UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOSEPH D. FORTE, individually, and on behalf of all others similarly situated,

Plaintiff,

15-cv-4936 (PKC)

-against-

MEMORANDUM AND ORDER

U.S. PENSION COMMITTEE, ADMINISTRATIVE COMMITTEE, INVESTMENT COMMITTEE, RICHARD JOHNSON, and EDGAR GRASS,

Defendants.
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CASTEL, U.S.D.J.

In a prior related action, this Court granted a motion to dismiss a purported securities class action brought by holders of American Depository Receipts ("ADRs") of Sanofi. In re Sanofi Sec. Litig., 155 F. Supp. 3d 386 (S.D.N.Y. 2016). The plaintiffs had alleged that Sanofi engaged in an illegal marketing scheme to artificially boost sales of its diabetes product line and hid the scheme from investors while extolling the product line's dramatic sales growth and Sanofi's commitment to corporate integrity. Id. at 391. One of the grounds on which this Court dismissed the complaint was the failure to plausibly allege that the undisclosed "illegal kickback scheme had a significant impact on the market for Sanofi's drugs in the first instance," or how ending the alleged scheme impacted Sanofi's stock price. Id. at 411.

Plaintiff Joseph D. Forte, a participant and beneficiary of the Sanofi US Group Savings Plan (the "Plan"), now brings this action, pursuant to section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, against certain fiduciaries of the Plan, on behalf of himself, the Plan, and other participants and beneficiaries of the Plan who

invested in the Sanofi Company Stock Fund (the "Stock Fund") during the period of March 21, 2013 through December 4, 2014. The action is brought as a putative class action against the U.S. Pension Committee, the Administrative Committee, and the Investment Committee (collectively, the "Committees") who he alleges were each a "named fiduciary" of the Plan and two individual defendants: (1) Richard Johnson, Plan Administrator and a member of the Administrative Committee, who was also Senior Director of Compensation and Benefits at Sanofi; and (2) Edgar Grass, a member of the Investment Committee and Sanofi's Treasurer. Forte also alleges that either Johnson or Grass or both were members of the U.S. Pension Committee.

Forte alleges that the defendants breached their fiduciary duties by allowing participants and beneficiaries to continue to invest in the Stock Fund with knowledge, actual or imputed, that the Stock Fund was no longer a prudent investment because of the illegal kickback scheme, and by failing to disclose what they knew about the scheme.

After the filing of the motion to dismiss, Forte moved to amend his complaint in light of this Court's decision in In re Sanofi Sec. Litig., the Supreme Court's decision in Amgen Inc. v. Harris, 136 S. Ct. 758 (2016), and new evidence in the form of an affidavit filed in a whistleblower action about the so-called kickback scheme.[1] Defendants move to dismiss the original complaint and oppose Forte's motion to amend on futility grounds. For reasons that will be explained, the Court grants the motion to dismiss the complaint and denies the motion to amend on the grounds that Forte does not have standing to bring his claim because he never purchased or sold ADRs of Sanofi during the alleged period of artificial price inflation.

[1] Because the Court decides the instant motion on the basis of standing, the Court need not address the issues raised by defendants' sur-reply regarding the potentially confidential and partially privileged nature of this affidavit. (See Defs.' Sur-Reply 1-2.)

THE COMPLAINT

For the purposes of defendants' motion, all non-conclusory factual allegations are accepted as true, see Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and all reasonable inferences are drawn in favor of the plaintiff as the non-movant, see In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007).

Like the securities plaintiffs, Forte relies on a whistleblower lawsuit brought by a former Sanofi paralegal to allege that Sanofi had engaged in a kickback scheme which paid consulting companies to promote the sale of a diabetes drug. (PAC ¶¶ 45-46.) He alleges that Sanofi never disclosed the whistleblower's allegations or that an internal investigation was conducted into those allegations. (Id. ¶ 10.) He also alleges that during the Class Period, Sanofi terminated its CEO and that the price of Sanofi's shares fell "almost 20%." (Id. ¶¶ 61-64.) "In short, Sanofi concealed facts material to investors from which they could infer that the company had a systematic problem or insufficient internal controls, and this concealment artificially inflated Sanofi's stock price." (Id. ¶ 10.)

The Complaint asserts two claims for relief. First, Forte claims that the defendants breached their fiduciary duty to "prudently and loyally manage the Plan's assets" by concealing information about the kickback scheme and continuing to allow new investments in the Stock Fund. (Id. ¶¶ 101-02.) Second, Forte claims that the defendants breached their duty to monitor by failing to provide information about the kickback scheme and the subsequent investigation to the other Plan fiduciaries. (Id. ¶ 109.) According to the PAC, these breaches caused "the Plan, and indirectly plaintiff[] and other Plan participants" to lose a "significant portion of their retirement investments." (Id. ¶¶ 103, 110.)

I. The Plan.

The Sanofi US Group Savings Plan is a defined contribution plan sponsored by Sanofi for eligible employees. (Id. ¶ 4.) According to the PAC, "employees can defer up to 30% of their qualified compensation into the Plan, and Sanofi will make a matching or partially [matching] contribution based on length of service of up to six percent." (Id. ¶ 29.) The Plan provides several investment options for participants to choose from, and Plan participants may decide to invest in any of the options available under the Plan. (Thomson Decl. Exs. A & B §§ 9.3(a)-(b).)[2] One of these options is the Stock Fund, which provides for investment in ADRs of Sanofi. (Id. Exs. A & B §§ 9.3(a), 2.1(m)-(n).) Under the Plan, participants have sole discretion to direct the investment of their contribution and the matching contribution from Sanofi. (See id. Exs. A & B §§ 9.3(a)-(b).)

The Plan allocates responsibility for administration of the Plan to three committees: the Administration Committee, the Investment Committee, and the U.S. Pension Committee. (Id. Exs. A & B § 11.1.) The Plan designates the Administrative Committee as the "plan administrator" and as a named fiduciary of the Plan under ERISA. (Id. Exs. A & B § 11.2.) The Administrative Committee has "complete discretionary authority to control and

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[2] Defendants provided relevant sections of the Plan in connection with their motion to dismiss. See Thomson Decl. Exs. A & B. Because subject matter jurisdiction is disputed in this case, the Court may consider evidence outside the pleadings on matters relating to subject matter jurisdiction. Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 243 (2d Cir. 2014). To the extent that defendants argue a failure to state a claim, the Court may consider exhibits or documents incorporated by reference without converting the motion into one for summary judgment. See Faulkner v. Beer, 463 F.3d 130, 134 (2d Cir. 2006). "'[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.'" Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002) (quoting Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) (per curiam)). "Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint." DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010) (quoting Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006)). The Plan documents submitted by defendants with their motion to dismiss are integral to the complaint as the PAC discusses the Plan and its operation extensively and are appropriately considered.

manage the administration and operation of the Plan" including authority to determine eligibility to participate in the Plan. (Id. Exs. A & B § 11.3.) The Plan directs the Investment Committee to "make any and all decisions regarding investments, investment philosophy, appointment of investment managers and funds to be offered to Participants." (Id. Exs. A & B. § 11.4.) Authority to appoint and remove members of the Administrative and Investment Committees and to monitor the performance of the Administrative and Investment Committees is assigned to the U.S. Pension Committee. (Id. Exs. A & B § 11.1.)

II. Sanofi's Alleged Illegal Kickback Scheme and Investigation.

Forte claims that in early March 2013, Sanofi launched an internal investigation into allegations made by former paralegal Diane Ponte regarding an illegal kickback scheme to drive up the sales of diabetes products in the U.S. (PAC ¶¶ 5, 42.) Ponte was a paralegal in the Contracts Group at Sanofi, and it was her job to review and approve contracts "for compliance with the Federal healthcare laws and Sanofi's internal policies." (Id. ¶ 42.) According to Ponte and the PAC, all contracts had to be approved by the Finance, Purchasing, and Legal Departments before they could be signed by a Sanofi employee. (Id. ¶ 43.) This review process was allegedly intended to ensure that no Sanofi employee executed a contract that "provided for illegal incentives, kickbacks, and/or inducements to customers" to influence prescribing or selling Sanofi drugs. (Id.) The alleged scheme involved Sanofi executives "knowingly [paying] illegal kickbacks to induce purchases of its drugs by U.S. retail pharmacies, and [concealing] the payments by miscoding them" in the Sanofi contract review system. (Id. ¶ 5.) Ponte alleged that "at least $34 million in illegal payments" were made to Deloitte and Accenture and concealed in this way. (Id. ¶¶ 5, 45-46.) Information regarding Ponte's allegations comes from a

whistleblower complaint she filed against Sanofi in December 2014. (Id. ¶ 9.) Neither the PAC nor the briefing on the instant motion reports the present status of Ponte's lawsuit.

In March 2013, in response to Ponte's allegations, the PAC claims that Sanofi commenced an internal investigation into the nine potentially fraudulent contracts. (Id. ¶ 52.) Ponte claimed that during the investigation the Assistant Vice-President of Special Projects and the Vice-President of the U.S. Diabetes Unit (the "Senior Executives"), (id. ¶ 45), were forced to retire and were given "lucrative severance and retirement packages worth millions of dollars." (Id. ¶ 54.) One of the Senior Executives joined Accenture and the other transitioned to a "lucrative consulting agreement" with Sanofi. (Id.) Ponte also alleged that CEO Viehbacher had knowingly participated in this kickback scheme and that he was terminated in October 2014, once the Board of Directors learned of his involvement. (Id. ¶ 63.) The results of Sanofi's internal investigation are not described in the original complaint or the proposed amended complaint.

III. Sanofi's Public Disclosures

During the Class Period, Forte alleges that Sanofi failed to publically disclose receipt of Ponte's allegations, the details of those allegations, and that an internal investigation into the potential kickback scheme had been launched. (Id. ¶ 58.) Nor did Sanofi disclose what Forte calls "the truth behind the 'retirements'" of the two Senior Executives. (Id.) Instead, Sanofi "repeatedly certif[ied] in its Form 20-F annual statements and quarterly earnings releases on Form 6-K that it had sufficient internal controls." (Id. ¶ 59.) Forte claims these public statements were misleading to investors because "they failed to disclose that: (1) Sanofi was making improper payments to healthcare professionals in connection with the sale of pharmaceutical products in violation of federal law; and (2) a significant portion of Sanofi's

reported revenues were derived from such illegal conduct." (Id.) According to the PAC, the lack of information about Ponte's allegations and the subsequent internal investigation, together with affirmative statements about Sanofi's internal controls caused Sanofi stock to trade at an artificially inflated price. (Id. ¶ 58.)

On October 6, 2014, Sanofi issued a statement announcing that it had received, and was investigating, allegations regarding improper payments to healthcare workers in connection with the sale of pharmaceutical products in the Middle East and Africa. (Id. ¶ 60.) Sanofi also announced that it had "proactively notified the U.S. Department of Justice and the U.S. Securities and Exchange Commission" of the allegations. (Id.) Then, on October 29, 2014 Sanofi reported that its Board of Directors had decided to terminate Viehbacher as CEO and on December 3, 2014, the press reported on the filing of Ponte's whistleblower lawsuit and her allegations, including her claim that Viehbacher was terminated when the Board learned of his involvement in the illegal kickback scheme. (Id. ¶¶ 61, 63.) Forte claims that as a result of these announcements, Sanofi's stock price fell almost 20% from $55 per share to $45 per share, resulting in significant losses to the Plan participants. (Id. ¶¶ 64, 85.) According to Forte, this drop in stock price reflected the market's realization that Sanofi was making illegal payments to healthcare professionals, had "systemic compliance problems that went as high as the CEO," and that they had been misled as to the quality of Sanofi's earnings and the sufficiency of Sanofi's internal controls. (Id. ¶ 64.)

Forte claims that the lack of transparency regarding Ponte's allegations and the ensuing investigation was particularly egregious because, during the Class Period, Sanofi had an active Corporate Integrity Agreement ("CIA") with the U.S. Department of Health and Human Services ("HHS") Office of Inspector General ("OIG") related to charges that the company had

paid illegal kickbacks to incentivize sales of Hyalgen, another Sanofi drug. (Id. ¶¶ 40, 52.) The CIA required Sanofi to comply with federal healthcare laws and "prescribed mandatory guidelines for the investigation and reporting of illegal activities" by Sanofi and its employees. (Id. ¶ 40.) Therefore, Ponte's allegations raised serious concerns about Sanofi's compliance with the CIA as well as with federal anti-kickback laws. (Id. ¶ 53.)

IV. Defendants' Knowledge of the Alleged Illegal Kickback Scheme.

Forte alleges that all of the defendants knew about the kickback scheme during the Class Period. (Id. ¶ 65.) Forte claims that Johnson knew about the kickback scheme because as Senior Director of Compensation and Benefits he would have had to approve the retirement and severance packages given to the two Senior Executives. (Id. ¶ 67.) According to Forte, "unless [Johnson] was willfully blind, it is reasonable to infer that he knew and understood the circumstances of those executives' departures . . . and that he therefore knew about the internal investigation over their involvement in illegal payments, as well as the illegal payments scheme itself." (Id.) As Forte put it, "[i]t defies reason to believe that Johnson would approve such unusual severance packages without learning about *any* of the untoward circumstances that had given rise to those packages." (Id. ¶ 68) (emphasis in the original).

Grass allegedly knew about the kickback scheme because as Treasurer of Sanofi, he was responsible for ensuring compliance with anti-money laundering laws. (Id. ¶ 69.) Therefore, his office would have had to approve the contracts with Deloitte and Accenture. (Id.) Forte claims that "[u]nless Grass was willfully blind when these illegal payments came across his desk, it is reasonable to infer that he knew what they were for and understood their illegality." (Id.) Forte claims that even if Johnson and Gross did not initially know about the full extent of the kickback scheme, what they did know was enough of a red flag that each of them should

have been prompted to investigate further. (Id. ¶¶ 68, 70.) According to the PAC, knowledge of the kickback scheme is imputed to the three Committees due to Johnson and Grass's membership on one or more of the Committees. (Id. ¶ 65.)

V. Defendants' Fiduciary Duties and Alleged Breach.

As fiduciaries of the Plan, the defendants "were responsible for ensuring the continued prudence of investment options and monitoring the investments and policies in the Plan." (Id. ¶ 4.) Once they became aware of the illegal kickback scheme, the unpublicized internal investigation, and the alleged forced retirement of the two Senior Executives, they would have understood that the Sanofi stock had been trading at an artificially inflated price such that it was no longer a prudent investment. (Id. ¶¶ 10, 72.) According to Forte, this triggered a duty on the part of the defendants to take action to protect the interests of the Plan and the Plan participants.

Forte claims that the defendants should have taken action to remove the Stock Fund as an investment option while the stock was trading at an artificially high price or otherwise prevented Plan participants from purchasing shares in the Stock Fund during that time. (Id. ¶¶ 17, 73.) According to Forte, the defendants also should have alerted their co-fiduciaries and the Sanofi Board of Directors about the circumstances which rendered the Stock Fund an imprudent investment. (Id. ¶ 17.) This information could have prompted curative disclosures from Sanofi regarding the alleged kickback scheme and subsequent internal investigation "thus prevent[ing] Sanofi's stock from trading at an artificially high price for as long as it did." (Id.)

The PAC alleges that defendants "could not have reasonably believed that restricting new purchases of the Stock Fund would likely do more harm than good" to the Plan or its participants. (Id. ¶ 75.) Nor would restricting new purchases of the Fund run afoul of any

securities regulations as preventing new purchases would not disclose any inside information. (Id. ¶¶ 75-76.) Instead, Plan participants were harmed by "over-paying for stock that was fraudulently inflated in price" when they had "other investment options available." (Id. ¶ 77.) These participants were left to suffer "unnecessary losses when the artificial inflation was corrected" or "miss[] out on deserved profits if the stock price managed to recover at some point in the future." (Id.)

Forte also claims that defendants "could not have reasonably believed that effectuating truthful, corrective disclosure would do more harm than good" to the Plan or its participants. (Id. ¶ 78.) Not only would such disclosures be consistent with the federal securities laws, (id. ¶ 82), defendants had an obligation under ERISA to be truthful and accurate in communicating with the Plan participants. (Id. ¶ 78.) Concerns that disclosure might temporarily lower the stock price should not have prevented the defendants from acting. (Id. ¶ 79.) In his complaint, Forte claims that "[e]very stock fraud in history, when corrected, has resulted in a temporary drop in the stock price . . . [b]ut in virtually every fraud case, the longer the fraud persists, the harsher the correction tends to be." (Id.) Therefore, if the defendants were concerned about doing more harm than good, "they should have sought to minimize the harm that correcting the fraud would temporarily cause" by disclosing what they knew about Ponte's allegations and the internal investigation that followed, earlier. (Id.)

According to Forte, the longer defendants concealed information about Ponte's allegations, "the more purchasers bought [into the Stock Fund] at artificially inflated prices; and because the artificial inflation increased during most of the Class Period, the size of the harm to each purchaser increased over time as well, because the stock had that much farther to fall when the truth inevitably came out." (Id. ¶ 81.) Even though the Stock Fund did benefit from the

inflated prices by selling just over $3 million in stock during 2013 and over $7 million in stock in 2014, the Fund purchased far more than that – roughly $12.8 million in 2013 and about $14.5 million in 2014 – all at inflated prices. (Id. ¶ 80.) Therefore, Forte claims, "[i]t would defy logic for the fiduciaries to have thought that correcting the artificial inflation would have done more harm than good" when the purchasers, who were harmed, outnumbered the sellers, who benefited, by more than two to one. (Id.)

Forte also claims that Plan participants like himself, who did not purchase new shares of the Stock Fund during the Class Period but simply held their Stock Fund shares, were also harmed by the defendants' failure to disclose what they knew about the scheme. (Id. ¶ 81.) "[B]y holding Stock Fund shares over a period of time when Sanofi stock was artificially appreciating in value, [Plan participants like Forte] were deprived the option of transferring their shares into a different, prudent investment and thus sparing themselves greater losses when the correction ultimately took place." (Id.)

In sum, Forte alleges that by failing to restrict new purchases of the Stock Fund when they knew that Sanofi stock was trading at an artificially high price, and by failing to alert others about the kickback scheme so that the company could make corrective public disclosures, the defendants deprived the Plan participants of the opportunity to make alternative investments, and cost those participants millions in lost retirement savings. (Id. ¶¶ 84-85.)

DISCUSSION

I. Legal Standards.

Defendants move to dismiss the complaint pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of subject matter jurisdiction and Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim. "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1)

when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). As the party asserting jurisdiction, the plaintiff bears the burden of demonstrating subject matter jurisdiction. See Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011). In resolving a motion to dismiss under Rule 12(b)(1), "the district court must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." Tandon, 752 F.3d at 243. "But where jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." Id. (alterations and internal quotation marks omitted); see also Ray Legal Consulting Grp. v. Gray, 37 F. Supp. 3d 689, 696 (S.D.N.Y. 2014) ("[W]here subject matter jurisdiction is contested[,] a district court is permitted to consider evidence outside the pleadings, such as affidavits and exhibits.").

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Rule 15(a) provides that where leave of court is required for a party to amend its pleading, "[t]he court should freely give leave when justice so requires." Rule 15(a), Fed. R. Civ. P. Nonetheless, a "district court has broad discretion in determining whether to grant leave to amend." Gurary v. Winehouse, 235 F.3d 792, 801 (2d Cir. 2000). "[M]otions to amend should

generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party." Burch v. Pioneer Credit Recovery, Inc., 551 F.3d 122, 126 (2d Cir. 2008) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). An amendment to a pleading is considered futile "if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6)." Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 88 (2d Cir. 2002).

II. Constitutional Standing.

Defendants contend that Forte's complaint should be dismissed because he lacks standing to bring his claims against the Committees and the individual defendants because he did not purchase or sell Sanofi ADRs during the period of alleged artificial price inflation. "Standing is a federal jurisdictional question 'determining the power of the court to entertain the suit.'" Carver v. City of New York, 621 F.3d 221, 225 (2d Cir. 2010) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). "Constitutional standing refers to the requirement that parties suing in federal court establish that a 'Case' or 'Controversy' exists within the meaning of Article III of the United States Constitution." Am. Psychiatric Ass'n v. Anthem Health Plans, Inc., 821 F.3d 352, 358 (2d Cir. 2016).

There are three Article III standing requirements: (1) the plaintiff must have personally suffered an injury-in-fact, *i.e.*, an invasion of a judicially cognizable interest which is concrete and particularized as well as actual or imminent, rather than conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct at issue such that the injury is fairly traceable to the challenged conduct; and (3) the injury must be likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S.

464, 472 (1982). The requirements of Article III standing necessarily extend to claims brought by ERISA plaintiffs suing for a breach of fiduciary duty. These plaintiffs "must establish . . . constitutional standing, meaning the plan participant must . . . assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty." Kendall v. Emps. Ret. Plan of Avon Prods., 561 F.3d 112, 118 (2d Cir. 2009) (citation omitted), abrogated on other grounds by Am. Psychiatric Ass'n, 821 F.3d 352.

In the class action context, the named plaintiff "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Warth, 422 U.S. at 502. Claims such as Forte's, brought under ERISA § 502(a)(2) and § 409(a), are brought on behalf of the plan in a representative capacity rather than for individual relief. See Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985); L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cty., Inc., 710 F.3d 57, 65 (2d Cir. 2013). However, as Forte's claims are effectively a request for restitution or disgorgement under ERISA, (PAC ¶¶ A-L), he must still "satisfy the strictures of constitutional standing by demonstrating individual loss, to wit, that [he has] suffered an injury-in-fact." Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 200 (2d Cir. 2005) (internal citations, quotation marks, and alterations omitted); Taveras v. UBS AG, 612 F. App'x 27, 29 (2d Cir. 2015) (summary order) ("An ERISA plan participant lacks standing to sue for ERISA violations that cause injury to a plan but not individualized injury to the plan participant.").

Judge Sullivan's analysis in In re UBS ERISA Litig., 08-cv-6696 (RJS), 2014 WL 4812387 at *6-7 (S.D.N.Y. Sept 29, 2014) is instructive on this point. In that case, the Court found that the plaintiff, who, like Forte, was a participant in a retirement plan which did not

involve the "direct and active management of the participants' assets, but instead simply empowered the [plan's] fiduciaries to present investment options to the [plan] participants," could not demonstrate Article III injury-in-fact simply by claiming that the plan itself had suffered losses. In re UBS, 2014 WL 4812387 at *6-7. Because of the plan's structure, the Court noted that this was not a case in which "any diminution in the value of the [plan's] assets would necessarily impact the value of each [] participant's account." Id. at *6. Instead, the plaintiff could only demonstrate a "constitutionally sufficient injury" by pointing to the losses her personal account suffered as a result of the alleged fiduciary breaches. Id. Judge Sullivan distinguished cases such as L.I. Head Start, 710 F.3d 57 (2d Cir. 2013) (finding constitutional standing on the basis of derivative injury where ERISA welfare benefits plan was managed on behalf of the participants) on the basis that those decisions "involved ERISA plans that *managed* assets on behalf of plan participants, with each participant's financial fortune tied to the plan's overall success (or failure)." Id. at *7 (emphasis in original). Unlike the plan at issue in In re UBS and the Plan at issue here, each participant in a managed plan "would necessarily be harmed by any losses sustained by the plan as a result of a breach of fiduciary duty." Id. However, in a situation, like the present case, where the plan participants make their own investment decisions based on options selected by the plan fiduciaries, the Court found that a plaintiff must still show an individualized harm in order to establish standing. Id.

Defendants argue that Forte lacks constitutional standing because he did not purchase any Stock Fund shares at inflated prices and therefore has not plausibly alleged an individualized injury. Forte claims that during the Class Period the price of Sanofi stock was artificially inflated due to the alleged kickback scheme and the defendant's concealment of that scheme, (PAC ¶ 58), but that the price of the stock dropped significantly when Ponte's

allegations regarding the kickback scheme were made public, (id. ¶ 9), when Sanofi announced that it had terminated CEO Viehbacher, and that it was investigating potential misconduct in the Middle East and Africa. (Id. ¶ 64.) However, Forte does not allege that he purchased any stock at the artificially inflated price or that he sold any stock at a loss. Instead, Forte alleges that he owned shares in the Stock Fund prior to the start of the Class Period and continued to hold them throughout the Class Period. (See Pl.'s Mem. of Law in Supp. of Mot. to Amend 17-18; Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss 3.) Thus, Forte does not allege that he overpaid for his Sanofi stock. Instead, he claims he was injured by the defendants' alleged breach of fiduciary duties because when Ponte's allegations did eventually come to light in December 2014 the stock price fell more than it would have had the defendants disclosed what they knew about the scheme earlier. (PAC ¶ 79.)

In Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005), the Supreme Court held that "an inflated purchase price will not itself constitute . . . economic loss." Id. at 342. Instead, "stock must be purchased at an inflated price and sold at a loss for an economic injury to occur." Taylor v. KeyCorp, 680 F.3d 609, 613 (6th Cir. 2012) (summarizing Dura); see also Brown v. Medtronic, 628 F.3d 451, 455-56 (8th Cir. 2010) ("[A]t a minimum, a plaintiff [in an ERISA case alleging a breach of fiduciary duty in the form of actions that artificially inflated share price] must allege a net loss in investment value that is fairly traceable to the defendants' challenged actions."). Taylor also noted that while Dura was decided in the securities-fraud context, its "common-sense analysis," described by the Supreme Court as "pure logic," Dura, 544 U.S. at 342, is "equally applicable" to ERISA claims premised on artificial price inflation. Taylor, 680 F.3d at 613; Brown, 628 F.3d at 456 ("Presumably any such rule founded on basic concepts of loss and injury and characterized as 'pure logic' should find broad application in

ERISA, securities law, and other contexts where plaintiffs describe their injuries in terms of stock price changes."). Forte essentially claims that because his shares in the Stock Fund were worth less at the end of the Class Period than they were at the beginning, he has suffered a cognizable injury. However, as the Brown court pointed out, Dura teaches that a plaintiff must "identify more than merely a stock price drop throughout the proposed class period to articulate an injury for the purpose of establishing standing." Brown, 628 F.3d at 456.

While Forte cannot claim that he overpaid for artificially inflated Stock Fund shares, he claims that he was nevertheless injured when he was deprived of the opportunity to transfer his investment in the Stock Fund to a different, more prudent, investment. (PAC ¶ 81.) Forte points to Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985) to support this alternative investment measure of injury. See Dkt. No. 12 at 2. However, while Donovan does adopt an alternative investment theory of injury for some ERISA claims, it expressly notes that such a measure of damages is *inappropriate* for cases which, like Forte's, are premised on artificial inflation caused by misrepresentation or withheld information. See Donovan, 754 F.2d at 1054-55 ("In such cases, it may well be that the best measure of damages is one that awards the plaintiff the difference between what was paid for the stock, and what would have been paid had the plaintiff been aware of the concealed information."); see also Taylor, 680 F.3d at 614 (rejecting an alternative investment theory of injury where plaintiff alleged that withholding information affected share prices); Brown, 628 F.3d at 458 (same).

Forte's assertion that he was injured because had he known about the alleged kickback scheme, he would have pulled his investment from the Stock Fund and invested it elsewhere is further undercut by the Securities and Exchange Commission ("SEC") amicus brief that Forte attached to his proposed amended class action complaint. If the Court were to accept

the theories advanced by the SEC in their amicus brief, had the defendants learned of the alleged kickback scheme and decided to restrict transactions in the Stock Fund in response, they would have been obligated to close the Stock Fund to both purchases *and sales*, to avoid violating federal securities laws. (See Pl.'s Mot. to Amend, Ex. D 11-16.) Therefore, had the defendants taken the action urged by Forte himself, (see Pl.'s Mem. in Supp. of Mot. to Amend 16-17; PAC ¶ 17), he would not have been allowed to sell his shares in the Stock Fund and invest that money elsewhere. Forte cannot plausibly claim he was injured by a lost opportunity he never could have had.

Forte cites several out of circuit cases in support of his argument that "holder" claims should be recognized. The Court does not find these cases to be persuasive. Most of the decisions Forte cites deal with class certification and simply permit classes of plan participants to be certified that include both purchasers and holders of the stock at issue. See Furstenau v. AT&T Corp., 02-cv-5409 (GEB), 2004 WL 5582592 at *5 (D.N.J. Sept. 3, 2004); In re Ikon Office Sols., Inc., 191 F.R.D. 457, 465 (E.D. Pa. 2000); Jones v. NovaStar Fin. Inc., 257 F.R.D. 181, 188 (W.D. Mo. 2009). These decisions analyze the problems holder claims pose to the commonality and typicality prongs of the class certification test and do not deal directly with the question of whether holder claims satisfy the requirements of constitutional standing. See In re Ikon, 191 F.R.D. at 465 ("Obviously, the court makes no ruling as to the ultimate viability of these holder claims . . . . The court merely rules, at present, that existence of holder-based claims does not defeat class certification per se . . . ."); Jones, 257 F.R.D. at 187-88. In fact, the court in In re Ikon certified a class that included holder claims but specifically noted that the order was "without prejudice to defendants' arguments that no cause of action exists with respect to

'holder' claims, i.e. stock acquisition before the beginning of the ERISA Class period." 191 F.R.D. at 468.

At the motion to dismiss phase, the court in Jones concluded that a plaintiff who did not purchase any stock at artificially inflated prices but who cashed out her shares during the class period had adequately pled injury sufficient for constitutional standing. See Jones v. NovaStar Fin. Inc., 08-cv-00490 (NKL), 2009 WL 331553 at *5 (W.D. Mo. Feb. 11, 2009). However, in that case the court essentially found that the plaintiff had plausibly alleged a five dollar drop in stock price due to the defendants' misconduct such that but for the defendants' fiduciary breaches, the plaintiff would have received more benefits at cash out than she actually did. Id. Conversely, in the present case, Forte had failed to plausibly allege any actual loss. Of the three disclosures Forte alleges contributed to the drop in Sanofi's stock price, (PAC ¶¶ 60-64), only the press coverage of Ponte's whistleblower action has any connection with the defendants' alleged concealment of the kickback scheme. Yet, rather than depressing the stock price, the price of Sanofi stock actually increased from on the day the kickback allegations came to light. See http://www.nasdaq.com/symbol/sny/historical (showing a price increase from 48.03 to 48.11 on December 3, 2014).[3]

The Court has not found support in this Circuit for the theory that plaintiffs who merely held stock during a period of artificial inflation meet the injury requirement of Article III standing. Cf. In re AOL Time Warner ERISA Litig., 02-cv-8853 (SWK), 2006 WL 2789862, at *8 (S.D.N.Y. Sept. 27, 2006) (characterizing ERISA holder claims as "non-recoverable"). In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig., 763 F. Supp. 2d 423 (S.D.N.Y. 2011) similarly does not advance Forte's position. While Judge Sweet explained that the plaintiffs

[3] On a motion to dismiss, district courts are permitted to take judicial notice of well-publicized stock prices. Ganino v. Citizens Utils. Co., 228 F.3d 154, 166 n.8 (2d Cir. 2000).

sought "holder damages" as opposed to "purchaser damages," this appears to be a summary of the plaintiffs' position rather than a specific endorsement of ERISA holder claims. In re Bear Stearns, 763 F. Supp. 2d at 565. The Court did not analyze the Article III standing of such holder claims and instead dismissed the plaintiffs' claims on other grounds. See id. at 565-81.

Even if, assuming *arguendo*, holder claims were generally viable, Forte has failed to plausibly allege any individualized injury-in-fact. Forte claims that plan participants like himself, who merely held shares of the Stock Fund during the Class Period were harmed by defendants' actions because "they were deprived the option of transferring their shares into a different, prudent investment and thus sparing themselves greater losses when the correction ultimately took place." (PAC ¶ 81.) However, as was previously explained, Forte cannot plausibly allege that he was injured in this way. He was never deprived of an opportunity to transfer his shares of the Stock Fund because had the defendants restricted purchases in the Stock Fund, they would have had to restrict sales of those shares as well. (See Pl.'s Mot. to Amend, Ex. D 11-16.)

According to the PAC, Forte was also injured when the defendants failed to disclose the kickback scheme because "[e]very stock fraud in history, when corrected, has resulted in a temporary drop in the stock price . . . [b]ut in virtually every fraud case, the longer the fraud persists, the harsher the correction tends to be." (PAC ¶ 79.) Therefore, Forte argues, he and other plan participants were injured by the defendants' failure to disclose because the stock fell farther than it would have otherwise when the kickback scheme was eventually revealed by Ponte's lawsuit. (Id. ¶¶ 79, 81.) However this injury is entirely speculative. Forte does not plead any facts to support his broad contention that "in virtually every fraud case, the longer the fraud persists, the harsher the [price] correction tends to be," (id. ¶ 79), nor does he

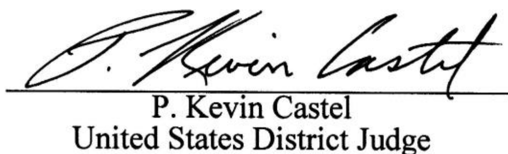
plead facts to show that this kind of extreme price correction happened in *this* instance. In fact, the price of Sanofi stock actually increased on the day Ponte's allegations were made public, see http://www.nasdaq.com/symbol/sny/historical, making Forte's claims of injury even less plausible.

In sum, neither the original complaint nor the proposed amended class action complaint adequately allege an injury-in-fact necessary to establish constitutional standing. Therefore, Forte's complaint will be dismissed.

CONCLUSION

It is unnecessary for the Court to reach defendants' arguments that Forte failed to adequately plead loss causation, failed to plead facts establishing defendants had knowledge of the alleged misconduct, failed to satisfy the pleading requirements established in Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) and Amgen Inc. v. Harris, 136 S. Ct. 758 (2016), failed to adequately allege a breach of the duty to monitor, and that the Administrative Committee and Richard Johnson are not appropriate defendants. Defendants' motion to dismiss, (Dkt. No. 15), is granted. Plaintiff's motion to amend the Complaint, (Dkt. No. 20), is denied. Defendants' motion to strike the jury demand, (Dkt. No. 15), is denied as moot.

SO ORDERED.



P. Kevin Castel
United States District Judge

Dated: New York, New York
September 30, 2016