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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

REPLY MEMORANDUM IN SUPPORT OF CERTAIN DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AMENDED ERISA COMPLAINT

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The abuse of discretion standard applies to any claim that it was imprudent for a plan to invest in company stock, regardless of whether plaintiffs label their claim an "artificial inflation" case or a "diversification" case. Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995); In re Calpine Corp. ERISA Litig., 2005 U.S. Dist. LEXIS 9719, at *15-18, 23 (N.D. Cal. Mar. 31, 2005); In re Duke Energy ERISA Litig., 281 F. Supp. 2d 786, 788-90 (W.D.N.C. 2003). Plaintiffs' § 408 adequate consideration cases are inapplicable here because the adequate consideration analysis in § 408 is an exemption to the prohibited transactions rules set forth in § 406 of ERISA. Chao v. Hall Holding Co., 285 F.3d 415, 438 (6th Cir. 2002). The Complaint here asserts no claim under § 406. Plaintiffs are also wrong in arguing that the abuse of discretion standard is limited to ESOPs. That argument has been almost universally rejected by other courts. Landgraff v. Columbia HCA, 2000 WL 33726564, *5 (M.D. Tenn. May 24, 2000), aff'd, 2002 WL 203208 (6th Cir. Feb. 7, 2002); Wright v. Or. Metal. Corp., 360 F.3d 1090, 1098 n.3 (9th Cir. 2004); Steinman v. Hicks, 252 F. Supp. 2d 746, 758 (C.D. Ill. 2003). Plaintiffs have failed to address any of the facts in the cases defendants cite in demonstrating that plaintiffs have not alleged facts sufficient to plead an abuse of discretion. Plaintiffs do not dispute the fact that Cardinal is in a much better financial situation than the company in Kuper, in which the Sixth Circuit found there was no abuse of discretion. Plaintiffs do not cite a single case where a plaintiff has been permitted to proceed with a prudence claim where the employer company's stock outperformed the market during the class period as Cardinal stock has done. Proving an abuse of discretion is a necessary element of plaintiffs' prudence claim. Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995); Moench v. Robertson, 62 F.3d 553, 571-72 (3d Cir. 1995); Wright v. Or. Metal. Corp., 360 F.3d 1090, 1097 (9th Cir. 2004). Because plaintiffs have failed to allege such an abuse of discretion, Count I should be dismissed.

1. The Abuse of Discretion Standard The Sixth Circuit Adopted In Kuper Applies Here. 1

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Count II fails to plead loss causation. Dura Pharm., Inc. v. Broudo, 125 S. Ct. 1627, 1630-32 (2005). Plaintiffs attempt to blur the distinctions between Count I (the prudence

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claim) and Count II (the misrepresentation claim). Those are fundamentally different claims, based on different theories, with different legal elements. Defendants' loss causation argument is directed at Count II only. Accordingly, plaintiffs' arguments about the duty of prudence, and how causation and damages are analyzed in a prudence claim, are completely beside the point. Although plaintiffs make several arguments to avoid Dura's clear mandate as to how proximate causation is pleaded in a "price inflation" case, those efforts are unavailing. Dura's logic is not limited to securities cases. Plaintiffs fail to cite to a single case limiting Dura's loss causation pleading requirement to securities cases or a single case in which ERISA plaintiffs were not required to plead loss causation. Plaintiffs have not satisfied the Dura standard for pleading proximate causation in their misrepresentation claim because the plaintiffs cannot dispute that Cardinal's stock price went up after the earnings restatement that plaintiffs claim was the required "corrective disclosure." The Complaint thus identifies no loss caused by the "corrective disclosure" on which plaintiffs now rely. Dura's loss causation requirement warrants dismissal.

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Because § 502(a)(3) does not allow claims for monetary damages, the claims brought under that section in all three counts must be dismissed to the extent they seek to compel payment of money be the defendant. Plaintiffs are wrong in arguing that they are really seeking equitable relief. Plaintiffs have not alleged that any defendant possesses an identifiable fund of money received from the Plan or a plaintiff to which plaintiffs are entitled. All plaintiffs allege is that the Plan participants experienced paper losses in their Plan accounts when Cardinal's sock price declined. That alleged decline cannot give risk to equitable relief because it is not particular funds or property in defendants' possession, which is necessary for restitution to lie in equity. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002). Plaintiffs ignore the Sixth Circuit's recent decision in Crosby v. Bowater, which is dispositive on this issue. 382 F.3d 587, 594 (6th Cir. 2004).

D. The Misrepresentation Claim Fails Because Plaintiffs Have Not Pleaded Actual Reliance On Any Specific Alleged Misstatements. 21

The Complaint's ambiguous statement that plaintiffs "relied upon, and are presumed to have relied upon, the representation and nondisclosures . . . to their detriment" does not plead actual reliance in any intelligible way and does not sufficiently put defendants on notice of the particular statements plaintiffs say misled them. Several cases, including the Sixth Circuit's decision in Del Rio v. Toledo Edison, 2005 U.S. App. LEXIS 7576,

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*11-12 (6th Cir. Apr. 29, 2005), explicitly hold that actual reliance is an element of a misrepresentation claim under ERISA. Nothing in those decisions suggests that the reliance element of a misrepresentation claim under ERISA somehow disappears when company stock is in question. This Court should decline to engraft the fraud-on-the-market theory onto ERISA and should dismiss Count II for failure to plead actual reliance.

E. The Misrepresentation Claim Against The Committee Defendants Fails Because The Complaint Does Not Show The Committee Defendants Had Any Knowledge Of The Alleged Misstatements. 25

Count II fails to state a claim against the Committee Defendants because the Complaint does not allege that the Committee Defendants bringing this motion had any knowledge of the alleged misstatements or even any reason to know about the alleged "undisclosed materially adverse information." A complaint that does not allege that the Committee Defendants "actually possessed the 'adverse information'" fails to state a claim. Crowley v. Corning, 234 F. Supp. 2d 222, 230 (W.D.N.Y. 2002). Plaintiffs' single argument in response, that the Committee Defendants held senior position and therefore they (and through them, the Plan Committee itself) knew or should have known about the undisclosed adverse information set out in the Complaint, is flawed because the Complaint fails sufficiently to plead factual allegations that the Committee Defendants knew or should have known of any alleged misdeeds.

F. Counts I And II Fail As To The Director Defendants And Should Be Dismissed. 26

Plaintiffs concede that they are not seeking to hold the Director Defendants directly liable for Counts I and II. Accordingly, the Court should dismiss any claims in Counts I and II against the Director Defendants based on plaintiffs' concession. Plaintiffs nevertheless seek to hold the Director Defendants liable for alleged breaches of the duties of prudence and disclosure as co-fiduciaries under Counts I and II. Defendants' co-fiduciary requests are set forth in Section G of this brief.

G. Plaintiffs' Co-Fiduciary Liability Claims Fail As A Matter Of Law Because The Allegations In The Complaint Do Not Put Defendants Sufficiently On Notice Of The Claims Asserted Against Them......................... 27

The Complaint does not state a claim for co-fiduciary liability by simply lumping together undifferentiated assertions against 25 defendants. Nor is merely parroting a statute sufficient to satisfy pleading requirements, despite plaintiffs' protestations to the contrary. In re Sprint Corp. ERISA Litig., 2004 U.S. Dist. LEXIS 9622, at *58-59 (D. Kan. May 27, 2004). A complaint must specify what each supposedly breaching co-fiduciary knew, concealed, or enabled to state a claim for co-fiduciary liability. Milofsky v. Am. Airlines, 404 F.3d 338, 342 (5th Cir. 2005), reh'g en banc granted, 2005 U.S. App. LEXIS 15122 (5th Cir. July 19, 2005). Where plaintiffs lump all the defendants

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together and simply recite the statutory language, the pleading does not contain allegations that put defendants on notice of the particular charges against each defendant.

H. Plaintiffs' Failure To Monitor Claim (Count III) Should Be Dismissed Because It Is Derivative Of The Defective Imprudence And Failure To Disclose Claims. 29

Because Counts I and II fail to state a claim for relief on multiple grounds, plaintiffs' derivative failure-to-monitor claim fails as well and should be dismissed.

I. There Is No *Respondeat Superior* Liability Under ERISA. 29

The terms of ERISA do not provide for *respondeat superior* liability. Nothing in ERISA suggests that Congress intended for the common law of agency and vicarious liability to be imported into the fiduciary provisions of the Act. Tool v. Nat'l Employee Benefits Servs., Inc., 957 F. Supp. 1114, 1120-21 (N.D. Cal. 1996). Plaintiffs cite no binding or persuasive authority in arguing that Count III states a claim for relief against Cardinal. The cases plaintiffs do cite, to the extent they recognize *respondeat superior* liability under ERISA, are contrary to the Supreme Court's warnings that ERISA must not be expanded beyond the statute's terms. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002); Mertens v. Hewitt Assoc., 508 U.S. 248, 254 (1993). In addition, plaintiffs ignore the fact that, even in the non-controlling cases that have applied the doctrine to ERISA cases, the cases generally require plaintiffs to plead that the employer *de facto* controlled the agent. Crowley v. Corning, 234 F. Supp. 2d 222, 230 (W.D.N.Y. 2002); Banistor v. Ullman, 287 F.3d 394, 408 (5th Cir. 2002). Plaintiffs here have not alleged that Cardinal *de facto* controlled the Director Defendants' decisions regarding the Committee's appointment and monitoring.

J. The Claims Against Susan Nelson Should Be Dismissed Because Plaintiffs Do Not Allege That Ms. Nelson Functioned In Any Fiduciary Role. 31

Plaintiffs do not dispute that the Complaint fails to allege that Ms. Nelson was a fiduciary. Since the Complaint fails even to allege generally that Ms. Nelson was assigned any fiduciary functions, it falls far short in stating any claims against her. The Court should dismiss plaintiffs' claims against Ms. Nelson.

III. CONCLUSION 32

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I. INTRODUCTION

Plaintiffs' opposition brief ("Opp.") attempts to blur the line between plaintiffs' various claims and repeatedly attacks arguments that defendants do not make in an attempt to confuse the straightforward legal propositions defendants have raised that warrant dismissal of the Complaint. Plaintiffs' claims should be dismissed for the reasons that defendants offered, which plaintiffs either misstate or simply ignore in their brief.

Plaintiffs' brief is notable in that it does not dispute many of defendants' central points:

- Cardinal specifically warned participants that the Cardinal Stock Fund was undiversified and likely to be more volatile than other investment options;

- Cardinal was always profitable, always had positive cash flows, always paid dividends on its stock, and there was no precipitous decline or impending bankruptcy or collapse; and

- Cardinal's stock outperformed the benchmarks during the putative class period.

Those facts alone render plaintiffs' claims groundless as a matter of law.

The Court should dismiss this case at the pleading stage. If allowed to proceed, this would be exactly the kind of case that discourages companies from sponsoring company stock investment plans and pursuing Congress' goal of giving employees the chance to have ownership in the companies where they work.

II. ARGUMENT

A. Plaintiffs' Imprudence Claim Fails As A Matter Of Law.

1. The Abuse of Discretion Standard The Sixth Circuit Adopted In Kuper Applies Here.

Plaintiffs argue that Kuper's abuse of discretion standard does not apply because "[t]his is an artificial inflation case, not a failure to diversify case." (Opp. at 5.) Plaintiffs are

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wrong. The abuse of discretion standard applies to any claim that it was imprudent for a plan to invest in company stock. (Mem. at 14-16, 18-19 and citations.) The label plaintiffs put on their prudence claim does not affect the standard of review of a fiduciary's conduct. Thus, numerous courts have applied an abuse of discretion analysis where plaintiffs alleged an investment in company stock was imprudent, including in cases where plaintiffs alleged the company stock's market price was artificially inflated. See, e.g., In re Calpine Corp. ERISA Litig., 2005 U.S. Dist. LEXIS 9719, *15-18, 23 (N.D. Cal. Mar. 31, 2005); In re Duke Energy ERISA Litig., 281 F. Supp. 2d 786, 788-90 (W.D.N.C. 2003); Crowley v. Corning, Inc., 234 F. Supp. 2d 222, 225-27 (W.D.N.Y. 2002).[1]

The controlling case law does not draw the distinction that plaintiffs urge. In Kuper, the Sixth Circuit held that "'an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision,'" but "'the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion.'" 66 F.3d 1447, 1459 (6th Cir. 1995) (quoting Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995)) (emphasis added). Nowhere did the Kuper court, or the Moench court before it, limit its holding to allegations solely alleging a "failure to diversify." To the contrary, the Sixth Circuit broadly stated that "[w]e agree and adopt the Third Circuit's holding [in Moench] that a proper balance between the purpose of ERISA and the nature of ESOPs requires that we review an ESOP fiduciary's decision to invest in employer stock for an abuse of discretion." Id. (emphasis added).[2]

[1] Plaintiffs themselves cite two cases in which courts applied the abuse of discretion standard where plaintiffs alleged that defendants breached their fiduciary duty of prudence because the employer company's stock was artificially inflated. See Opp. at 12 (citing In re Sprint Corp. ERISA Litig., 2004 U.S. Dist. LEXIS 9622, *7-10 (D. Kan. May 27, 2004); In re Syncor ERISA Litig., 351 F. Supp. 2d 970, 975-76 (C.D. Cal. 2004)).

[2] That Kuper and Moench did not limit the abuse of discretion standard to claims using the phrase "failure to diversify" makes perfect sense. There is no principled basis for distinguishing an allegation that a fiduciary did not sufficiently "diversify" a plan from an allegation that a fiduciary should have liquidated holdings of employer

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The abuse of discretion standard applies to all cases where a plaintiff alleges that an EIAP fiduciary breached his duty of prudence by causing the plan to invest in employer stock. The purpose of the abuse of discretion standard is the same, regardless whether plaintiffs label their claim an "artificial inflation" claim. Courts have adopted the abuse of discretion standard because they recognize that the duties of EIAP fiduciaries can be facially contradictory, and the abuse of discretion standard defines a middle path that reconciles those duties. On the one hand, ERISA requires an EIAP fiduciary to follow the plan's express terms, which often require investment in employer stock. ERISA § 404(a)(1)(D). On the other hand, ERISA also imposes general duties of prudence. ERISA § 404(a)(1)(B). The abuse of discretion standard attempts to balance those duties. It recognizes that "if [a] fiduciary, in what it regards as an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution [under ERISA § 404(a)(1)(D)], particularly if the employer's securities thrive." Moench, 62 F.3d at 572; see also Kuper v. Quantum Chem. Corp., 852 F. Supp. 1389, 1395 (S.D. Ohio 1994) ("defendants who attempted to diversify ESOP assets conceivably could confront liability for failure to comply with plan documents"), aff'd sub nom, Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995); Steinman v. Hicks, 352 F.3d 1101, 1104-05 (7th Cir. 2003) (recognizing the risk EIAP fiduciaries face if they choose not to maintain investment in employer securities). Without this deferential standard of review, the risks to EIAP fiduciaries would be

(continued…)

stock or that he breached his duty by continuing to hold the stock. See, e.g., Calpine, 2005 U.S. Dist. LEXIS 9719, at *14 ("At the hearing, plaintiff's counsel informed the Court that he was not pursuing a claim that the defendants breached their duty of prudence by failing to diversify the Calpine fund. However, counsel also asserted that defendants were liable for failing to 'deselect' the Calpine stock fund as an investment option, which the Court finds is substantively the same as a claim based on failure to diversify the Calpine stock fund") (emphasis added). A comparison of the allegations in Kuper with those here illustrates this point. Plaintiffs here allege that the defendants should not have permitted the Fund to "purchase and hold" shares of Cardinal stock (¶ 2; see also ¶ 87); the Kuper plaintiffs alleged that the fiduciaries breached their duties by "failing to diversify or liquidate." See Kuper, 66 F.3d at 1457. See also id. at 1451-52, 1459-60 (same). There is no substantive difference. The allegations in this case and Kuper form the basis of the same argument — that the fiduciary should not have allowed the plan to continue investing in employer stock. The Kuper standard therefore applies.

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intolerable; plans that expressly require the holding of company stock would become unworkable and would cease to exist, contrary to Congress' goal of encouraging employee ownership of company stock. (Mem. at 15 n.6; see also Steinman, 352 F.3d at 1105 ("If ESOPs had to be diversified they would fail in their purpose of encouraging employees' ownership of their employer stock.").) These considerations apply whenever a plan provides for investment in company stock and a plaintiff claims an EIAP fiduciary should have departed from the plan's terms, as is the case here.

Plaintiffs cite only one anomalous and non-controlling case, In re JDS Uniphase Corp. ERISA Litig., 2005 WL 1662131 (N.D. Cal. July 14, 2005), that purports to distinguish between allegations that fiduciaries breached their prudence duties when they invested in employer stock and allegations that fiduciaries breached those duties when they failed to "diversify" out of employer stock. (Opp. at 7.) JDS Uniphase cites no caselaw for its position that there is a difference between allegations of breach based on continued investment in employer stock and on a failure to diversify. Id. at *7-8. Another district court in the same circuit, citing the Ninth Circuit's decision in Wright v. Oregon Metallurgical Corp., 360 F.3d 1090 (9th Cir. 2004), held the opposite and applied the abuse of discretion standard where the plaintiffs alleged that the defendants' failure to disclose complete and accurate information regarding the employer company's stock led to the stock's artificial inflation. See Calpine, 2005 U.S. Dist. LEXIS 9719, at *15-18, 23. The JDS Uniphase court's reasoning is also contrary to the Sixth Circuit's broad and unqualified holding in Kuper. See Kuper, 66 F.3d at 1459 (citing and adopting Moench).

The JDS Uniphase court cited Lalonde v. Textron, Inc., 369 F.3d 1 (1st Cir. 2004), which Plaintiffs also cite in their brief for the proposition that the Court should not apply

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the abuse of discretion standard in "artificial inflation" cases. (Opp. at 7.) The Lalonde case, however, does not discuss the distinction between "artificial inflation" and "diversification" cases that the plaintiffs urge this Court to recognize here. Instead, Lalonde declined to apply the Kuper/Moench abuse of discretion standard at all without "further record development." 369 F.3d at 6. As Kuper is controlling law in this Circuit, Lalonde does not save plaintiffs' argument.

In any event, JDS Uniphase and Lalonde are based on completely different circumstances from plaintiffs' allegations here. The JDS Uniphase court determined that the complaint would have stated a claim even if the court had applied the abuse of discretion standard, distinguishing the allegations in that case from those in Calpine. 2005 WL 1662131, at *7-8. The JDS Uniphase plaintiffs alleged that the company's stock "dropped drastically" from $145 per share to $5 per share, whereas, in Calpine, "the record before the court disclosed that Calpine had steady revenue and profit, showing that it was a viable concern and not in the sort of deteriorating financial circumstances that must be pled to rebut the presumption of prudence." Id. at *1, 8 n.5. Similarly, in Lalonde, the employer's earnings per share had dropped over 70% and its common stock "significantly underperformed in comparison to the market as a whole . . . and [the company's] peer group." 369 F.3d at 3. Cardinal's stock performance is much more similar to the employer stock's performance in Calpine than that in JDS Uniphase and Lalonde. (Mem. at 8-9, 16-18.)

Finally, the cases plaintiffs cite in contending that "many Courts have recognized claims for imprudent investment in publicly traded stocks where the price was artificially inflated" do not support plaintiffs' suggestion that those courts recognized the imprudence claims because they were "artificial inflation" cases instead of "diversification" cases. (Opp. at 6 n.5.)

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The cases make no such distinction and therefore are irrelevant to plaintiffs' argument. Moreover, two of the cases do not even adopt the abuse of discretion standard set forth in Kuper and Moench. See Lalonde, 369 F.3d at 6; Hill v. Bellsouth Corp., 313 F. Supp. 2d 1361, 1367-68 (N.D. Ga. 2004). They are thus directly contrary to Sixth Circuit law.

2. Plaintiffs' "Adequate Consideration" Cases Do Not Apply.

Plaintiffs assert that "the plain language of ERISA" distinguishes failure-to-diversify cases from artificial inflation cases and, citing § 408, state that ERISA "expressly requires that plan purchases be for adequate consideration." (Opp. at 6.) That argument is not well-taken.

In arguing that failure-to-diversify cases seek to "override" ERISA's express language while "artificial inflation" cases somehow seek to "enforce" the express language of ERISA, plaintiffs fail to mention that § 408(e)(1) is a "conditional exemption from the prohibited transaction rules for acquisition of employer securities by ESOPs and certain other plans." See Donovan v. Cunningham, 716 F.2d 1455, 1465 (5th Cir. 1983) (emphasis added) (cited by plaintiffs). Like the exemption for EIAPs in § 404(a)(2), the adequate consideration exemption also seeks to override ERISA's express prohibition of certain transactions by allowing a plan to acquire or sell an employer's securities in circumstances otherwise prohibited by ERISA.

Furthermore, § 408 is an exemption to the prohibited transactions rule set forth in § 406. See id.[3] The Complaint here asserts no claim under § 406. Indeed, the Complaint does not even mention § 406. The Sixth Circuit has emphasized that a different analysis applies for § 404 cases (such as Kuper and this case) than for § 406 cases:

[3] See Donovan, 716 F.2d at 1464-65 ("As a supplement to the general duties imposed on fiduciaries by Section 404, ERISA also incorporates a detailed list of specifically prohibited transactions. . . . The object of Section 406 was to make illegal per se the types of transactions that experience had shown to entail a high potential for abuse.").

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> [T]he holding in Kuper is inapplicable to the present case as Kuper only addressed violations of § 404, not § 406. . . . [A] violation of § 406 was not at issue in Kuper. . . . Instead, at issue in Kuper was whether the defendants had violated their fiduciary duties under § 404.

Chao v. Hall Holding Co., 285 F.3d 415, 438 (6th Cir. 2002). When a plaintiff alleges a § 406 prohibited transaction violation, the fiduciary has the burden to prove that the stock purchase was for adequate consideration. See Donovan, 716 F.2d at 1467-68. In contrast, when a plaintiff alleges that a fiduciary of an EIAP violated § 404 by imprudently investing in employer stock, Kuper places the burden on the plaintiff to show the fiduciary abused his discretion. See 66 F.3d at 1458-59. Thus, the adequate consideration exemption has no relevance here.[4]

Nor do the adequate consideration cases that plaintiffs cite support their argument. In Horn v. McQueen, the court applied an adequate consideration analysis rather than the abuse of discretion standard to imprudence allegations because the plaintiffs alleged § 406 violations (the prohibited transactions rule) in addition to § 404 violations. See 215 F. Supp. 2d 867 (W.D. Ky. 2002). The Horn court explained that "the plaintiffs' claims under ERISA section 406 are the gravamen of this case and that section operates under a different framework" than § 404. Id. at 876 (emphasis added). That distinction is consistent with Chao. Donovan, which was decided over ten years before Kuper and Moench, was also premised on a § 406 prohibited transaction claim. See 716 F.2d at 1465. Horn and Donovan are also irrelevant because the complaints in

[4] Even if plaintiffs had alleged that defendants somehow violated § 406, that claim would fail as a matter of law because plaintiffs have not alleged that the Plan paid more for Cardinal stock than the price prevailing on a national exchange. See 29 U.S.C. § 1002(18) (defining "adequate consideration" as "the price of the security prevailing on a national securities exchange" for securities for which there is a generally recognized market). Another federal court recently rejected the argument that an allegation of artificial inflation supports a claim for a prohibited transaction under § 406. See Honeywell, 2004 U.S. Dist. LEXIS 21585, at *48-49 ("Despite the statutory definition [of adequate consideration], Plaintiffs argue that the consideration paid in connection with Plan's transactions in Honeywell stock was in fact not merely adequate because the price of Honeywell stock was inflated. This allegation does not provide a sufficient basis for departing from the statutory definition. . . . [I]f a participant wishes to sue for fraud relating to the inflation of the price of the stock, he or she has options that do not require an expanded reading of a clear statutory definition.").

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those cases did not allege that the companies' stock prices were inflated because of misrepresentations or nondisclosures. Because plaintiffs here have alleged no § 406 violation, the Court should reject plaintiffs' argument that the adequate consideration standard set forth in Donovan and other § 406 cases is somehow relevant to their § 404 claims.

3. The Abuse Of Discretion Standard Is Not Limited To ESOPs.

Plaintiffs next contend that the Kuper standard does not apply because the Cardinal Plan is not an ESOP. (Opp. at 8-10.) That argument has been almost universally rejected by other courts. (Mem. at 18-19.) As the court in Landgraff v. Columbia/HCA Healthcare Corp. explained, the Sixth Circuit adopted an abuse of discretion standard based on the fact that ESOPs "are exempt from the diversification requirement and prohibition against self dealing," and those exemptions necessarily make ESOPs riskier than certain other types of ERISA plans. 2000 WL 33726564, *5 (M.D. Tenn. May 24, 2000), aff'd, 2002 WL 203208 (6th Cir. Feb. 7, 2002). This places fiduciaries in a "precarious position" because they "must 'administer the ESOP investment consistent with the provisions of both a specific employee benefits plan and with ERISA['s duty of prudence.]'" Id. (quoting Kuper).

In Kuper, the Sixth Circuit adopted the Third Circuit's holding in Moench, which attempted to alleviate these conflicts by balancing ERISA's duty of prudence and Congress' "'desire to encourage employee ownership.'" Id. (quoting Moench). The court sought to accomplish this objective through the abuse of discretion standard. Id. The "same reasoning" that the court applied to ESOPs applies to stock bonus plans and other EIAPs. See id. at *6. All EIAPs, not just ESOPs, are exempt from ERISA's: (1) diversification requirement, (2) prudence requirement to the extent it requires diversification, (3) percentage limitation on investments in an employer's securities, and (4) strict prohibitions against self-dealing. See ERISA §§ 404(a)(2), 406(b)(1), 407(b)(1), 408(e). Therefore, "the competing Congressional interest in

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employee ownership of company stock and the fiduciary's duty of prudence must be balanced with respect to all EIAPs," not merely ESOPs. Landgraff, 2000 WL 33726564, at *6 (emphasis added).

The overwhelming majority of courts agree. See Wright, 360 F.3d at 1098 n.3 ("[S]tock bonus plans, as present in this case, and ESOPs are both EIAPs and are treated the same for the purpose of fiduciary duty analysis."); Steinman v. Hicks, 252 F. Supp. 2d 746, 758-59 (C.D. Ill. 2003) (applying the Moench standard to a non-ESOP EIAP), aff'd, 352 F.3d 1101 (7th Cir. 2003); Duke Energy, 281 F. Supp. 2d at 794 n.5 (in finding that the plan at issue was an ESOP, "the court is not implying that an 'eligible individual account plan' ('EIAP') providing for the acquisition of employer securities cannot be treated like an ESOP with regard to exceptions from fiduciary requirements"); Calpine, 2005 U.S. Dist. LEXIS 9719, at *15-16 (applying an intermediate prudence standard to an EIAP; noting that "other circuits have imposed an intermediate prudence standard, under which an EIAP fiduciary who invests in employer stock 'is presumed to have acted consistently with ERISA'").[5]

Indeed, at least two federal appellate courts have held that the abuse of discretion standard applies to all EIAPs. See Wright, 360 F.3d at 1098 n.3 (expressly holding that the standard applies to all EIAPs); Steinman, 352 F.3d at 1102-06 (affirming district court's summary judgment in favor of defendant fiduciaries of EIAP after applying the abuse of discretion standard). No appellate court has held that the standard applies only to ESOPs.

Plaintiffs incorrectly claim that the Third Circuit "specifically declined to apply the Moench standard to a non-ESOP 401(k) plan." (Opp. at 10 (citing In re Schering-Plough

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[5] Plaintiffs themselves cite two cases in which courts acknowledged that the abuse of discretion standard applies to all EIAPs, not just ESOPs. See, e.g., Syncor ERISA Litig., 351 F. Supp. 2d at 979; In re ADC Telecomm., Inc., ERISA Litig., 2004 WL 1683144, *5 (D. Minn. July 26, 2004).

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Corp. ERISA Litig., 420 F.3d 231, 238 (3d Cir. 2005).) Schering-Plough did no such thing. The main issue there was whether the plaintiffs were properly seeking monetary damages on behalf of the plan or whether they were improperly seeking individual relief. See 420 F.3d at 235. In determining that the plaintiffs could attempt to pursue damages claims on behalf of the plan under § 502(a)(2), the court expressly held open the possibility that the district court, on remand, could apply the abuse of discretion standard: "we express no opinion on the significance, if any, of 29 U.S.C. § 1104(a)(2) [ERISA § 404(a)(2)] in the context of this case." Id. at 238 n.5. Section 404(a)(2), of course, expressly exempts all EIAPs from the duty to diversify and the duty of prudence to the extent it requires diversification. Schering-Plough thus does not aid the plaintiffs at all.

The only other case plaintiffs cite is Unaka Co., Inc. v. Newman, 2005 WL 1118065 (E.D. Tenn. Apr. 26, 2005). Even in that case the court conceded that other courts, including in the Sixth Circuit, have determined that all EIAPs are subject to the same abuse of discretion standard. Id. at *21. And the court failed to cite any case stating that the abuse of discretion standard should not be applied to EIAPs. See id.

Additionally, in concluding that the actions of the plan fiduciaries should not be reviewed for an abuse of discretion, the Unaka court emphasized that "[i]n reviewing a fiduciary's actions, the court must be governed by the intent of the plan." Id. The court found that the provisions of the Unaka plan permitting the holding of employer securities were "merely incidental" to other purposes. See id. The Unaka plan specifically limited the acquisition of employer securities to no more than 25% of the fair market value of the trust fund's assets. See id. at *1. The court determined that the plan acquired Unaka stock "not because of the language of the plan" but rather because of other business considerations. See id. at *21.

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The Cardinal Plan, in contrast, has strong provisions requiring that a company stock fund be one of the investment offerings and mandates that the Cardinal Fund consist of Cardinal stock. (Mem. at 6, 15.) It provides no ceiling on the proportion of Plan assets that can be invested in company stock. Additionally, unlike the Unaka defendants' primary reason for investing in company stock, the Plan here provided for Cardinal stock as an investment option because the express language of the Plan clearly demonstrated the settlor's intent that company stock be offered. (See Mem. at 15; see also Def. Ex. A at § 8.05; Def. Ex. B at § 8.05.) For all of these reasons, Unaka provides no useful guidance here.

4. Plaintiffs' Imprudence Claim Fails As A Matter of Law Because The Complaint Does Not Allege Facts That Could Establish An Abuse of Discretion.

Kuper, Moench, and other cases interpreting the abuse of discretion standard demonstrate that the duty of prudence prevents a fiduciary from investing in employer stock only in extreme circumstances and that the abuse of discretion standard leaves only a "narrow exception" for possible liability for such investments. (Mem. at 15-18 and citations.)[6] Plaintiffs argue that defendants erroneously state the Kuper standard and create it "completely of whole cloth." (Opp. at 11.) Plaintiffs would have the Court disregard how the courts in Kuper, Moench, and other cases actually applied the abuse of discretion standard and instead attempt to apply the standard in a vacuum. The factual background, including the financial health of the

[6] Although plaintiffs argue that they do not need to allege that Cardinal was on the brink of collapse to show an abuse of discretion (Opp. at 11-12), many courts have required just such factual allegations. See Calpine, 2005 U.S. Dist. LEXIS 9719, at *16 ("Under Wright, to rebut the presumption established by the intermediate prudence standard, a complaint must plead facts that, if proven, would demonstrate that the fiduciaries knew that the 'company's financial condition is seriously deteriorating and that there is a genuine risk of insider self-dealing.' Indeed, Wright specifically distinguished a line of district court cases where the presumption of prudence had been rebutted by allegations that 'clearly implicated the company's viability as an ongoing concern,' such as allegations of incipient financial collapse or bankruptcy, on the grounds that no such facts had been pled in the Wright case.") (quoting Wright, 360 F.3d at 1098-99); In re McKesson HBOC, Inc. ERISA Litig., 2005 WL 1878118, at *17 (N.D. Cal. Sept. 9, 2005) ("Wright suggests that a plaintiff can only state a claim for a fiduciary's imprudent failure to violate the plan and diversify an ESOP by alleging that the company faced insolvency."); Duke Energy, 281 F. Supp. 2d at 795 (holding that plaintiffs failed to plead an abuse of discretion where the company was "far from 'impending collapse,' and not in 'dire circumstances.'").

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company at issue, in the cases adopting and applying the abuse of discretion standard is critically important and cannot be ignored. Plaintiffs fail to address any of the facts in the cases defendants cited. (Mem. at 16-18; Opp. at 11-12.)

Comparing the facts in Kuper with those here leaves no doubt that the Complaint's allegations do not state a prudence claim. In Kuper, the company's stock declined 80%. See 66 F.3d at 1450. The CEO sold all of his shares, and the company experienced a liquidity crisis. See id. at 1459-60. The Sixth Circuit held that these circumstances were insufficient to show an abuse of discretion in continuing to invest plan assets in employer stock. See id. Here, in stark contrast, Cardinal's stock price outperformed the broader market, the S&P Healthcare Index, and other measures. (Mem. at 8-9, 16-17 and citations.) The company has always been profitable, and the stock has always paid a regular dividend. See id. Plaintiffs do not dispute any of this. In fact, their brief does not attempt to explain how the facts in Kuper could be insufficient to show an abuse of discretion while the allegations in this case somehow could demonstrate such an abuse. That Cardinal is indisputably in a much better financial situation than the company in Kuper cannot be ignored in determining whether plaintiffs have adequately alleged an abuse of discretion. (Mem. at 15-18 and citations.)

Plaintiffs do not cite a single case where a plaintiff has been permitted to proceed with a prudence claim where the employer company's stock outperformed the market during the class period as Cardinal stock has done. The cases plaintiffs cite, rather than supporting their position, in fact further demonstrate that the duty of prudence prevents a fiduciary from investing in employer stock in only extreme circumstances — circumstances certainly not present here. See Syncor, 351 F. Supp. 2d at 975 (employer company's stock dropped by more than 50% in two days following allegations that the company violated the Foreign Corrupt Practices Act);

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ADC Telecomm., 2004 WL 1683144, at *1-2 (employer company announced a "large-scale worldwide layoff" after its stock price "plummeted, losing almost 95% of its value").

Despite plaintiffs' arguments to the contrary, this Court should apply the abuse of discretion standard at the 12(b)(6) stage, as multiple other courts have done. (Mem. at 19-20 and citations.) Although the courts that have applied the abuse of discretion standard sometimes refer to the standard as a "presumption of prudence," they have not used the word "presumption" in its evidentiary sense. Those cases instead refer to the abuse of discretion standard as a substantive part of the plaintiffs' prudence claims, embodying the deferential standard of review that ERISA requires for claims related to a plan's investment in company stock. See, e.g., Kuper, 66 F.3d. at 1458-59; Moench, 62 F.3d at 571-72; Wright, 360 F.3d at 1097. Because, under Sixth Circuit law, proving an abuse of discretion is a necessary element of plaintiffs' prudence claim, the Complaint must plead facts that, if true, establish an abuse of discretion. See Kuper, 66 F.3d. at 1458-59; Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003) ("To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all the material elements of the claim."). The allegations plaintiffs have made here do not begin to do so. See, e.g., Wright, 360 F.3d at 1098-99 ("Plaintiffs' alleged facts effectively preclude a claim under Moench, eliminating the need for further discovery. . . . The published accounts of [the company's] earnings and financial fundamentals during the relevant period, attached to the complaint, demonstrate that [the company] was far from the sort of deteriorating financial circumstances involved in Moench and was, in fact, profitable and paying substantial dividends throughout that period."). For all of these reasons, Count I should be dismissed.[7]

[7] In arguing that the Court should not apply the abuse of discretion standard on a motion to dismiss, plaintiffs cite several cases that discuss presumptions as evidentiary standards. (Opp. at 13-14 (citing Swierkiewicz

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B. Plaintiffs Fail Adequately To Plead Loss Causation In Count II As The Supreme Court's Recent Dura Decision Requires.

1. Plaintiffs Confuse The Elements Of Their Prudence Claim (Count I) With the Elements Of Their Misrepresentation Claim (Count II).

Count II fails to plead loss causation. (Mem. at 21-25 and citations.) Instead of responding to defendants' argument, plaintiffs attempt to blur the distinctions between Count I (the prudence claim) and Count II (the misrepresentation claim). Those are fundamentally different claims, based on different theories, with different legal elements.

The prudence claim in Count I rests on the theory that a prudent person in the defendants' position would not have allowed Cardinal stock to be included among the Plan's investment options. (¶¶ 78-87.) Defendants do not direct their loss causation argument at Count I. (Mem. at 21-25.)

Count II, in contrast, is a misrepresentation claim which plaintiffs characterize as a "price inflation" claim. (Opp. at 5-8.) Plaintiffs' theory in Count II is that the defendants made misrepresentations to the market about Cardinal's prospects and finances, and that those misrepresentations caused Cardinal stock to trade at higher prices than it otherwise would have during the Class Period. (¶¶ 93-97; Opp. at 5-8.) This is similar to the theory in the pending securities litigation, but is brought under ERISA and on behalf of Plan participants only.[8] Like the securities case, the mechanism by which the ERISA plaintiffs claim to have been harmed is

(continued…)

v. Sorema, N.A., 534 U.S. 506 (2002); Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002); Hill v. Blue Cross-Blue Shield of Mich., 409 F.3d 710 (6th Cir. 2005).) Because the abuse of discretion standard is an element of plaintiffs' prudence claim, not an evidentiary standard, those cases are irrelevant. The cases are also inapplicable because they did not involve the proper pleading standard for imprudence claims where the claims will be reviewed under the abuse of discretion standard. See Swierkiewicz, 307 F.3d at 510 (proper pleading standard in an employment discrimination case under Title VII and the ADEA); Galbraith, 307 F.3d at 1126 (proper pleading standard for constitutional tort claims); Hill, 409 F.3d at 720-21 (proper pleading standard for fiduciary duty claim involving exhaustion of administrative remedies).

[8] See Consolidated Amended Complaint in In re Cardinal Health, Inc. Secs. Litig., Consolidated Case No. C2-04-575 at ¶¶ 411-12 (Docket No. 26).

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by having paid "too much" for Cardinal stock as a result of the proverbial "artificial inflation" in stock price caused by the alleged misstatements. (¶¶ 93-97.) Defendants' loss causation argument is directed at Count II, and only Count II. (Mem. at 21-25 and citations.)

Because the loss causation argument is directed only at the misrepresentation claim, and not the prudence claim, plaintiffs' lengthy arguments about the duty of prudence, and how causation and damages are analyzed in a prudence claim, are beside the point. (Opp. at 14-20 and n.14.) What matters is how loss causation must be alleged in a misrepresentation claim where the mechanism for transmitting the alleged misrepresentation is a publicly-traded stock price's supposed "artificial inflation." See Dura Pharm., Inc. v. Broudo, 125 S. Ct. 1627, 1630-32 (2005).

Why do plaintiffs try to confuse matters, discussing issues pertinent only to a prudence claim (like Count I), when by their own admission Count II is a "price inflation" claim about misrepresentations? (Opp. at 5-8.) Because their Complaint gives them nothing to say regarding the causation element of their misrepresentation claim. Plaintiffs' response leaves the key points completely unrebutted. First, the Complaint identifies no corrective disclosure that caused Cardinal's stock price to fall. Second, plaintiffs cannot contest that Cardinal's stock price rose after the October 26, 2004 restatement that corrected the alleged misstatements. (Def. Ex. G.)[9] Third, the Complaint alleges that Cardinal's stock price is still inflated, which is contradictory to any claimed loss from a corrective disclosure. (¶¶ 1, 40.) In the face of these unrebutted points, the Complaint fails to identify any loss that defendants' alleged misrepresentations proximately caused.

[9] Elsewhere in their brief, plaintiffs insinuate that Cardinal's stock price dropped after the restatement. (Opp. at 4.) The Complaint, however, contains no such allegation. Moreover, plaintiffs never challenge the public-record stock price data (which is subject to judicial notice) showing that Cardinal's stock price increased after the restatement. (See Def. Ex. G; Keithley Instruments, Inc. Secs. Litig., 268 F. Supp. 2d 887, 896 (N.D. Ohio 2002) (considering stock prices).)

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Plaintiffs do not dispute that proximate causation, "commonly referred to as 'loss causation,'" is an element of a misrepresentation claim under ERISA. Campbell v. Shearson/Amer. Express, Inc., 1987 WL 44742, *2 (6th Cir. Sept. 9, 1987). Because proximate causation is an element of the claim, plaintiffs must plead and eventually prove it. If proximate causation is not properly alleged, a misrepresentation claim must be dismissed. Kane v. United Indep. Union Welfare Fund, 1997 WL 411208, *2, 4 (E.D. Pa. July 22, 1997) (dismissing ERISA and other claims where "Plaintiff's amended complaint alleges no present injury to the Fund"; stating that "[s]ince the complaint has not alleged actual harm to the Fund by the alleged fiduciary breaches of the trustees, there is no possible recovery" under § 502(a)(2) and "[t]he alleged breach must be proved to have caused actual injury to the plan"). Plaintiffs' only criticism of Kane is that the complaint conceded that there was no present injury to the fund. (Opp. at 17.) That is no basis for distinguishing Kane's central holding. Kane is completely consistent with Dura's loss causation pleading requirements.

Plaintiffs also attempt to downplay McKesson HBOC, Inc. ERISA Litig., 2002 WL 31431588 (N.D. Cal. Sept. 30, 2002), contending that its reasoning has been "widely criticized," citing Gee and Rankin. (Opp. at 18.) Plaintiffs misrepresent defendants' reliance on McKesson. The part of Gee and Rankin that plaintiffs cite regarding an "evolving consensus" relates to an argument raised in those cases that the claims were barred by the federal securities laws. See Gee v. UnumProvident Corp., 2005 WL 534873, at *9-12 (E.D. Tenn. Jan. 13, 2005); Rankin v. Rots, 278 F. Supp. 2d 853, 873-74 (E.D. Mich. 2003). Defendants here have not made that argument. We cite McKesson for a very different proposition — the need for an ERISA complaint to plead proximate causation by "identify[ing] . . . what damages or harm is alleged to

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have resulted from each of the specific breaches of duty." 2002 WL 31431588, at *17 (N.D. Cal. Sept. 30, 2002). Plaintiffs do not challenge McKesson on that point.

Plaintiffs criticize a few of our causation cases because they were summary judgment decisions. (Opp. at 17.) But plaintiffs do not dispute that those cases stand for the fundamental proposition that plaintiffs in ERISA cases must prove proximate causation, and Dura and other cases establish that proximate causation must not simply be proven, but pleaded as well. (Mem. at 21-25.)[10]

2. Plaintiffs' Efforts to Avoid Dura Are Unavailing.

Plaintiffs make several arguments to try to avoid Dura's clear mandate as to how proximate causation is pleaded in a "price inflation" case. Ironically, each argument is directly at odds with plaintiffs' repeated refrain elsewhere in their brief that this is an "artificial inflation" or "price inflation" case. (Opp. at 5-8.) Dura was such a case, and the Supreme Court squarely resolved the loss causation pleading requirements for that kind of case. See 125 S. Ct. at 1630-32.

The loss causation rule's purpose is to ensure that an alleged misstatement actually caused the plaintiff's claimed losses. Because the law does "not . . . provide investors with broad insurance against market losses, but . . . protect[s] them against those economic losses that misrepresentations actually cause," id., 125 S. Ct. at 1633, a mere stock price decline does not automatically give rise to a claim. Rather, the price decline must be connected to the disclosure of information that was previously misstated or omitted. Plaintiffs do not allege that

[10] Plaintiffs also state in passing that under Kuper, the only link plaintiffs must demonstrate is "'that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident.'" (Opp. at 14-15.) That argument is also a prudence argument and is therefore irrelevant to defendants' loss causation argument. Moreover, Kuper makes clear that the burden of proof to establish a "causal link" for claimed damages is on plaintiffs. See 66 F.3d at 1459-60. Dura elaborated on what a complaint must plead to satisfy loss causation in an artificial inflation case like this. See 125 S. Ct. at 1630-32.

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Cardinal's stock price declined because of a correction of previously misstated information. In fact, plaintiffs do not even dispute that the stock price rose after the restatement in October 2004 that they say corrected prior misstatements. (Def. Ex. G.) What's more, the Complaint seems to allege that Cardinal's stock price is still artificially inflated, in that it defines the class period for the price inflation claim as extending to the present day. (¶¶ 1, 40.) Dura therefore bars Count II.

(a) The Logic Of Dura Is Not Limited To Securities Cases.

Plaintiffs contend that this Court should limit Dura's logic to securities cases. (Opp. at 16-18.) But the fact that Dura involved Rule 10b-5 claims makes no difference. The requirement that a plaintiff plead proximate cause applies to a 10b-5 claim, or a common law fraud claim, or a breach of fiduciary duty claim based on misrepresentation. In fact, Dura draws on the common law of torts and non-Rule 10b-5 principles, including the Restatement of Torts, in analyzing how proximate causation is to be pleaded and proved in a "price inflation" case such as the one plaintiffs avow this to be. See Dura, 125 S. Ct. at 1631-33.[11]

Plaintiffs fail to cite a single case limiting Dura's loss causation pleading requirement to securities cases or a single case in which ERISA plaintiffs were not required to plead loss causation. No such case exists.

Ironically, while plaintiffs contend that securities pleading cases like Dura do not apply here, they rely on In re Initial Public Offering Secs. Litig., 2005 WL 1529659 (S.D.N.Y. June 28, 2005). That securities case only supports defendants' position. There, the Southern District of New York court dismissed all of the claims based on a failure to plead loss causation:

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[11] Plaintiffs acknowledge that the federal district court in Lewis v. Hermann, 775 F. Supp. 1137 (N.D. Ill. 1991) (cited in Mem. at 25 n.13), applied the loss causation standard from securities law to an ERISA claim, but try to minimize the impact of that fact because the plaintiff effectively conceded the point. (Opp. at 17-18.) No court, however, has ever overruled or questioned Lewis' loss causation conclusion on that basis.

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> [I]n material misstatement and omission cases, a court cannot presume dissipation of the inflationary effect; a plaintiff must explicitly allege a disclosure or some other corrective event. Moreover, to establish loss causation, a plaintiff must allege . . . that the subject of the fraudulent statement or omission was the cause of the actual loss suffered, i.e., that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security.

Id. at *2 (quoting and reaffirming prior ruling in case) (emphasis added). See also id. at *5 (concealment "can only cause losses after it is disclosed"); *6 ("plaintiffs' failure to allege a corrective disclosure of the falsity of defendants' opinions precludes any claim that such falsity caused their losses"); and *6 (loss from complicated scheme to mislead public about true value of stock "can only be caused when the true value of the securities is revealed to the public"). That is plaintiffs' own case and it warrants dismissal of Count II under Dura.

(b) Trust Law Does Not Require A Different Result.

Plaintiffs reference the common law of trusts. (Opp. at 17.) Trust law principles of prudence, which plaintiffs emphasize, are not relevant to a misrepresentation claim like Count II for the reasons previously explained. Plaintiffs are simply mixing apples and oranges again. Trust law requires proof of proximate causation for damages to be awarded on account of a fiduciary's misrepresentation and is thus consistent with Dura. See LaMonte v. Sanwa Bank Cal., 52 Cal. Rptr. 2d 861, 865 (Cal. Ct. App. 1996) (a plaintiff's failure to show that misrepresentation proximately caused damage "is fatal to the cause of action" for breach of fiduciary duty).

(c) Plaintiffs Have Not Satisfied The Dura Standard For Pleading Proximate Causation On Their Misrepresentation Claim.

Plaintiffs contend that the Complaint meets Dura's pleading standard in any event. (Opp. at 18-19.) They suggest that an unspecified earnings restatement (presumably referring to Cardinal's October 26, 2004 restatement) was the required "corrective disclosure."

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(Opp. at 19-20; ¶ 78.) But that argument dooms their misrepresentation claim for the simple reason that plaintiffs cannot dispute that Cardinal's stock price went up after the "corrective disclosure." Cardinal's stock price increased from $39.33 per share on October 26 to $47.35 the first trading day after the disclosure. (Def. Ex. G.) Moreover, in the 90 days following the restatement, Cardinal's mean stock price was $53.1124. (Id.) The Complaint thus identifies no loss caused by the "corrective disclosure" on which plaintiffs now rely. Dura's unequivocal loss causation requirement warrants dismissal. See 125 S. Ct. at 1630-32.[12]

C. Plaintiffs' Claims Under ERISA Section 502(a)(3) Must Be Dismissed To The Extent They Seek Money Damages.

Because § 502(a)(3) does not allow claims for monetary damages, the claims brought under that section in all three counts must be dismissed to the extent they seek to compel defendants to make payments of money. (Mem. at 11-13 and citations.) Plaintiffs' sole argument in response is that, because the Complaint references "statutory costs and attorney's fees, declaratory, injunctive, and equitable relief, and the imposition of a constructive trust on any amounts by which any Defendant was unjustly enriched," plaintiffs "really" seek equitable relief. (Opp. at 33.) Plaintiffs are wrong.

The relief that plaintiffs actually seek cannot be characterized fairly as "equitable." There are no allegations that any defendant misappropriated money from the Plan or dealt with the Plan to his personal benefit. There are no allegations that any defendant possesses an identifiable fund of money received from the Plan or a plaintiff to which plaintiffs are entitled. All that is alleged, rather, is that participants experienced paper losses in their Plan accounts during a portion of the putative class period when Cardinal's stock price declined (even

[12] Plaintiffs' JDS Uniphase case does not require a different result. In that case, the stock price eventually fell from $100 to $3 after the disclosure. See 2005 WL 1662131, at *7-8. Moreover, JDS Uniphase does not address Dura.

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thought it outperformed the market). That alleged decline in stock value cannot give rise to equitable relief because it is not "particular funds or property in [defendants'] possession," which the Supreme Court has stated is necessary "for restitution to lie in equity." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214 (2002); see also Mem. at 11-12.[13] Plaintiffs do not argue, and the Complaint does not allege otherwise. Nor does the Complaint identify any other form of equitable relief to which plaintiffs could be entitled on the facts alleged.

The Sixth Circuit's recent decision in Crosby v. Bowater (which plaintiffs ignore) is dispositive. The Sixth Circuit held that regardless of whether a plaintiff "asks" for equitable-sounding relief, suits that "seek[] to compel the defendant to pay a sum of money to the plaintiff are 'almost invariably' excluded from the category of suits . . . typically available in equity." 382 F.3d 587, 594 (6th Cir. 2004). That is fatal to plaintiffs' § 502(a)(3) claims.

D. The Misrepresentation Claim Fails Because Plaintiffs Have Not Pleaded Actual Reliance On Any Specific Alleged Misstatements.

In Count II, plaintiffs fail to plead actual reliance on any specific misstatements. (Mem. at 25-28 and citations.) Contrary to plaintiffs' assertions, the Complaint's ambiguous statement that "Plaintiffs, the Plan, and the participants relied upon, and are presumed to have relied upon, the representations and nondisclosures . . . to their detriment" does not plead actual reliance in any intelligible way. (¶ 96 (emphasis added); Opp. at 20.) This vague and conclusory allegation does not sufficiently put defendants on notice of the particular statements plaintiffs say

[13] That value is gone; it is not a discrete "fund[] or property" that defendants took from plaintiffs and that equity can require them to "restore[]" to plaintiffs. See Great-West, 534 U.S. at 213-14 (holding that, if the property that the plaintiff sought to recover or its proceeds has been dissipated, so that no property remains, the plaintiff's claim is only that of a general creditor and he cannot seek equitable remedies such as a constructive trust or lien); In re Honeywell Int'l ERISA Litig., 2004 U.S. Dist. LEXIS 21585, *56-57 (D.N.J. Sept. 14, 2004) ("Here there is no real allegation that Defendants are in continued possession of specific property or funds that rightfully belong to the Plan — or even of proceeds traceable to such property or funds. The alleged breaches of the duty harmed the Plan (and, indirectly, Plaintiffs) by diminishing the value of the Plan's holdings; but there is no allegation that specific funds or property that once belonged to the Plan or participants remains in the hands of any of the Defendants."); Bauhaus USA, Inc. v. Copeland, 292 F.3d 439, 443-45 (5th Cir. 2002) (affirming dismissal of an ERISA plan administrator's declaratory judgment suit because the funds at issue were no longer in the defendant's possession).

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misled them. (Mem. at 26-27.) Indeed, defendants are left to guess which — if any — of the hundreds of public statements about Cardinal's business during the five-year class period plaintiffs relied upon to their detriment. (Id.) If the plaintiffs mean to say that they actually heard and relied on specific statements that plaintiffs claim were false, then it is not too much to ask them to identify those statements.

That plaintiffs do not really claim actual reliance is borne out by their extended argument attempting to convince the Court that they do not need to plead actual reliance. Instead, they argue, the fraud-on-the-market doctrine somehow applies in ERISA cases. (Opp. at 20-26.) But they fail to cite a single case holding that the fraud-on-the-market doctrine actually applies in ERISA's context. Plaintiffs maintain that the Sixth Circuit's decision in Del Rio v. Toledo Edison (6th Cir. Apr. 23, 2005), and the other cases defendants cite explicitly holding that actual reliance is an element of a misrepresentation claim under ERISA (Mem. at 26 and citations), are somehow inapplicable because "'the fraud on the marketplace theory' was not even implicated in the case, much less discussed, analyzed, or decided" or the case did not "involve[] 'fraud-on-the-market' claims." (Opp. at 21 n.18.) But nothing in the Sixth Circuit's decision or the other cases we cite remotely suggests that the reliance element of an ERISA misrepresentation claim somehow disappears when company stock is in question. If anything, plaintiffs' argument highlights our fundamental point: the fraud-on-the-market doctrine is generally not discussed, analyzed, or decided in ERISA cases because the doctrine does not apply to ERISA cases.

The Third Circuit's recent In re Schering-Plough Corp. decision bears out our argument, even though plaintiffs cite it in their brief. (Opp. at 21 n.18.) In that case, the Third Circuit held that the plaintiffs could seek relief on behalf of a plan under § 502(a)(2) of ERISA,

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even though the plan was an individual account plan; the court explained that "the fact that Plaintiffs may have to show individual reliance on the defendants' alleged misrepresentations to prevail on some claims does not mean they do not seek recovery for Plan losses." 420 F.3d at 235-36 (emphasis added). Schering-Plough acknowledges that actual reliance is indeed an element of an ERISA misrepresentation claim. See also In re Elec. Data Sys. Corp. ERISA Litig., 224 F.R.D. 613, 628-30 (E.D. Tex. 2004) (concluding that ERISA misrepresentation claim "requires individual determinations of materiality and reliance" even though plaintiffs "urge the Court to apply securities law's fraud-on-the-market presumption in this ERISA context"; "[a] plaintiff must establish reasonable and detrimental reliance upon a material misrepresentation to recover for breach of fiduciary duty based on misrepresentations") (emphasis added).

None of plaintiffs' other cases supports the importation of the fraud-on-the-market doctrine into ERISA either. Plaintiffs cite In re Ikon Office Solutions, Inc. Sec. Litig., 191 F.R.D. 457 (E.D. Pa. 2000), for the proposition that the Court should focus on defendants' actions, not plaintiffs', in deciding class certification. (Opp. at 25.) So what? The issue now is not class certification, but what plaintiffs must plead to state a claim for misrepresentation under ERISA. The Ikon court simply held that "[w]hile the decision as to whether to hold Ikon stock may ultimately be individualized, only one common issue of fact must exist to satisfy the commonality requirement of Rule 23" because the "Third Circuit has approved (in fact, required) the certification of classes even in situations where there may be extreme questions of reliance or causation so long as there are similar legal theories underlying the various injuries." 191 F.R.D. at 464-65 (emphasis added). Ikon does not hold (or even suggest) that individual reliance is not

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an element of a misrepresentation claim; the court merely determined that individualized questions of reliance did not preclude class certification in that case. Id.[14]

Plaintiffs also attempt to discredit defendants' argument that, nearly a year after the court in In re AEP ERISA Litigation, 327 F. Supp. 2d 812 (S.D. Ohio 2004), declined to decide whether the fraud-on-the-market presumption of reliance is applicable in ERISA cases, there is still no support for applying the presumption outside the context of Rule 10b-5. (Opp. at 20-21; Mem. at 27 and citation.) Plaintiffs argue that "[d]efendants might equally have said, however, that nearly a year later, no subsequent rulings have denied that the fraud-on-market presumption applies in ERISA cases." (Opp. at 20-21.) That is incorrect. In a stock-drop case similar to this one, the EDS court recently rejected the applicability of the theory in an ERISA context. See Elec. Data Sys., 224 F.R.D. at 628-30; see also Del Rio, 2005 WL 1001430, *11-12 (listing elements of misrepresentation claim under ERISA, including that plaintiff "relied on those misrepresentations to [his] detriment").

The bottom line is that a plaintiff must plead actual reliance to state a claim for misrepresentation under ERISA. (Mem. at 26.) Plaintiffs would have this Court adopt a pleading theory new to all of ERISA law. Indeed, neither the Sixth Circuit, nor any district court in the Circuit, nor any other federal circuit has applied the presumption in an ERISA case, and nothing in ERISA's text suggests Congress intended the fraud-on-the-market doctrine to apply to

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[14] Plaintiffs' other class certification cases are similarly irrelevant to their argument that actual reliance is not an element of a misrepresentation claim under ERISA. See Rankin v. Rots, 220 F.R.D. 511, 518, 523 (E.D. Mich. 2004) (citing Ikon and holding that only one common issue of fact must exist to satisfy the commonality requirement for class certification; finding that an alleged breach of the duty of prudence, rather than an alleged breach of the duty of disclosure, presented a common issue; holding that "[a]lthough there may be factual differences as to whether . . . a class member relied on any alleged misrepresentations," those "individualized issues do not predominate" for class certification purposes); In re CMS Energy ERISA Litig., 225 F.R.D. 539, 543-45 (E.D. Mich. 2004) (certifying class after finding that the alleged breach of the duty of prudence, rather than plaintiffs' disclosure claim, fulfilled the requirement of a single common issue for certification and, citing Ikon, holding that certification could be approved even if there were "extreme individual questions of reliance or causation").

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claims under the statute. (Mem. at 27-28.) This Court should decline to engraft the fraud-on-the-market theory onto ERISA and should dismiss Count II for failure to plead actual reliance.

E. The Misrepresentation Claim Against The Committee Defendants Fails Because The Complaint Does Not Show The Committee Defendants Had Any Knowledge Of The Alleged Misstatements.

Count II fails to state a claim against the Committee Defendants because the Complaint does not allege that the Committee Defendants bringing this motion had any knowledge of the alleged misstatements or even any reason to know about the "undisclosed materially adverse information." (¶ 94; Mem. at 29-30.) A complaint that does not allege that the Committee Defendants "actually possessed the 'adverse information'" fails to state a claim. Crowley, 234 F. Supp. 2d at 230. The Complaint alleges only that Cardinal's SEC filings (which are not alleged to have been prepared by the Committee Defendants) contained negligent omissions, not intentional misrepresentations. (¶¶ 94, 97.) Other courts have dismissed similar claims against administrative committees where there was no indication that they knew about supposedly omitted information. (Mem. at 31 and citations.)

Plaintiffs make only a single argument in response. They contend that the Complaint alleges that the Committee Defendants held senior positions and therefore they (and through them, the Plan Committee itself) knew or should have known about the undisclosed adverse information set out in the Complaint. (Opp. at 28.) The flaw in plaintiffs' argument is that it never addresses defendants' central contention: this Complaint fails sufficiently to plead factual allegations that the Committee Defendants knew or should have known of any alleged misstatements. (Mem. at 29-31 and citations.) The Complaint, for example:

- does not allege that Cardinal's SEC filings contained any intentional misstatements;
- does not allege that the Committee Defendants had any specific role in preparing Cardinal's SEC filings;

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- does not contend that the Committee Defendants were responsible for any supposed false statements in any filings; and
- does not even identify their positions (except for Watkins and Nelson, who held human resource positions).

That the Complaint references "undisclosed material adverse information" without differentiating defendants is insufficient. (Id.) There are simply no facts to support the conclusory assertion that any of the Committee Defendants "should have known" that other, unspecified people made negligent mistakes in Cardinal's filings. (¶¶ 94, 97.)

While ignoring the holdings of the cases defendants cite, plaintiffs hang their hat on In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861 (S.D. Tex. 2004), to try to avoid dismissal. (Opp. at 29.) There, the court found that the plaintiffs' allegations "'that the SPD contained affirmative, material misrepresentations'" was sufficient to state a claim. See 309 F. Supp. 2d at 881. That case does not apply here. Here, the Complaint alleges only negligent misrepresentations by others.

F. Counts I And II Fail As To The Director Defendants And Should Be Dismissed.

In their brief, plaintiffs state that the "claims against the Director Defendants in Counts I and II are based solely on their liability as co-fiduciaries," thereby conceding that plaintiffs are not seeking to hold the Director Defendants directly liable for Counts I and II. (Opp. at 29 n.25; see also Mem. at 32-36.) Accordingly, the Court should dismiss any direct claims in Counts I and II against the Director Defendants based on plaintiffs' concession.

Plaintiffs nevertheless seek to hold the Director Defendants liable for alleged breaches of the duties of prudence and disclosure as co-fiduciaries under Counts I and II. (Opp. at 29-30.) Our co-fiduciary requests are set forth in the next section of this brief.

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G. Plaintiffs' Co-Fiduciary Liability Claims Fail As A Matter Of Law Because The Allegations In The Complaint Do Not Put Defendants Sufficiently On Notice Of The Claims Asserted Against Them.

The Complaint does not state a claim for co-fiduciary liability by simply lumping together undifferentiated assertions against 25 defendants. (Mem. at 36-38 and citations.) Nor is merely parroting a statute sufficient to satisfy pleading requirements. (Mem. at 37 and citations.)

Plaintiffs erroneously claim that "Defendants do not contest that the complaint fails to give them notice of the claim." (Opp. at 29.) In fact, however, defendants specifically argue that in a case such as this, where plaintiffs have lumped together 25 defendants and simply recited the statutory language for co-fiduciary liability (¶¶ 90, 100), the "pleading [] does not contain allegations that put defendants on notice of the particular charges against each defendant." (Mem. at 37.)

Plaintiffs also argue that a co-fiduciary claim need only mimic the statutory language for co-fiduciary liability. (Opp. at 29.) That is incorrect as well. See Sprint, 2004 U.S. Dist. LEXIS 9622, at *58-59 (dismissing co-fiduciary claims where complaint "simply parrot[ed] the language of the co-fiduciary liability statute"). Plaintiffs claim that Rankin supports their assertion that they are not required to plead facts that, if true, would prove their co-fiduciary liability claims. (Opp. at 30.) It does not; indeed, if anything, Rankin supports defendants' position. The Rankin court found that the plaintiff in that case alleged adequately that the defendants were fiduciaries and had breached their fiduciary duties. See 278 F. Supp. 2d at 867-68, 871-72. But the court distinguished the Rankin complaint from the complaint in In re Providian Financial Corp. ERISA Litigation, 2002 WL 31785044 (N.D. Cal. Nov. 14, 2002). See 278 F. Supp. 2d at 867. Providian held that the plaintiffs had not sufficiently alleged fiduciary status and had "failed to put defendants on notice of the allegations" where "plaintiffs

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. . . lumped the various classes of defendants into an undifferentiated mass and alleged that all of them violated all of the asserted fiduciary duties." 2002 WL 31785044, at *3-4 (emphasis added).

The Rankin court found that the plaintiff's complaint was "not like the complaint in Providian" because "Rankin delineated her claims against each of the defendants or group of defendants" and "the allegations [here] are relatively narrow and addressed to a small class of individuals, [and are] not, as in Providian, asserted against the company, the various plans committees, or other purported fiduciaries." 278 F. Supp. 2d at 867 (emphasis added). The opposite is true here. As in Providian, the Complaint here broadly asserts co-fiduciary liability claims against a large collection of defendants and fails to delineate the co-fiduciary claims against each defendant or group of defendants.[15] (¶¶ 90, 100.)

Plaintiffs further claim that because the plaintiffs in AEP sufficiently alleged their co-fiduciary claims, the Court should hold that plaintiffs here have sufficiently alleged their co-fiduciary claims. (Opp. at 29.) Plaintiffs ignore the important differences between this case and AEP. (Mem. at 38 n.20.) In that case, the Court declined to dismiss co-fiduciary claims against two individual defendants, the company's chief executive officer and chief operating officer. 327 F. Supp. 2d at 817. Here, the Complaint asserts co-fiduciary claims against 25 defendants who each have different responsibilities for different aspects of the Plan or no Plan responsibility

[15] To the extent that In re Polaroid allows "parroting" allegations to survive a motion to dismiss, it is erroneous and contrary to the multiple cases defendants cited. See, e.g., Sprint, 2004 U.S. Dist. LEXIS 9622, at *58-59; Stein v. Smith, 270 F. Supp. 2d 157, 175 (D. Mass. 2003) (holding that a complaint must specify "which breach by which putative fiduciaries were known of and/or facilitated by which co-fiduciaries"); McKesson, 2002 WL 31431588, at *3, 17 (granting motion to dismiss co-fiduciary claims against 15 defendants where the plaintiffs' allegations were insufficient to put each defendant on notice of alleged wrongdoing); Milofsky v. Am. Airlines, 404 F.3d 338, 342 (5th Cir. 2005) (dismissing primary liability claims because complaint failed to plead "specific facts" establishing that defendant was a fiduciary with respect to the acts or omissions in question), reh'g en banc granted, 2005 U.S. App. LEXIS 15122 (5th Cir. July 19, 2005).

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at all. (Mem. at 38 n.20.) Such vague and conclusory allegations of co-fiduciary liability against 25 defendants do not allege specific facts that would support co-fiduciary liability.

Finally, plaintiffs claim that defendants are "insist[ing] on highly specific factual allegations." (Opp. at 29.) Not so. The problem here is not the absence of highly specific facts, but the Complaint's complete failure to state which defendants were co-fiduciaries of which other defendants for what particular acts and why. Reciting the language of the co-fiduciary liability statute is not enough. (Mem. at 37.) Plaintiffs must allege facts which, if true, would establish liability. Plaintiffs do not even try to argue that they have done that here.[16] Thus, the Court should dismiss the entirety of Counts I and II against the Director Defendants.

H. Plaintiffs' Failure-To-Monitor Claim (Count III) Should Be Dismissed Because It Is Derivative Of The Defective Imprudence And Failure To Disclose Claims.

Because Counts I and II fail to state a claim for relief on multiple grounds, see supra, plaintiffs' derivative failure-to-monitor claim fails as well and should be dismissed. (Mem. at 38.)

I. There Is No *Respondeat Superior* Liability Under ERISA.

The terms of ERISA do not provide for *respondeat superior* liability. (Mem. at 38-39 and citations.) "[N]othing in ERISA suggests that Congress intended the wholesale importation of the common law of agency and vicarious liability into the fiduciary provisions of the act." Tool v. Nat'l Employee Benefits Servs., Inc., 957 F. Supp. 1114, 1120-21 (N.D. Cal.

[16] Plaintiffs argue that they do not have enough information properly to plead co-fiduciary liability. (Opp. at 30.) That does not save plaintiffs' co-fiduciary liability claims against the Director Defendants. The Civil Rules liberally permit plaintiffs to later amend their pleadings. If any of plaintiffs' claims were to survive defendants' motion to dismiss and plaintiffs later discovered information that justified pleading a co-fiduciary liability claim, plaintiffs could try to amend their Complaint. Plaintiffs' asserted lack of information to properly plead co-fiduciary liability cannot justify bringing claims against the Director Defendants in a mass and making conclusory assertions that each is responsible for every action of every other defendant over a five-year period — that not only fails to state a claim, it completely fails to give any Director Defendant notice of any specific thing he is alleged to have done wrong.

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1996) (citation omitted). Because plaintiffs premise Cardinal's alleged liability under Count III on *respondeat superior*, a doctrine absent from the ERISA statute, the Court should dismiss that claim as to Cardinal.

Although courts have reached different conclusions, plaintiffs cite no binding or persuasive authority in arguing that Count III states a claim for relief against Cardinal. (Opp. at 31-32.) The cases plaintiffs do cite, to the extent they recognize *respondeat superior* liability under ERISA, are contrary to the Supreme Court's warnings that ERISA liability must not be expanded beyond the statute's terms. See Great-West, 534 U.S. at 209 (stating the Court's reluctance to "extend[] remedies not specifically authorized" in the text of ERISA because "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly"); Mertens v. Hewitt Assoc., 508 U.S. 248, 254 (1993) ("In Russell we emphasized our unwillingness to infer causes of action in the ERISA context."); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) ("because ERISA is a 'comprehensive and reticulated statute,' and is 'enormously complex and detailed,' it should not be supplemented by extratextual remedies, such as the common-law doctrines advocated by [plaintiffs]"). Several cases plaintiffs cite fail to provide any rationale, let alone a convincing one, for ignoring those warnings. See, e.g., Banistor v. Ullman, 287 F.3d 394, 408 (5th Cir. 2002) (providing no rationale for applying *respondeat superior* in the context of ERISA); Nat'l Football Scouting, Inc. v. Cont'l Assurance Co., 931 F.2d 646, 648-49 (10th Cir. 1991) (same). In Stanton v. Shearson Lehman/American Express, Inc., the court conceded that "there is nothing in the Act itself or the legislative history of ERISA which specifically addresses" *respondeat superior* liability. 631 F. Supp. 100, 104-05 (N.D. Ga. 1986). This Court should decline to expand ERISA liability beyond the carefully crafted terms of the statute.

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In addition, although plaintiffs go to lengths to convince the Court that the *respondeat superior* doctrine makes sense in an ERISA context (Opp. at 30-32), they ignore the fact that, even in the non-controlling cases that have applied the doctrine to ERISA claims, the cases generally require plaintiffs to prove that the employer *de facto* controlled the alleged agent. See, e.g., Crowley, 234 F. Supp. 2d at 228 (rejecting vicarious liability theory where complaint lacked allegations supporting the alleged principal's *de facto* control over fiduciary); Banistor, 287 F.3d at 408 (cited by plaintiffs; stating that the main issue for *respondeat superior* liability is whether the principal "had de facto control" over the agent's actions); Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544, 563-64 (D. Md. 2003) (cited by plaintiffs; "the issue is whether the principal, by virtue of its de facto control over the agent, had control over the disposition of plan assets"), aff'd, 372 F.3d 261 (4th Cir. 2004).

Plaintiffs here have not alleged that Cardinal *de facto* controlled the Director Defendants' decisions regarding the Committee's appointment and monitoring. Instead, the Complaint boldly asserts, without a single supporting factual allegation, that "[t]he Company is liable for the Director Defendants' breaches of fiduciary duty in connection with the Director Defendants' failures to properly appoint, monitor and inform the fiduciaries whom they appointed under the doctrine of *respondeat superior*." (¶ 109.) Thus, even if the Court concluded that *respondeat superior* liability could conceivably exist under some hypothetical set of facts, the Complaint here still fails to state any such claim against Cardinal.

J. The Claims Against Susan Nelson Should Be Dismissed Because Plaintiffs Do Not Allege That Ms. Nelson Functioned In Any Fiduciary Role.

Plaintiffs do not dispute that the Complaint fails to allege that Ms. Nelson was a fiduciary. (Opp. at 32-33; Mem. at 40-41 and citations.) The Complaint does not allege that Ms. Nelson was a member of the Committee (she was not; she was the secretary for the

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Committee). The Complaint also does not allege that the Plan assigns any fiduciary functions to the secretary for the Committee (it does not).

Plaintiffs must allege "specific facts" about Ms. Nelson's alleged exercise of discretion with respect to the aspect of plan administration at issue to state a breach of fiduciary duty against Ms. Nelson. (See Mem. at 41 and citations.) Since the Complaint fails even generally to allege that Ms. Nelson was assigned any fiduciary functions, it falls far short of stating any claims against her. Plaintiffs' sole argument in response, that the Complaint adequately pleads claims against Ms. Nelson because the Complaint "notifies [her] that she is being sued because of her role on the Committee," fails to address these critical deficiencies. (Opp. at 32.) The Court should dismiss plaintiffs' claims against Ms. Nelson.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in defendants' opening memorandum, the Court should dismiss the Complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 10, 2005, I filed a true and accurate copy of the foregoing Reply Memorandum In Support of Certain Defendants' Motion To Dismiss The Consolidated Amended ERISA Complaint, through this Court's CM/ECF system which will send notification of such filing to registered counsel electronically. In addition, the following are also being served via regular U.S. mail, postage prepaid:

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