to have been fiduciaries of the plans; and the placeholder defendants "Unknown Fiduciaries 1-100." The plaintiffs allege that the defendants breached their fiduciary duties and aided and abetted breaches of fiduciary duties all in violation of ERISA by, among other means, failing to take action to prevent Northwest from underfunding its pension plans by approximately $5.7 billion during the period from October 1, 2000 until September 14, 2005, when Northwest filed for Chapter 11 bankruptcy. The allegations pertain to the funding of three defined benefit pension plans: one for pilot employees, one for contract employees, and one for salaried employees (collectively the "Plans").

The plaintiffs assert six causes of action under ERISA, against all defendants unless otherwise specified, including: (1) breach of fiduciary duties for failing to ensure that Northwest properly funded the Plans; (2) breach of fiduciary duties by only the director and Compensation Committee defendants for failing to monitor other fiduciaries; (3) breach of fiduciary duties for failing to provide complete and accurate information regarding Northwest's financial condition to the Plans' participants and beneficiaries; (4) breach of the fiduciary duty to avoid conflicts of interest; (5) participating in or aiding and abetting Northwest's underfunding of the Plans; and (6)

participating in or aiding and abetting Northwest's failure to notify the Plans and their participants of Northwest's underfunding of the Plans.[1]

The defendants have moved to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[2] For the reasons discussed below, the motion is **denied.**

I.

A.

For the purposes of this motion, the facts alleged in the Amended Complaint are accepted as true.

Of the named plaintiffs, Bruce W. Cress, Peter Ochobauer, Walter Boulden, Mark A. Knudsen, and Christopher J. Parkyn are participants in the Northwest Airlines Pension Plan for Pilot Employees who worked for Northwest during the class period. (Am. Comp. ¶¶ 15-16, 18-19, 21.) Amanda Ochabauer and Bernard C.

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[1] The plaintiffs also filed claims against Northwest in its bankruptcy proceedings based on deficiencies in the minimum funding required for the three Plans. Bankruptcy Judge Gropper recently granted the debtors' objection and expunged the claims in light of Northwest's election pursuant to section 402 of the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, 120 Stat. 780 (Aug. 17, 2006) (to be codified in scattered sections of titles 26 and 29 U.S.C.), which "reduced to zero" the balance in the company's ERISA funding standard account while amortizing the liabilities over a prospective seventeen-year period and which provided that the funding deficiency is "deemed satisfied" as a matter of law. In re Northwest Airlines Corp., No. 05-17930, 2007 WL 1295758, at *1 (Bankr. S.D.N.Y. May 1, 2007) (quoting sections 402(e) and 402(f) of the PPA). The defendants in this action were not parties to the claims before Bankruptcy Judge Gropper.

[2] The motion is brought on behalf of all named defendants other than Judith Munzenrider, who at the time of briefing had not been served and had not authorized defense counsel to represent her in this action.

Larkin are participants in the Northwest Airlines Pension Plan for Contract Employees and also worked for the airline during the class period. (Id. ¶¶ 17, 20.) None of the named plaintiffs is a participant in the Northwest Airlines Pension Plan for Salaried Employees, although they bring this action on behalf of participants in that plan as well. (Id. preamble.) Contributions to the three Plans are held under a single master trust, the Defined Benefit Master Trust, which is structured so that each Plan has an undivided commingled interest in all of the trust assets. (Id. ¶ 56.)

Northwest Airlines, Inc. and its parent company Northwest Airlines Corp. (collectively referred to as "Northwest") are sponsors of the Plans. (Id. ¶¶ 23, 26.) The Contract Employees Plan had 53,911 participating employees as of January 1, 2002, and it was underfunded by $741 million on that date. (Id. ¶ 53.) The Pilot Employees Plan had 8,326 participants and was underfunded by $248 million on January 1, 2002, and the Salaried Employees Plan had 10,517 participants and was underfunded by $67 million as of that date. (Id. ¶¶ 54, 55.) At the time the Amended Complaint was filed, the plaintiffs allege on information and belief that the amount of each Plan's underfunding had grown to five or six times its 2002 level. (Id. ¶¶ 53-55.)

Rather than relying on an external fiduciary to manage the Plans, Northwest internalized some of the fiduciary functions.

(Id. ¶ 59.) During the class period, the Plans and their assets were administered and managed by committees selected and monitored by Northwest's Board of Directors or the Compensation Committee of the Board. (Id.) Northwest's Chief Executive Officer ("CEO") had the exclusive authority to act for Northwest as the sponsor of the Plans in some situations. (Id.) The Charter for the Compensation Committee provides that the Board of Directors appoints members of the Compensation Committee and designates its Chairperson. (Id. ¶ 31.) The Charter further provides that the Compensation Committee is responsible for administering Northwest's "stock plans, and such similar stock and incentive compensation plans" and for "exercis[ing] all of the powers, duties and responsibilities of the Board of Directors with respect to such plans." (Id.) The Compensation Committee and its members exercised discretionary authority with respect to the management and administration of the Plans and their assets. (Id. ¶ 34.)

Documents filed with the United States Department of Labor indicate that Northwest's Pension Investment Committee ("PIC") is a fiduciary of the Plans, as are various investment managers hired by the PIC. (Id. ¶ 42.) The plaintiffs are unaware of the identities of the individual members of the PIC. (Id. ¶ 43.)

Defendant Terri L. Keimig served as Northwest's Director of Retirement Savings and Stock Plans during a portion of the class

period. Keimig signed each of the Plans' Forms 5500 filed with the Department of Labor and the IRS for plan year 2004 as the "Plan Administrator." (Id. ¶ 46.) Defendant Timothy J. Meginnes signed the Plans' Forms 5500 for plan years 2003 and 2004 on behalf of Northwest. (Id. ¶ 47.) Defendant Munzenrider signed the Plans' Forms 5500 for plan year 2003 as the "Plan Administrator." (Id. ¶ 48.) The plaintiffs allege upon information and belief that Keimig, Meginnes, and Munzenrider exercised discretionary authority with respect to the management and administration of the Plans and their assets. (Id. ¶¶ 46-48.)

Northwest has suffered from financial problems in recent years, posting a positive net income in only seven of twenty quarters since 2000 and last showing a profit in the final quarter of 2003. (Id. ¶ 71.) The company sustained net losses of $423 million in 2001 and $798 million in 2002, posted a net profit of $248 million in 2003, and then sustained a net loss of $878 million in 2004 and a net loss of $675 million in the first two quarters of 2005. (Id. ¶¶ 94-98.) Northwest's debt ratings were downgraded in the spring and summer of 2005 and various news articles described the company's financial problems during this period. (Id. ¶¶ 99-107.) Northwest filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York on September 14, 2005. (Id. ¶¶ 24, 27.)

At the time Northwest filed for bankruptcy, the Plans were underfunded by $5.7 billion. (Id. ¶¶ 108-09.) The plaintiffs allege that Northwest failed to fund the Plans as it was required to do under ERISA. (Id. ¶ 137.)

The plaintiffs allege that the defendants, many of whom are officers and directors of Northwest, had knowledge of the financial health of the company and therefore knew or should have known that the Plans would be "radically underfunded." (Id. ¶ 115-18.) They further allege that a reasonably prudent fiduciary in the circumstances would have acted to protect the participants against losses that could have been avoided. (Id. ¶ 119.)

The plaintiffs also allege that the defendants failed to disclose the Plans' significant funding shortfalls to their participants, preventing the participants from making informed decisions regarding the Plans. (Id. ¶¶ 122-24.) Also, because a significant percentage of director and officer compensation during the class period was in the form of stock or stock option grants and because the Plans' assets included more than five percent of Northwest's outstanding stock, the plaintiffs allege that the defendants had a conflict of interest between protecting their own interests as executives and stockholders or the interests of the Plans' participants. (Id. ¶¶ 125-30.) Defendant Gary L. Wilson, the Chairman of the Board of Directors

and Northwest's largest individual shareholder, sold most of his Northwest stock during the period preceding the bankruptcy filing, reducing his holdings from 4.34 million shares on March 31, 2005 to 646,840 by August 25, 2005. (Id. ¶¶ 32, 108.) Wilson's sales of stock during the six months preceding the bankruptcy filing resulted in almost $20 million in proceeds. (Id. ¶ 108.) Other executives, including defendant Douglas Steenland who was the company's CEO, sold much of their stock in the period before the bankruptcy. (Id. ¶ 128.)

B.

On a motion to dismiss pursuant to Rule 12(b)(6), the allegations in the Amended Complaint are accepted as true. Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998). In deciding a motion to dismiss, all reasonable inferences must be drawn in the plaintiffs' favor. Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995); Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

While the Court should construe the factual allegations in the light most favorable to the plaintiffs, the Court is not

required to accept legal conclusions asserted in the Amended Complaint. See Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002); Barile v. City of Hartford, 386 F. Supp. 2d 53, 54 (D. Conn. 2005).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents that are referenced in the Amended Complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs' possession or that the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken. Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002); see also Taylor v. Vermont Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002); Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991); Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991); VTech Holdings Ltd. v. Lucent Techs., Inc., 172 F. Supp. 2d 435, 437 (S.D.N.Y. 2001).

II.

All of the claims in this action are based on breaches of the duties ERISA imposes on the fiduciaries of a pension plan. "ERISA is designed to protect employee pensions and benefits plans by, among other things, 'setting forth certain general fiduciary duties applicable to the management of both pension and

nonpension benefit plans.'" In re Worldcom, Inc., 263 F. Supp. 2d 745, 756-57 (S.D.N.Y. 2003) (quoting Varity Corp. v. Howe, 516 U.S. 489, 496 (1996)). ERISA defines a fiduciary functionally, providing in relevant part: "[A] person is a fiduciary with respect to a plan 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." 29 U.S.C. § 1002(21)(A); see also Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 63 (2d Cir. 2006); Worldcom, 262 F. Supp. 2d at 757 ("ERISA defines a fiduciary in functional terms of control and authority over the plan." (internal quotation marks omitted)).

ERISA defines the standard to which fiduciaries of a plan are held as that of a "prudent man." Worldcom, 263 F. Supp. 2d at 758. Section 404(a)(1) provides:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) 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 . . . .

29 U.S.C. § 1104(a)(1). Section 404(a)(1) of ERISA thus imposes three "overlapping standards": to act "solely in the interests of the participants and beneficiaries," to act "for the exclusive purpose" of providing benefits to them, and to act with the care of a "prudent man." Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, C.J.). These duties, which are drawn from the common law of trusts, have been described as "the highest known to the law." Worldcom, 263 F. Supp. 2d at 758 (quoting Flanigan v. Gen. Elec. Co., 242 F.3d 78, 86 (2d Cir. 2001)). ERISA fiduciaries must manage the plan with "an eye single" to the interests of the plan's participants and beneficiaries. Worldcom, 263 F. Supp. 2d at 758 (quoting Donovan, 680 F.2d at 271).

Section 409(a) of ERISA imposes liability on a plan fiduciary who "breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter." 29 U.S.C. § 1109(a). A breaching fiduciary is "personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." Id. In addition, section 405(a)

imposes liability on a plan fiduciary for a breach of fiduciary responsibilities by a "co-fiduciary" (1) where the first fiduciary "participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach," (2) where the first fiduciary's own breach enables the co-fiduciary to commit a breach, or (3) where the first fiduciary "has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. § 1105(a).

In addition to the broadly worded fiduciary obligations outlined above, ERISA imposes specific minimum funding standards on the sponsors of a plan. See 29 U.S.C.A. §§ 1082, 1083 (1999 & Supp. 2006) (amended 2006). Plan administrators are required to provide certain information about the plan to the participants and beneficiaries, including notification of a failure to make a required payment to meet the minimum funding standard imposed by § 1082. See 29 U.S.C. § 1021(d).

Counts One, Two, Three, and Four allege various breaches of fiduciary or co-fiduciary duties by the defendants in violation of sections 404(a) and 405(a) of ERISA. Counts Five and Six allege that the defendants aided and abetted Northwest's failure to fund the Plans in violation of 29 U.S.C. § 1082 and Northwest's failure to notify the Plans' participants of its funding delinquencies prior to its bankruptcy filing in violation

of 29 U.S.C. § 1021. The defendants make various arguments in support of their motion to dismiss, which are discussed in turn below.

A.

The defendants initially construed Count One of the Amended Complaint to allege that they had breached a fiduciary duty to fund the Plans adequately. They argued that ERISA in fact imposes no requirement that they, as fiduciaries rather than sponsors, fund the Plans themselves. However, Count One in fact alleges not that the defendants failed to meet any obligation to fund the Plans themselves, but rather that they failed to investigate the Plans' underfunding or to take ameliorative action to ensure that the Plans' sponsor Northwest funded the Plans properly. (See Am. Compl. ¶¶ 142-45.) The Court of Appeals for the Second Circuit has recognized a fiduciary duty under ERISA to investigate the possibility of a lawsuit or other means to ensure that a plan is properly funded. See Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 916-17 (2d Cir. 1989) ("Under ERISA, trustees have a fiduciary duty to act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." (internal quotation marks omitted)); see also Liss v. Smith, 991 F. Supp. 278, 289-91 (S.D.N.Y. 1998) (holding

that the failure to investigate diligently and to pursue delinquent contributions constituted a breach of fiduciary duties under ERISA section 404(a)(1)).

Upon clarification of the basis for Count One, the defendants do not dispute that such a fiduciary duty to investigate and to pursue delinquent contributions exists. Instead, they contend that no such duty was breached here because no funding delinquency exists. The defendants assert that many American companies' pension plans have developed substantial funding deficits without violating ERISA's minimum funding standards, which are defined by statute by using a "funding standard account." See 29 U.S.C.A. § 1082(b) (1999 & Supp. 2006).[3] The defendants argue that the Amended Complaint never points to any specific failure by Northwest to make an ERISA annual or quarterly installment required by 29 U.S.C. § 1082 during the alleged class period. However, the Amended Complaint plainly charges significant deficiencies in the Plans' funding in violation of ERISA. (See Am. Compl. ¶¶ 9, 53-55, 108, 151.) At argument on the present motion the plaintiffs affirmed that they are alleging funding deficiencies that were contrary to ERISA requirements. While the defendants deny that there was any underfunding using the statutory requirement for minimum funding,

[3] The statute was amended, effective August 17, 2006. PPA §§ 101(b), 202(d), 120 Stat. at 784-85, 885. The Amended Complaint plainly refers to underfunding as it existed prior to the PPA's amendment of 29 U.S.C. § 1082(b).

that contention raises an issue of fact that cannot be resolved on a motion to dismiss.

Under the Rule 8 pleading standard, which applies to ERISA breach of fiduciary duty actions, e.g., Worldcom, 263 F. Supp. 2d at 759-60, the plaintiffs need not plead funding delinquencies with particularity. Because issues of fact remain as to whether Northwest met its obligations under ERISA to fund the Plans, the Court cannot decide on a motion to dismiss that no funding delinquencies existed and thus that no claim for breach of fiduciary duties predicated upon the existence of such funding delinquencies can be sustained. Moreover, the Court could not conclude based on the detailed allegations in the Amended Complaint that the plaintiffs' allegations of funding deficiencies in violation of ERISA are not "plausible." See Bell Atl. Corp. v. Twombly, 550 U.S. ___, 127 S. Ct. 1955, 1974 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

B.

The defendants also argue that upon Northwest's bankruptcy filing, the Plans' rights to contributions became subject to federal bankruptcy law, and that Northwest has complied with its obligations in the post-filing period. The defendants attempt to

buttress this argument by referring to Northwest's amendment of the Plans to appoint an independent fiduciary responsible for pursuing any claims to recover contributions due under ERISA's minimum funding standards in the post-filing period and by invoking that independent fiduciary's faithful efforts to pursue any such amounts due by filing claims in the bankruptcy proceedings. This argument is simply irrelevant to the plaintiffs' claims, however, because the plaintiffs' allegations relate to breaches in the pre-bankruptcy period, not the post-bankruptcy period.

C.

The defendants contend that regardless of the degree to which the Plans were underfunded at the time of Northwest's bankruptcy filing, the Plans' funding deficiencies were reduced to zero by a provision of the Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, 120 Stat. 780 (to be codified in scattered sections of titles 26 and 29 U.S.C.), a statute which amended ERISA and which provided special relief for airline pension plans. Section 402 of the PPA allows a commercial passenger airline that has frozen its plan's future benefits accruals to elect an alternative funding schedule which treats its funding standard account balance as "reduced to zero" and amortizes its unfunded liabilities over a prospective seventeen-

year period. See PPA § 402(b)-(f); see also In re Northwest, 2007 WL 1295758, at *1. Northwest made this election under the PPA for each of the three Plans by filing forms with the IRS on September 17, 2006, and the defendants assert that this election reduced to zero any funding deficiencies in the Plans as of September 30, 2006. Because of this "zeroing out" of Northwest's funding standard account balance under the accounting mechanism employed by ERISA, the defendants argue that no action that relies upon Northwest's underfunding of the Plans can be asserted against them.

The plaintiffs admit that Northwest has made the election under the PPA to "zero out" its accounting ledger and to amortize its funding deficiencies over a prospective seventeen-year period. However, the plaintiffs correctly assert that these accounting changes enacted by the PPA, which did not affect Northwest's Plans until more than a year after its bankruptcy filing and the concomitant close of the alleged class period, have no effect on the plaintiffs' right to sue for breaches of fiduciary duties they allege took place well before Northwest's PPA election took effect. The PPA's accounting procedure of recalibrating a present balance and setting a schedule for the future repayment of accumulated deficiencies can hardly erase the fact, accepting the plaintiffs' allegations as true, that serious underfunding had occurred. The PPA simply allows those

deficiencies to be funded over the coming years. By its terms, section 402 of the PPA applies only to "plan years ending after the date of the enactment of this Act [August 17, 2006]." PPA § 402(j). The defendants in fact conceded at argument on their motion that nothing in the PPA's text specifically affects causes of action that arose before the PPA's enactment. The gist of the plaintiffs' allegations is that the defendants breached their fiduciary duties by allowing the funding deficiencies to occur which must now be paid over the coming years, a requirement which the plaintiffs contend is highly unlikely to be met.

Moreover, the defendants' argument is inconsistent with some recent authority to the effect that the PPA is to have only prospective effect. See West v. AK Steel Corp., 2007 WL 1159951, at *15-*16 (6th Cir. Apr. 20, 2007). In West, the Court of Appeals for the Sixth Circuit held that section 701 of the PPA relating to the proper calculation of "lump sum" pension distributions does not apply retroactively but, under the terms of the statute, applies only to distributions made after August 17, 2006, the date of the enactment of the statute. While that case involved the applicability of section 701, rather than section 402, of the PPA, the court relied upon the PPA's inclusion of a section-specific date of effectiveness as well as its legislative history--two factors that apply with equal force to section 402--in finding that the provision only applies

prospectively. See id.; see also Bryerton v. Verizon Commc'ns, Inc., 06 Civ. 6672, 2007 WL 1120290, at *5 (S.D.N.Y. Apr. 17, 2007) (finding the PPA's effect on ERISA's age discrimination protections is prospective only).

Therefore, regardless of the PPA's effect on the Plans' accounting balances going forward, this recent statute has no effect on the plaintiffs' allegations of injury arising from the defendants' alleged failure to perform their fiduciary duties and the consequent underfunding of the Plans.

The defendants assert that Bankruptcy Judge Gropper's recent decision disallowing and expunging the plaintiffs' claims against the Northwest debtors because of the PPA's zeroing out of Northwest's current ERISA funding standard account balance, see supra note 1, precludes the plaintiffs from disputing the same issue in the present case. However, the sponsor Northwest's current liability for underfunded amounts due to the Plans after its PPA election is not at issue in this case, and Bankruptcy Judge Gropper's decision therefore does not have a preclusive effect on the plaintiff's ability to assert fiduciary duty claims here.

To the extent that the PPA altered Northwest's responsibilities to fund its plan going forward, the issue could eventually be relevant to the plaintiffs' theory of damages. The plaintiffs argue that the defendants' alleged breaches of

fiduciary duties left the Plans' participants in a situation in which Northwest is unlikely to be able to make the distributions promised under its Plans (although the parties agree that Northwest has not yet defaulted on any of its payments under the Plans). While factual and legal questions over the plaintiffs' damages may arise in this litigation, at this stage the Court cannot find that the amortization of Northwest's past liabilities to the Plans over a future period forecloses a claim for injuries based on the acts or omissions by fiduciaries that occurred before the PPA's enactment or effective date.

D.

Count Two alleges that the director and Compensation Committee defendants breached their fiduciary duty to monitor the PIC and the employee defendants by, among other things, failing to ensure that these other fiduciaries knew about Northwest's financial problems. (Am. Compl. ¶¶ 153-63.) An appointing fiduciary has a fiduciary duty to monitor those appointed to serve as plan administrators, see, e.g., In re Polaroid ERISA Litig., 362 F. Supp. 2d 461, 477 (S.D.N.Y. 2005) ("An appointing fiduciary's duty to monitor his appointees is well-established."); Worldcom, 263 F. Supp. 2d at 765, and that duty has been the subject of Department of Labor regulations, see 29 C.F.R. § 2509.75-8, FR-17 ("At reasonable intervals the

performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary . . . ."). Because the scope of the duty is fact-specific, claims based on a breach of the duty to monitor often survive a motion to dismiss. See In re Syncor ERISA Litig., 351 F. Supp. 2d 970, 986 (C.D.Cal. 2004) (collecting cases).

The defendants' argument that the duty to monitor claim must fail because it presupposes an underlying breach by the monitored fiduciaries is unavailing because the plaintiffs have alleged a viable underlying breach in Count One. While the defendants offer various cases that they say limit any fiduciary duty to provide information about impending financial difficulties, none of those cases supports dismissal of Count Two, which alleges the need to provide necessary information for plan management as part of the fiduciary duty to monitor. Cf. Baker v. Kingsley, 387 F.3d 649, 663-64 (7th Cir. 2004) (recognizing a duty to monitor plan administrators); Crowley ex rel. Corning, Inc. Inv. Plan v. Corning, Inc., 234 F. Supp. 2d 222, 229-30 (W.D.N.Y. 2002) (dismissing fiduciary duty claims against directors under a respondeat superior theory but not discussing the viability of a "duty to monitor" claim). In light of the factual issues that arise in determining the proper scope of the duty to monitor, the allegations in Count Two are sufficient to survive this motion to dismiss.

E.

Count Three alleges that the defendants failed to provide complete and accurate information about Northwest's financial health and prospects to the Plans' participants and conveyed materially inaccurate information to those participants regarding the company's financial and operational health and prospects in breach of their duties as fiduciaries or co-fiduciaries. (See Am. Compl. ¶¶ 164-73.) An ERISA fiduciary has both a duty not to make misrepresentations to plan participants and an affirmative duty to inform when the fiduciary knows that silence might be harmful. See Polaroid, 362 F. Supp. 2d at 478 (quoting Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993)); see also Dobson v. Hartford Fin. Servs. Group, Inc., 389 F.3d 386, 401 (2d Cir. 2004) (collecting cases recognizing a fiduciary's obligation to disclose material information even where it "goes beyond the four corners of the plan itself"). Hence, "ERISA fiduciaries . . . cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings." Worldcom, 263 F. Supp. 2d at 766.

The defendants argue that the duty of disclosure is limited to express disclosure requirements set out in ERISA, see, e.g., 29 U.S.C.A. §§ 1021, 1024, 1311 (1999 & Supp. 2005) (amended 2006), and that only the Plans' administrator, whom they assert

is Northwest alone, can be held responsible for breaching these specific duties. The plaintiffs, however, contest the claim that only Northwest served as the Plans' administrator during the relevant time. The plaintiffs also argue that the Plans' administrators did not comply with the express disclosure requirements of 29 U.S.C. §§ 1021(d) and 1311, and that other defendants caused Northwest to misrepresent the Plans' funding deficiencies in its SEC filings. (See Am. Compl. ¶¶ 108, 168.)

Because the scope of the duty to disclose or inform is "decidedly case specific" and the plaintiffs have raised factual questions over who bore the duty and whether false information was disseminated, the allegations contained in Count Three are sufficient to state a claim. Cf. Agway, Inc., Employees' 401(k) Thrift Inv. Plan v. Magnuson, 03 Civ. 1060, 2006 WL 2934391, at *16 (N.D.N.Y. Oct. 12, 2006) (Adopted Magistrate Report and Recommendation).

F.

Count Four alleges that the defendants breached their duty of loyalty by failing to avoid conflicts of interest because they put the interests of Northwest ahead of the participants' interests with respect to funding the Plans and because at least one defendant liquidated the majority of his holdings of Northwest securities prior to bankruptcy while taking no action

to protect the Plans. (See Am. Compl. ¶¶ 174-80.) The Court of Appeals for the Second Circuit has recognized conflict of interest claims under ERISA. See Donovan, 680 F.2d at 271 (recognizing "a duty [of fiduciaries] to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them").

The defendants contend that the allegations are insufficient to support a claim because the ERISA duty of loyalty focuses only on actions a person takes in his role as a fiduciary, see Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000); Worldcom, 263 F. Supp. 2d at 768, and because the mere fact that a fiduciary receives compensation in the form of the sponsor's securities does not create a conflict of interest under ERISA, see, e.g., Polaroid, 362 F. Supp. 2d at 479; Worldcom, 263 F. Supp. 2d at 768. However, the plaintiffs allege more than the mere existence of a conflict because fiduciaries held and sold Northwest stock; they allege, although in summary fashion, that the fiduciaries failed to engage independent fiduciaries and to take other protective steps because they wanted to avoid drawing attention to Northwest's underfunding of its Plans. These allegations suffice to state a claim.

G.

The defendants make several additional arguments that are without merit. They argue that Counts Five and Six, which allege aiding and abetting Northwest's underfunding of its Plans and its failure to notify the participants of its underfunding, respectively, should be dismissed because they depend upon Counts One and Three, which they argue should be dismissed. Because Counts One and Three survive, so do Counts Five and Six. Similarly, the defendants argue that the claims alleging "co-fiduciary" liability pursuant to section 405(a) of ERISA fail because there were no underlying breaches, but that argument also fails because the Amended Complaint contains sufficient allegations to state claims of primary breaches of fiduciary duties in violation of section 404(a).

Finally, the defendants challenge the plaintiffs' standing to assert claims on behalf of the Salaried Employees Plan because none of the named plaintiffs is a participant in that plan. The plaintiffs respond, without rebuttal, that the assets of the Plans are held in a single, commingled unitary trust and that the participants of the three Plans share common claims based upon the same breaches of fiduciary duties. In similar circumstances, courts have held that "an individual in one ERISA benefit plan can represent a class of participants in numerous plans other than his own, if the gravamen of the plaintiff's challenge is to

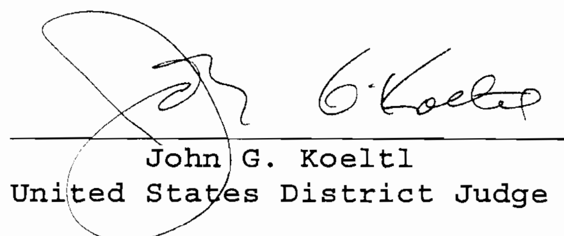
the general practices which affect all of the plans." Mulder v. PCS Health Sys., Inc., 216 F.R.D. 307, 317 (D.N.J. 2003) (quoting Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 422 (6th Cir. 1998)); see also In re Merck & Co., Inc. Secs. Derivative & ERISA Litig., 05 Civ. 2369, 2006 WL 2050577, at *8 (D.N.J. July 11, 2006). The defendants' challenge to the plaintiffs' standing is unpersuasive.

CONCLUSION

The Court has considered all of the defendants' remaining arguments and found them to be either moot or without merit. For the reasons explained above, the motion to dismiss the Amended Complaint is **denied**.

SO ORDERED.

Dated: New York, New York
June 6, 2007



John G. Koeltl
United States District Judge