

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

	X	
	:	No. C2-04-643
In re Cardinal Health, Inc.	:	
ERISA Litigation	:	Judge Marbley
	:	
	X	Magistrate Judge King

**PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT RICHARD J. MILLER'S
MOTION TO DISMISS THE CONSOLIDATED AND AMENDED COMPLAINT**

Lead Plaintiffs David L. McKeehan, James A. Syracuse and Timothy E. Ferguson, on behalf of themselves (hereinafter collectively "Plaintiffs") and all other persons similarly situated (hereinafter the "Participants"), and on behalf of the Cardinal Health 401(k) Savings Plan (together with its predecessors, the "Plan"), respectfully submit this Memorandum of Law in opposition to Defendant Richard J. Miller's Motion to Dismiss the Consolidated and Amended Complaint ("Defendant Miller's Motion"). Plaintiffs incorporate by reference their Memorandum of Law In Opposition to Certain Defendants' Motion to Dismiss the Consolidated and Amended Complaint (Plaintiffs' Principal Brief).

Defendant Miller, in fact, raises only one argument independent of those raised by Cardinal Health and other Defendants. He argues, specifically, that the Complaint "fails to provide any specific allegations to support the conclusory assertions that Mr. Miller knew or should have known that Cardinal's SEC filings contained erroneous financial information or otherwise omitted 'material adverse information.'" Defendant Miller's Motion, at 1. Miller makes this argument despite the fact that the Complaint specifically alleges that he was Cardinal's Chief Financial Officer, Principal Accounting Officer, and a signatory on the Form 11-K annual reports for the Cardinal 401(k) Savings Plan. *Id.*

As set forth in the Plaintiffs' Principal Brief, when an ERISA fiduciary conveys information to plan participants, that fiduciary "has a duty under section 1104(a) to convey complete and accurate information" *AEP*, 327 F. Supp. 2d at 831, quoting *In re Unisys Sav. Plan Litigation*, 74 F.3d 420, 441 (3d Cir. 1996), and citing *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 455 (6th Cir. 2002), cert. denied, 538 U.S. 1033 (2003). If the fiduciaries know or have reason to know that the information is inaccurate, they have breached their duty. See, e.g., *In re Dynege, Inc. ERISA Litigation*, 309 F. Supp. 2d 861, 881 (S.D. Tex. 2004) (finding "knew or should have known" allegations sufficient "because these allegations challenge the adequacy of the investigation that the . . . defendants undertook prior to distributing the" plan document that incorporated inaccurate SEC filings); *In re Enron Corp. Securites, Derivative and "ERISA" Litigation*, 284 F. Supp. 2d 511, 658-59 (S.D. Tex 2003) (finding sufficient allegations of failure to disclose "what they knew or should have known, through prudent investigation, was a threat to the pension plans or to correct any material misinformation"). Here, Plaintiffs allege a misrepresentation and failure to disclose material adverse information concerning Cardinal's financial condition. Complaint, ¶ 94. Since Mr. Miller was head of both finance and accounting at Cardinal Health, if anyone knew the facts, it should have been Miller. Moreover, if he did not actually know that the financial information provided to Plan Participants was inaccurate, which is hard to believe, he certainly had the means to discover that information through "prudent investigation."

Defendant Miller, like the other Defendants, would like to impose a far higher pleading standard on the Plaintiffs than the one enshrined in the Federal Rules of Civil Procedure, requiring them to plead the evidence by which they intend to establish what he knew or should have known. However, a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief."

Fed. R. Civ. Proc. 8(a). “Such a statement must simply ‘give the Defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002).

The Complaint in this case does so, and thus the Motion to Dismiss should be denied.

CONCLUSION

For the reasons set forth above, the plaintiffs respectfully request that the Court deny Defendant Miller’s Motion to Dismiss. In the event the Court elects to dismiss some or all of the Complaint, Plaintiffs respectfully request leave to amend.

DATED: October 11, 2005

Respectfully submitted,

**CLARK, PERDUE, ARNOLD
& SCOTT CO., L.P.A.**

By: /s/James E. Arnold

James E. Arnold, Esq. (0037712)
471 East Broad Street, Suite 1400
Columbus, OH 43215
Telephone: (614) 460-1600
Facsimile: (614) 469-1066
Email: jarnold@cpaslaw.com

Liaison Counsel for ERISA Plaintiffs

STULL, STULL & BRODY

Edwin J. Mills
6 East 45th Street
New York, NY 10017
Telephone: (212) 687-7230
Facsimile: (212) 490-2022

SCHATZ & NOBEL

Robert A. Izard
Mark P. Kindall
330 Main Street, 2nd Floor
Hartford, CT 06106-1851
Telephone: (860) 493-6292
Facsimile: (860) 493-6290

Co-Lead Counsel for ERISA Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been electronically filed through the Court's CM/ECF system, which will send notification of such filing to registered counsel electronically. Pursuant to that notification, a true and correct copy of the foregoing was mailed to any party or counsel not receiving electronic service from CM/ECF by first-class U.S. Mail this 11th day of October, 2005.

/s/James E. Arnold

James E. Arnold