UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

CERTAIN DEFENDANTS' MOTION TO DISMISS
THE CONSOLIDATED AMENDED ERISA COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Local Rule 7.1, and applicable law, defendants Cardinal Health, Inc. ("Cardinal"), Cardinal Employee Benefits Policy Committee, Paul Williams, Anthony J. Rucci, Carole Watkins, Susan Nelson, Robert D. Walter, Dave Bing, George H. Conrades, John F. Finn, Robert L. Gerbig, John F. Havens, J. Michael Losh, John B. McCoy, Richard C. Notebaert, Michael D. O'Halleran, David W. Raisbeck, Jean G. Spaulding, M.D., and Matthew D. Walter ("defendants") hereby move to dismiss the Consolidated Amended ERISA Complaint ("Complaint"). Points and authorities in support of this motion are set forth in the attached Memorandum of Law. Given the complexity of the legal issues and nature of plaintiffs' claims, defendants respectfully request oral argument on the issues raised in this Motion pursuant to Local Rule 7.1(b)(2).

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT
OF CERTAIN DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

The conclusory legal assertions and unwarranted factual inferences plaintiffs assert in their Complaint fail to set forth a claim for relief of any kind against defendants. The Court should therefore dismiss the Complaint in its entirety.

Plaintiffs' central theory is that the Cardinal Health 401(k) Savings Plan (the "Plan") and some Plan participants suffered losses because defendants breached their fiduciary duties in connection with the Employer Common Stock Fund (the "Cardinal Stock Fund" or the "Fund") that was one of several investment options under the Plan. After Cardinal experienced a temporary decline in its stock price in 2004, plaintiffs filed this lawsuit alleging that defendants failed "to disclose complete and accurate information" to participants about the Cardinal Stock Fund and that the Fund should not have been offered as an investment option because it was "imprudent." Their theory is groundless as a matter of law.

It is, of course, a truism that an investment fund consisting of a single company's stock normally will be more volatile than a diversified mutual fund. When it fashioned ERISA, however, Congress specifically authorized employers to offer company stock as an investment alternative in 401(k) plans, just as the Plan does here. Congress did this because it saw employee

ownership of employer stock as a desirable goal that it wanted to promote. See Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995) (Congress envisioned that employee stock ownership plans would encourage employee ownership). Plaintiffs' claims here fly in the face of Congress' intent and the structure and language of the ERISA statute.

In this case, Plan participants were free to pick from among a wide range of investment options. They could choose to invest, in any combination, in equity, stable value, fixed-income, international, or balanced funds, or a Cardinal stock fund. Participants were allowed to (and did) construct portfolios to satisfy their own unique risk/reward preferences.

Cardinal specifically warned participants that the Cardinal Stock Fund was undiversified and likely to be more volatile than other Plan investment options. No participant was forced into the Fund (and the Complaint does not claim otherwise). Each participant was free to move funds into or out of the Fund whenever that participant wanted.

The fact that the risk inherent in investing in a single stock (a risk Congress accepted and about which Cardinal warned participants) occurred — i.e., that the stock price fluctuated down and up over time — is no basis for a lawsuit. That is particularly true where, as here, the employer's stock outperformed the benchmarks during the worst bear market in a generation. Over the proposed class period, Cardinal's stock outperformed the S&P 500, the S&P Health Care index, and the NASDAQ 100 and NASDAQ composite indexes. Surely millions of Americans wish that their portfolios had performed as well as this supposedly "imprudent" investment. The circumstances of this case — where Cardinal was always profitable, always had positive cash flows, always paid dividends on its stock, and there was no precipitous decline in the stock price or impending bankruptcy or collapse — are far more positive than other ERISA cases where courts have dismissed similar claims.

This kind of case simply burdens plans and fiduciaries (and ultimately participants themselves) with litigation costs and inconveniences. It is no overstatement to say that this kind of case discourages companies from sponsoring plans and pursuing Congress' goal of giving employees the chance to participate in ownership of their companies.

As discussed below, plaintiffs fail to state an ERISA claim for multiple reasons:

- They lack standing to seek class-wide monetary relief on behalf of Plan participants. Section 502(a)(3), on which plaintiffs rely, provides a cause of action for equitable relief, not monetary damages, and there is no possible basis for equitable relief here.
- Their imprudence claim fails because the Complaint fails to allege that defendants abused their discretion in offering Cardinal stock as an investment option.
- Plaintiffs' misrepresentation claim does not draw the required proximate causal link between the alleged misrepresentations and actual loss that anyone suffered, i.e., the Complaint does not allege that Cardinal's supposedly "inflated" stock price later declined because of any misrepresentations. The Complaint also fails to allege that plaintiffs actually saw and relied upon any of the supposed misstatements in Cardinal's SEC filings.
- Plaintiffs' misrepresentation claim fails as against the Committee Defendants (defined below) because the Complaint does not plead facts that demonstrate the Committee Defendants knew of the alleged errors in Cardinal's SEC filings, or that they had reason to know of supposedly undisclosed information.
- The Complaint does not adequately plead that each of the defendants actually functioned as a fiduciary with respect to the alleged breaches. Nor does it allege a single fact showing that any of the Director Defendants had any role in selecting 401(k) investment alternatives or communicating with Plan participants.
- Plaintiffs' claim for co-fiduciary liability fails because the Complaint simply lumps together the 25 defendants without describing what any of them supposedly knew or concealed about the conduct of any other defendant.
- Plaintiffs' failure-to-monitor claim fails because it is derivative of plaintiffs' other non-cognizable claims.
- Finally, plaintiffs' cannot invoke the doctrine of *respondeat superior* in Count III because there is no *respondeat superior* liability under ERISA.

In short, the Complaint fails to state any claim for relief, and the Court should dismiss it.

II. STATEMENT OF FACTS

The Statement of Facts is based on those allegations in the Complaint that are well-pled and documents cited in the Complaint, primarily Plan-related documents, which the Court can judicially notice. See, e.g., Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997) ("[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim") (citation omitted); Borman v. Great Atl. & Pac. Tea Co., 2003 U.S. App. LEXIS 10424, at *7 n.3 (6th Cir. May 22, 2003) (district court properly relied on exhibits that "disclosed the terms of the ERISA plans at issue"); Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998) (district court properly considered documents governing plan membership, coverage, and administration in ERISA case). For purposes of this motion only, defendants assume the truth of facts properly alleged in the Complaint. The Court should not accept as true conclusory allegations or assertions, or allegations or assertions that the Plan documents disprove. See Tahfs v. Proctor, 316 F.3d 584, 590 (6th Cir. 2003) (a complaint must contain "either direct or inferential allegations respecting all the material elements" and the allegations must constitute "more than bare assertions of legal conclusions") (citation omitted).

A. The Plaintiffs and The Putative Class

Plaintiffs claim that they are or were participants in the Plan. (¶ 1.)[1] They propose to sue on behalf of the Plan and a class of all Plan participants "for whose individual

[1] Paragraph references are to the Complaint.

accounts the Plan purchased and/or held shares of the Employer Common Stock Fund . . . at any time from October 24, 2000 to the present." (Id.)

B. The Defendants

Plaintiffs bring the action against Cardinal; the Cardinal Employee Benefits Policy Committee (the "Benefits Committee" or "Committee"); Richard C. Adloff, Paul Williams, Donna Brandin, Anthony J. Rucci, Steven A. Bennett, Carole Watkins, and Susan Nelson (the "Committee Defendants"); and Robert D. Walter, William E. Bindley, Dave Bing, George H. Conrades, John F. Finn, Robert L. Gerbig, John F. Havens, J. Michael Losh, John B. McCoy, Richard C. Notebaert, Michael D. O'Halleran, David W. Raisbeck, Jean G. Spaulding, M.D., and Matthew D. Walter (the "Director Defendants").[2] (¶¶ 10, 12, 14-22, 23-37.) The Complaint also names as defendants Richard Miller, Cardinal's former Chief Financial Officer, and Putnam Fiduciary Trust Company, the trustee of the Plan until December 2004. (¶¶ 13, 39.)

C. The Plan

The Plan is a "defined contribution" or "individual account" plan, meaning that it "provides for individual accounts for each Participant and for benefits based solely upon the amount contributed to the Participant's account." (¶ 48; ERISA § 3(34), 29 U.S.C. § 1002(34).) It is also an "eligible individual account plan" under ERISA § 407(d)(3), which means that any duty to diversify or prudently invest assets (to the extent prudence would require diversification), is not violated by acquiring and holding company stock, regardless of the amount. (Compl. preamble & n.1; ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2).) The Plan is intended to qualify for favorable tax treatment under § 401(k) of the Internal Revenue Code. (See Cardinal Health, Inc. Profit Sharing, Retirement and Savings Plan, Amended and Restated Effective as of July 1, 1998,

[2] Defendants Adloff, Brandin, Bennett, and Bindley have not yet been served.

at 1 (attached as Exhibit A); Cardinal Health, Inc. Profit Sharing, Retirement and Savings Plan, Amended and Restated Effective as of July 1, 2002, at 1 (attached as Exhibit B).)

Plaintiffs acknowledge that Cardinal is the only "named fiduciary" of the Plan. (¶¶ 54-56, 59; see also Ex. A at § 10.01 (Cardinal "shall be" the "named fiduciary"); Ex. B at § 10.01 (same).) The Plan states that "[t]he Company shall have the sole authority to appoint and remove the Trustee and members of the Committee" and "shall have the final responsibility for the administration of the Plan . . . and shall be the 'Plan Administrator' and the named fiduciary." (Ex. A at § 10.01; Ex. B at § 10.01.) The Plan designates no other entity or person a fiduciary.

One of the Plan's purposes is to "provide Participants with ownership interests in the Company." (Ex. A at § 8.05; Ex. B at § 8.05.) The Cardinal Stock Fund fulfills this purpose. The Plan mandates that the "Employer Common Stock Fund shall consist of stock of the Company and cash or cash equivalents needed to meet obligations of such fund or for the purchase of stock of the Company." (Ex. A at § 8.05 (emphasis added); Ex. B at § 8.05 (emphasis added).) In this respect, the Plan is fully consistent with Congress' aim of promoting employee ownership through individual account plans. See Kuper, 66 F.3d at 1458 ("Congress intended to encourage employees' ownership of their employer company.").

The Plan offers participants several diversified investment options in addition to the Cardinal Stock Fund. Those options changed from time to time. For example, in January 2001, the options increased from eight to twelve funds. (See July 1, 1999 Summary Plan Description ("SPD") of the Cardinal Health Profit Sharing, Retirement and Savings Plan, As Revised to Reflect Amendments Effective January 1, 2001, at 25 (attached as Exhibit C).) Currently, ten options are available. (See SPD of the Cardinal Health Profit Sharing, Retirement and Savings Plan, Effective January 1, 2005, at 22 (attached as Exhibit D).) These include a

stable value fund, a balanced fund, the Fidelity Diversified International Fund, and the PIMCO Total Return Investment Fund (Institutional Class), among others. (Id.)

Plaintiffs do not allege that every individual account in the Plan held Cardinal stock (¶ 41), and they concede that the Plan provides the participants extensive discretion in allocating their investments among the various alternatives. (¶ 49 ("Participants direct the Plan to purchase investments from among the several investment options available in the Plan and allocate them to Participants' individual accounts."); Ex. C at 12 ("The Plan generally permits you to direct the investment of your Account Balance."); SPD of the Cardinal Health Profit Sharing, Retirement and Savings Plan, Effective January 1, 2004, at 4 (attached as Exhibit E) ("You can change the amount you are contributing whenever you want to. You're never locked in at a certain percentage. You can direct your contribution into any of the investment funds available. Regardless of the amount you are contributing, you can invest your contributions in several different investment funds or in a single fund.").) Participants may transfer their investments into or out of the Cardinal Stock Fund and any other fund at any time. (See, e.g., Ex. C at 12-13; Ex. E at 4.) Funds in the Plan are invested according to the participants' directions. (¶ 52 ("Under the Plan, any company matching or other employer contribution would be invested in the same funds chosen by the Participant for the Participant's contributions."); Ex. E at 4 ("The company match and any profit sharing contributions are invested in the same funds you choose for your own contributions.").)

In addition to participants' contributions to the Plan, Cardinal makes voluntary matching contributions, which have varied from time to time. In 2004, Cardinal matched each participant's savings with $.50 for every $1 contributed by the participant, up to six percent of the participant's salary. (See Ex. E at 4.) Cardinal currently matches each participant's savings

on a one-to-one basis, up to three percent of the participant's pay, and $.50 for every $1 the participant contributes above three percent to a maximum of five percent of his compensation. (See Ex. D at 6.) Cardinal makes these contributions even though neither ERISA nor any other law requires an employer to contribute to an employee's retirement account.

The various SPDs distributed during the Class Period provided Plan participants with information regarding the investment options and associated risks to assist them in making their investment decisions. Contrary to plaintiffs' assertion that defendants "failed to provide the Plan and the Participants with an adequate description of the risk and return characteristics of Cardinal stock and the Fund" (¶ 97), the SPDs specifically warned participants that "the Cardinal Stock Fund generally has higher risk and return characteristics than the other investment funds due to the lack of diversity" and that "[t]he values of the investment funds fluctuate differently." (See, e.g., Ex. C at 14, 25.) SPDs have additionally warned that:

> [a]ll investments carry risks — some more than others. You need to understand the potential risks and rewards associated with each fund before investing. Generally, the funds that may provide higher return over the long term are the funds that have more risk associated with them, and the lower the risk, the lower the return.

(Ex. E at 6.) Participants have also been cautioned that "[n]either the Trustee, the Committee, nor the Employer in any way guarantees the Trust Fund [i.e., the investments in the Plan] from loss, nor do any of them guarantee the payment of any benefits that may become due to any person from the Trust Fund." (Ex. C at 23.)

Cardinal stock, like all publicly traded stocks, fluctuated in price during the putative Class Period. But over the entire length of the Class Period, Cardinal stock declined by

approximately 5%. (See Exhibit F.)[3] That performance has beaten the broader market and many widely-used benchmarks:

Performance from October 23, 2000 to August 17, 2005

Cardinal Health	-5.2%
S&P Healthcare index	-11.0%
S&P 500 index	-12.6%
NASDAQ composite average	-38.2%
NASDAQ 100 average	-53.8%

(See Ex. F.)

Over the course of several months in 2004, Cardinal's stock suffered a temporary decline in price that has since been largely reversed. (See Exhibit G.) In the wake of that decline and the inevitable shareholder lawsuits that followed, plaintiffs filed this tag-along ERISA complaint, asserting that Cardinal stock had been an "imprudent" investment and that the defendants had failed to make full disclosures about the company's business and finances.

III. SUMMARY OF ARGUMENT

The Complaint fails to state a claim for relief. The law recognizes the benefits of individual account plans that allow employees to gain an ownership interest in their companies, notwithstanding the fact that any one stock will always be more volatile than a diversified investment portfolio. The participants here were free to pick their investments and were specifically warned about the possible volatility risk of Cardinal stock, which, in any event, outperformed the market during the putative class period.

[3] The Court can take judicial notice of stock prices and other public information when considering a motion to dismiss. See, e.g., In re NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1331 (3d Cir. 2002) (considering stock price data compiled by the Dow Jones News service and "documents filed with the SEC, but not relied upon in the Complaint"); Ieradi v. Mylan Labs., Inc., 230 F.3d 594, 598-600 (3d Cir. 2000) (taking judicial notice of stock prices on the New York Stock Exchange as reported by Quotron and an article from the New York Times); In re Keithley Instruments, Inc. Secs. Litig., 268 F. Supp. 2d 887, 896 (N.D. Ohio 2002) (considering stock prices).

In the face of those facts, and others detailed below, plaintiffs fail to state any viable cause of action. The following table summarizes the deficiencies in plaintiffs' claims:

Summary of Grounds for Dismissal

	Count I (Prudence)	Count II (Misrepresentation/ Nondisclosure)	Count III (Monitoring)
Claims for Monetary Relief Not Allowed Under § 502(a)(3)	X	X	X
Failure to Allege Purchase of Cardinal Stock Was an Abuse of Discretion	X		
No Loss Causation as to Alleged Misstatements		X	
No Reliance on Alleged Misstatements		X	
No Allegation of Knowledge by Committee Defendants of Alleged Misstatements		X (Committee Defendants only)	
No Allegation Directors Functioned as Fiduciaries as to Investment Selection or Participant Communications	X (Director Defendants only)	X (Director Defendants only)	
Co-Fiduciary Liability Not Adequately Pleaded	X	X	
Derivative Monitoring Claim Fails Because Other Claims Fail			X
No Respondeat Superior Liability Under ERISA			X (Cardinal only)
Complaint Has No Fiduciary Allegations Against Defendant Nelson	X (Defendant Nelson only)	X (Defendant Nelson only)	

IV. ARGUMENT

A. Monetary Damages Claims Are Not Allowed Under ERISA Section 502(a)(3).

All three counts of the Complaint proceed both Sections 502(a)(2) and 502(a)(3) of ERISA. Section 502(a)(2) gives a participant a right to sue on behalf of a plan for alleged breach of fiduciary duty, with any recovery going to the plan. See 29 U.S.C §§ 1102(a); 1109(a) (fiduciary who breaches ERISA duty "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach"). Section 502(a)(3) creates a right of action for a participant to sue for "other appropriate equitable relief" to remedy violations of ERISA. Although the Complaint refers to "equitable" relief, at bottom, plaintiffs seek nothing more than monetary damages. Because Section 502(a)(3) does not allow claims for monetary damages, the claims brought under that section in all three counts must be dismissed.

Section 502(a)(3) permits plan participants to bring actions against fiduciaries for "appropriate equitable relief." See 29 U.S.C. § 1132(a)(3). But a demand that fiduciaries pay money to individual participants, as plaintiffs request here, is not "appropriate equitable relief."

The Supreme Court teaches that "[t]he term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were typically available in equity.'" Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) (quoting Mertens v. Hewitt Assoc., 508 U.S. 248, 256 (1993)) (emphasis in original). Money damages were not typically available in equity and are, "of course, the classic form of legal relief." Mertens, 508 U.S. at 255 (emphasis in original).

The Sixth Circuit recently applied the Supreme Court's holdings in Great-West and Mertens in explaining that "suits seeking 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." Crosby v. Bowater, Inc., 382 F.3d 587, 594 (6th Cir. 2004). That is true regardless of

whether a plaintiff asks for an injunction, constructive trust, or restitution. See id. at 595-96. Indeed, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant but to restore to the plaintiff particular funds or property in defendant's possession." Great-West, 534 U.S. at 214 (emphasis added). See also Helfrich v. PNC Bank Ky., 267 F.3d 477, 483 (6th Cir. 2001) (restitution measured by plaintiff's loss "is the hallmark of money damages that 502(a)(3) disallows"); Qualchoice v. Rowland, 367 F.3d 638, 649 (6th Cir. 2004) (stating that claim for restitution of money "is typically a claim at law"), rh'g en banc denied, 2004 U.S. App. LEXIS 19282 (6th Cir. Sept. 10, 2004), cert. denied, 125 S. Ct. 1639 (2005); Callery v. United States Life Ins. Co., 392 F.3d 401, 405-06 (10th Cir. 2004) (denying relief under § 502(a)(3) where plaintiff sought compensatory damages rather than to regain specific funds or property).

None of the relief plaintiffs request can be fairly characterized as "equitable." The Complaint does not allege that defendants misappropriated money from the Plan for personal benefit or that defendants made any wrongful profits from Plan assets. To the contrary, the Complaint makes clear that the "loss" for which plaintiffs seek relief is the decline in the price of Cardinal stock that occurred during the Class Period. (See, e.g., ¶¶ 3, 76, 78, 86-89, 96-99, 105-108, and Prayer For Relief.) An alleged decline in market value cannot give rise to a claim for "appropriate equitable relief" under Section 502(a)(3). 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 214. At bottom, this is a "suit[] seeking to the compel the defendants to pay a sum of money to the plaintiff[s]." Crosby, 382 F.3d at 594.

Although this Court in In re AEP ERISA Litigation declined to address whether plan participants in that case had standing to maintain a claim for monetary damages under

Section 502(a)(3), see 327 F. Supp. 2d 812, 821 (S.D. Ohio 2004), defendants submit that the Sixth Circuit's recent opinion in Crosby squarely resolves the issue and requires dismissal of the § 502(a)(3) claims. See Crosby, 382 F.3d at 589 (reversing the lower court's denial of a motion to dismiss plan participant's claim for money damages under § 502(a)(3); "if we were to say that such an action qualifies as a suit in equity, we should be giving the words used by Congress in § 502(a)(3) a meaning that Great-West and Mertens teach they will not bear.").

In addition, in AEP, the Court declined to dismiss the § 502(a)(3) claims at the pleadings stage in part because the defendants in AEP had failed to rebut the AEP plaintiffs' citation to the Department of Labor's amicus brief in Callery, supra. See AEP, 327 F. Supp. 2d at 821. The Department of Labor's earlier position in Callery is now untenable in our Circuit under Crosby. See Crosby, 382 F.3d at 595-96. Moreover, the Tenth Circuit unanimously rejected the Department of Labor's position in Callery after this Court ruled in AEP. See 392 F.3d at 409.[4]

In short, the Complaint's request, in all three counts, for monetary relief under Section 502(a)(3) is legally barred. See Great West, 534 U.S. at 214; Crosby, 382 F.2d at 594. Accordingly, the Court should dismiss those claims as a matter of law.

B. Count I Fails To State A Claim Because The Complaint Does Not Allege An Abuse of Discretion In Offering Cardinal Stock As An Investment Option.

Plaintiffs premise Count I on the theory that it was imprudent to offer Cardinal stock as an investment choice under the Plan. (¶¶ 78, 86-87.) Those allegations go nowhere.

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[4] The Court in AEP also cited In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 604-12 (S.D. Tex. 2003), in declining to address whether the AEP plaintiffs lacked standing under ERISA § 502(a)(3) because the issue was controversial. See 327 F. Supp. 2d at 821 n.4. The Enron court's discussion of § 502(a)(3), however, supports defendants' position because that court found that monetary relief is available under § 502(a)(3) only if it constitutes equitable restitution as defined by the Supreme Court in Great-West. See 284 F. Supp. 2d at 612. That is not the case here. In any event, Crosby disposes of this issue in the Sixth Circuit and requires dismissal of plaintiffs' § 502(a)(3) claims.

The Plan specifically required that Cardinal stock be offered as an investment vehicle, and the Plan must be administered according to its terms. See 29 U.S.C. § 1104(a)(1)(D). Cardinal stock actually outperformed the market during the class period, and the company never found itself in any kind of peril. Numerous courts have dismissed claims that it was imprudent to offer employer stock as a 401(k) investment alternative — including in circumstances where the employer was in much worse shape than Cardinal ever was — and this Court should do the same.

1. An Abuse of Discretion Standard Applies For Reviewing Investments In Employer Stock.

In Kuper, the Sixth Circuit recognized that employer stock plans serve two important purposes: (1) they encourage employee ownership in the company; and (2) they serve as an employee retirement plan. See 66 F.3d at 1457.[5] The Court also explained that employer stock plans "are not designed to guarantee retirement benefits, and they place employee retirement assets at a much greater risk than the typical diversified ERISA plan." Id. As a result, Congress "carved out specific exceptions to certain fiduciary duties" for plans that offer investment in employer stock. Id. at 1458. One key carve-out is an exemption from ERISA's diversification requirements. See id. Section 404(a)(2) creates an exception to the diversification requirement (and the prudence requirement to the extent it requires diversification) for eligible individual account plans ("EIAPs") — like the Cardinal Plan — that invest in employer stock. See 29 U.S.C. § 1104(a)(2) ("the diversification requirement of paragraph 1(C) and the prudence requirement (only to the extent it requires diversification) of

[5] Accord Wright v. Or. Metal. Corp., 360 F.3d 1090, 1097 (9th Cir. 2004) (recognizing that Congress favors employee investment in company stock); Steinman v. Hicks, 352 F.3d 1101, 1103 (7th Cir. 2003) (noting Congress's conviction that "employees' ownership of their employer's stock [is] a worthy goal"); Moench v. Robertson, 62 F.3d 553, 568 (3d Cir. 1995) ("the concept of employee ownership constitute[s] a goal in and of itself"); In re Duke Energy ERISA Litig., 281 F. Supp. 2d 786, 793 (W.D.N.C. 2003) (noting "the goal of encouraging employee ownership of employer stock"), aff'd, 2004 U.S. App. LEXIS 28830 (2d Cir. Nov. 15, 2004).

paragraph 1(B) is not violated by acquisition or holding of qualifying . . . employer securities"); Kuper, 66 F.3d at 1458.

Section 404(a)(1)(D), in turn, requires fiduciaries to administer plans according to their written terms. See 29 U.S.C. § 1104(a)(1)(D). Here, the Plan has strong provisions requiring that a company stock fund be one of the investment offerings. The Plan itself affirmatively "authorize[s]" the Trustee "to maintain" a company stock fund as one of the options, without any direction from the Committee. (Ex. A at § 8.05; Ex. B at § 8.05.) Investment funds other than the Cardinal Stock Fund can be established only "at the direction of or with the concurrence of the Committee," but there is no such requirement of Committee direction or authorization with respect to the company stock fund. (Id.) The Plan further mandates that the Fund "shall consist of stock of the Company and cash or cash equivalents needed to meet obligations of such fund or for the purchase of stock of the Company." (Id.)

To give effect to Section 404(a)(2)'s plain language as well as Congress' goal to promote employee ownership of employer stock, courts in the Sixth Circuit and elsewhere review fiduciaries' decisions to invest plan assets in employer securities under an abuse of discretion standard. See, e.g., Kuper, 66 F.3d at 1459; Moench, 62 F.3d at 553, 571; Duke Energy, 281 F. Supp. 2d at 794; Wright v. Or. Metal. Corp., 222 F. Supp. 2d 1224, 1232-34 (D. Or. 2002), aff'd, 360 F.3d 1090 (9th Cir. 2004).[6] Courts have recognized that under an abuse of discretion standard, maintaining investments in company stock leaves only a "narrow

[6] The Ninth Circuit in Wright strongly suggested that Section 404(a)(2) forecloses any claim that employer stock must be diversified in an EIAP, regardless of the circumstances, but declined to decide the issue because the plaintiff failed to plead facts sufficient to establish an abuse of discretion. See Wright, 360 F.3d at 1097 ("The Third Circuit's intermediate prudence standard is difficult to reconcile with ERISA's statutory text, which exempts EIAPs from the prudence requirement to the extent that it requires diversification . . . . Interpreting ERISA's prudence requirement to subject EIAPs to an albeit tempered duty to diversify arguably threatens to eviscerate congressional intent and the guiding rationale behind EIAPs themselves."). The Seventh Circuit made the same suggestion in Steinman. See 352 F.3d at 1103 ("Since the very purpose of an ESOP is to give employees stock in the employer, it would be anomalous if the ESOP's trustees were required to sell most of the stock donated by the employer in order to create a diversified portfolio of stocks.").

exception" for possible liability. See Wright, 222 F. Supp. 2d at 1233. Reflecting that principle, the Sixth Circuit, in applying the abuse of discretion standard, has held that the duty of prudence requires an EIAP fiduciary to divest a plan of company stock only in extreme circumstances, i.e., where the company is on the verge of bankruptcy or collapse or there was a precipitous decline in stock price. See Kuper, 66 F.3d at 1451, 1459-60.[7] No such circumstances are alleged here.

2. Plaintiffs Allege No Precipitous Decline In Cardinal's Stock Or That Cardinal Was Ever On The Verge Of Bankruptcy Or Collapse.

In this case, the Complaint does not allege facts establishing that it was an abuse of discretion to offer Cardinal stock as an investment alternative in the Plan. While plaintiffs allege that the price of Cardinal's stock was "artificially inflated as a result of undisclosed materially adverse information" (¶ 78), they do not allege, as they must, that there was a "precipitous decline" in the value of Cardinal stock, or that Cardinal is or ever was on the brink of collapse, or that the company did or may file for bankruptcy. See Kuper, 66 F.3d at 1458-60.

To the contrary, Cardinal's stock price declined about 35% in June/July 2004 (while in Kuper the stock price declined 80% (see id.)), but there has been substantial and nearly complete recovery in the price since that time. (See Ex. G.) In fact, over the class period (October 24, 2000 to the present), the Cardinal's stock price declined approximately 5%, hardly catastrophic given that much of the class period coincided with a grinding bear market. (See Ex. F.) In fact, during the same period, the S&P 500 Index and S&P Health Care Index both declined over 10%. (See id.) Thus, Cardinal's stock actually outperformed the broader market. Plaintiffs' prudence claim is a non-starter. See Kuper, 66 F.3d at 1458-60. One searches the

[7] "In determining whether the plaintiff has overcome the presumption, the courts must recognize that if the 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, particularly if the employer's securities thrive." Moench, 62 F.3d at 571-72. 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).

books in vain for any case where a court allowed a prudence claim to proceed based on an investment in company stock that outperformed the market.

Moreover, throughout the proposed Class Period and continuing to the present, Cardinal has always been profitable, and the stock has always paid a regular dividend. (10-Q for Cardinal Health, Inc., filed May 9, 2005 (attached as Exhibit H) at 2-4; 10-Q for Cardinal Health, Inc., filed Feb. 9, 2005 (attached as Exhibit I) at 2-3; 10-K for Cardinal Health, Inc., filed Oct. 26, 2004 (attached as Exhibit J) at 25-26).) Cardinal has had positive shareholder equity, positive cash flows, and a favorable ratio of current assets to current debts throughout the Class Period. (Ex. H at 4-5; Ex. I at 3-5; Ex. J at 25-28, 30-31, 47-49.) Cardinal's SEC filings reported a strong financial position, with ample cash and equivalents at the end of each reporting period. (Ex. H at 4-5; Ex. I at 4-5; Ex. J at 48-49.) Analysts gave the company investment-grade debt ratings. (Ex. J at 42-43.)[8]

These facts of public record do not portray a company anywhere near the brink of collapse or bankruptcy. Under the law of this Circuit, it is clear that plaintiffs cannot state a claim. In Kuper, the Sixth Circuit held that an 80% decline in the company's stock price, the CEO selling all his shares, and a liquidity crisis of the employer were insufficient to show an abuse of discretion in continuing to invest plan assets in employer stock. See 66 F.3d at 1459-60.

Other courts have reached the same result where the employer was in far worse shape than Cardinal ever was. In Crowley v. Corning, Inc., 234 F. Supp. 2d 222, 227, 230-31 (W.D.N.Y. 2002), the court dismissed prudence claims under Rule 12(b)(6), holding that an

[8] Although the Complaint references Cardinal's SEC filing (¶ 94), the Court could take judicial notice of those filings in any event. See, e.g., R2 Inv. LDC v. Phillips, 401 F.3d 638, 640 n.2 (5th Cir. 2005), ("a court may take judicial notice of documents in the public record, including documents filed with the Securities and Exchange Commission"), reh'g en banc denied, 2005 U.S. App. LEXIS 15188 (5th Cir. Mar. 31, 2005); Oran v. Stafford, 226 F.3d 275, 289 (3d Cir. 2000) (taking judicial notice of SEC filings).

approximately 80% decline in the value of Corning's stock was insufficient to show abuse of discretion. In Duke Energy, 281 F. Supp. 2d at 795, the court held that a price drop of over 50% — from $44.97 a share to less than $20 — was insufficient to plead abuse of discretion, where the plan sponsor was a "solid, viable company, far from 'impending collapse.'" That court dismissed prudence claims like the one here under Rule 12(b)(6). Accord Steinman v. Hicks, 252 F. Supp. 2d 746, 750, 757-60 (C.D. Ill. 2003) (finding no abuse of discretion despite more than 25% decline in the value of the employer's common stock), aff'd, 352 F.3d 1101 (7th Cir. 2003).

The same reasoning applies here. If anything, the prudence claim in our case is weaker than in those other cases, given the performance of Cardinal's stock and the Company's continued profitability, strong dividend payments, and positive cash flows. In short, the Complaint falls far short of alleging facts that, if true, would prove that defendants abused their discretion in permitting the Plan to invest in company stock. Cardinal has remained a "solid, viable company, far from 'impending collapse'" throughout the Class Period. See Duke Energy, 281 F. Supp. 2d at 795; Kuper, 66 F.3d at 1451, 1459-60; Wright, 222 F. Supp. 2d at 1233-34.

3. The AEP Decision Does Not Require A Different Result.

In AEP, the Court declined to determine at the pleading stage whether the plan at issue was subject to the abuse of discretion standard. 327 F. Supp. 2d at 828-29. Defendants respectfully submit that, given our circumstances, it is proper for the Court to address whether the Complaint alleges facts that, if true, show defendants abused their discretion.

First, the abuse of discretion standard as to employer stock applies to the Cardinal Plan because it applies to all EIAPs. See 29 U.S.C. § 1104(a)(2); Wright, 360 F.3d at 1098 n.3 ("[S]tock bonus plans . . . and ESOPs are both EIAPs and are treated the same for the purpose of fiduciary duty analysis."); Landgraff v. Columbia/HCA Healthcare Corp., 2000 WL 33726564,

at *5-6 (M.D. Tenn. May 24, 2000), (rejecting argument that the presumption applies only to ESOPs; "all EIAPs are exempt from the diversification requirement"), aff'd, 2002 WL 203208 (6th Cir. Feb. 7, 2002); In re Calpine Corp. ERISA Litig., 2005 U.S. Dist. LEXIS 9719, at *15 (N.D. Cal. Mar. 31, 2005) ("[U]nder the plain meaning of section 404(a)(2), a fiduciary of an EIAP is exempt from any duty to diversify the plan's holdings in employer stock.").[9]

Under ERISA, a plan is an EIAP if it is a "profit-sharing, stock bonus, thrift or savings plan" or an employee stock ownership plan ("ESOP"), and includes language that "explicitly provides for [the] acquisition and holding of qualifying employer securities." 29 U.S.C. § 1107(d)(3)(A)-(B). The Cardinal Plan is an EIAP because the Plan expressly provides for holding Cardinal stock and the preamble of the Plan states that it is a profit-sharing plan. (Ex. A at 1 and § 8.05; Ex. B at 1 and § 8.05.) The Complaint concedes that the Plan is an EIAP. (See Compl. at 1 n.1.) Because the Plan itself, as well as the Complaint, establishes that the Plan is an EIAP, no discovery is required to determine whether the abuse of discretion standard applies to the decision to offer Cardinal stock as an investment option.[10]

Second, although the Court expressed reservations about addressing the abuse of discretion standard on a motion to dismiss in AEP, many courts have treated it as a Rule 12(b)(6) issue: Does the complaint state facts that, if true, would prove that defendants abused their discretion by allowing the plan to invest in company stock? See Wright, 360 F.3d at 1098 ("Though plaintiffs contend that the district court prematurely dismissed their claims at the motion to dismiss stage, plaintiffs' alleged facts effectively preclude a claim under Moench,

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[9] See also Steinman, 252 F. Supp. 2d at 759 (equating ESOPs with EIAPs); Duke Energy, 281 F. Supp. 2d at 794 (concluding that plan that "allows investment in multiple funds, of which [company stock] is only one," was entitled to presumption of prudence).

[10] In AEP, discovery was necessary because the parties disputed which plan document controlled during the Class Period. See 327 F. Supp. 2d at 830. No such confusion exists in this case.

eliminating the need for further discovery."); Calpine, 2005 U.S. Dist. LEXIS 9719, at *15 (dismissing claim for failure to prudently manage plan assets because "Plaintiff has not, and cannot allege facts demonstrating that Calpine's 'financial condition [wa]s seriously deteriorating' and therefore cannot rebut the presumption of prudence established by the intermediate prudence standard"); Crowley, 234 F. Supp. 2d at 227, 230 (where Corning's stock declined approximately 80%, "conclusory allegations [were] insufficient to show that following the ESOP portions of the Plan was imprudent under the circumstances," prompting dismissal under Rule 12(b)(6)); Duke Energy, 281 F. Supp. 2d at 795 (where the plan sponsor was a "solid, viable company, far from 'impending collapse,'" a stock price drop from $44.97 to less than $20 per share was insufficient to show abuse of discretion, resulting in dismissal under Rule 12(b)(6)).

Neither Kuper nor Moench, the seminal cases on this issue, speaks of the abuse of discretion standard as an evidentiary presumption that applies only at trial or summary judgment. Instead, those cases address the substantive legal standard of what a plaintiff must plead and later prove to recover on a claim for breach of fiduciary duty based on an EIAP's investment in company stock. In Kuper, the Sixth Circuit adopted the Moench holding that such a claim can be sustained only if the plaintiff "establish[es] that the fiduciary abused its discretion" in including company stock in the plan, and went on to describe what constitutes an abuse of discretion. 66 F.3d at 1459. Because, under Sixth Circuit law, proving an abuse of discretion is a necessary element of the prudence claim that plaintiffs want to pursue, the Complaint must plead facts that, if true, establish an abuse of discretion. If a plaintiff does not plead such facts, or if what a plaintiff pleads is insufficient to show an abuse of discretion even if proven, then there is no cognizable claim. So it is here. The Court should dismiss Count I of the Complaint.

C. Plaintiffs Fail To Plead Proximate Causation In Count II.

The Complaint theorizes that misstatements in Cardinal's SEC filings "artificially inflated" its stock price (¶ 78), and that Plan participants bought Cardinal stock at inflated prices. (¶ 87.) Because of those purchases, the Complaint continues in conclusory fashion, the "Plan suffered losses." (¶ 98.) Those bare allegations do not draw the required proximate causal link between the alleged misrepresentations and any actual loss anyone suffered, a requirement that the Supreme Court clarified in its unanimous opinion in Dura Pharmaceuticals, Inc. v. Broudo, 125 S. Ct. 1627 (2005). Because the Complaint does not plead proximate causation (also called "loss causation"[11]), Count II legally fails.

To state an ERISA claim based on a misrepresentation, a plaintiff must plead (and eventually prove) that he suffered actual damages caused by the defendant's fiduciary breach. See Kuper, 66 F.3d at 1459-60. As the Sixth Circuit explained in Kuper, "a plaintiff must show a causal link" between the alleged breach "and the harm suffered." Id. at 1459. See also id. at 1460 ("Proof [of] a causal connection . . . is required between a breach of fiduciary duty and the loss alleged") (quotation and citation omitted; ellipses in original). In a case like this one, where a plaintiff's alleged damages flow from investing in a publicly-traded stock, the Supreme Court's recent decision in Dura makes clear that merely asserting that a stock's price was "artificially inflated" at the time of the plaintiff's purchase does not adequately allege that a misstatement caused loss to the plaintiff. See 125 S. Ct. at 1630-31. Instead, to allege that a misrepresentation proximately caused a loss, a complaint must show that the supposedly "inflated" stock price later declined because the misrepresentation was revealed and corrected. See id. at 1632.

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[11] See Campbell v. Shearson/Amer. Express, Inc., 1987 WL 44742, at *2 (6th Cir. Sept. 9, 1987) (noting that proximate cause requirement "is commonly referred to as 'loss causation.'").

Here, the Complaint fails to allege loss causation from any alleged misstatements. It says only that Cardinal's stock price was "inflated" when Plan participants bought it, without ever tying any loss-causing decline in the stock price to the revelation of the "truth" that supposedly underlay any misrepresentation. This failure is fatal to Count II.

The new Dura case is dispositive. There, the plaintiffs alleged that Dura Pharmaceuticals, a publicly-held company, falsely predicted that the FDA would soon approve one of its products. See id. at 1629-30. That misrepresentation, the plaintiffs claimed, caused Dura's stock price to be artificially inflated. See id. at 1630. The plaintiffs "paid artificially inflated prices for Dura securities and . . . suffered damages thereby," they alleged in their complaint, just like the Complaint here. See id. (quotation omitted); compare ¶ 78. When Dura later announced that the FDA would not approve its new product, the company's "share price temporarily fell but almost fully recovered within one week." See 125 S. Ct. at 1630. Later on, the company announced disappointing earnings; the stock price fell; and a few shareholders sued, complaining of alleged misrepresentations about the chances for FDA approval of the new product. See id.

The district court dismissed the complaint, finding that the allegations relating to approval of the new product failed to allege loss causation. See id. The Ninth Circuit reversed, concluding that a plaintiff satisfies the loss causation requirement simply by alleging (and subsequently proving) that "'the price' of the security 'on the date of purchase' was inflated because of the misrepresentation." Id. (quoting Ninth Circuit; emphasis in original).

The Supreme Court unanimously reversed the Ninth Circuit and reinstated the dismissal. The Court explicitly rejected the argument that a plaintiff need only allege that the misrepresentation inflated the price on the purchase date: "Normally, in cases such as this one

(i.e., fraud on the market cases) an inflated purchase price will not itself constitute or proximately cause the relevant economic loss." Id. at 1631. The Court explained that:

> [f]or one thing, as a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that at that instant possesses equivalent value. Moreover, the logical link between the inflated share purchase price and any later economic loss is not invariably strong. Shares are normally purchased with an eye toward a later sale. But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss. If the purchaser sells later after the truth makes its way into the market place, an initially inflated purchase price might mean a later loss. But that is far from inevitably so. When the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. (The same is true in respect to a claim that a share's higher price is lower than it would otherwise have been — a claim we do not consider here.) Other things being equal, the longer the time between purchase and sale, the more likely that this is so, i.e., the more likely that other factors caused the loss.
>
> Given the tangle of factors affecting price, the most logic alone permits us to say is that the higher purchase price will sometimes play a role in bringing about a future loss. It may prove to be a necessary condition of any such loss, and in that sense one might say that the inflated purchase price suggests that the misrepresentation (using language the Ninth Circuit used) "touches upon" a later economic loss. But, even if that is so, it is insufficient. To "touch upon" a loss is not to cause a loss, and it is the latter that the law requires.

Id. at 1631 (emphasis in original; citations omitted). The Court further explained that "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." Id. at 1634. In short, under Dura, until there is a disclosure of the "truth" of what was previously

omitted or misrepresented and that disclosure causes the price to decline, a sale of the security would result in no loss due to the omission or misrepresentation. See id. at 1631-32.[12]

Here, the Complaint mirrors the deficiencies Dura highlighted. It alleges that Cardinal's stock price was inflated because of alleged nondisclosures relating to revenue classification, revenue and earnings growth, "accounting irregularities," and other matters. (¶¶ 78, 94.) But the Complaint nowhere identifies any "corrective" disclosures on any of these subjects that caused Cardinal's stock price to decline. In fact, the Complaint contends that the price of Cardinal's stock is still inflated, in that the Class Period goes right up to the present day. (¶¶ 40, 78.) The Complaint thus fails to allege loss causation. See Dura, 125 S. Ct. at 1631-34.

The reasoning and application of Dura makes perfect sense here. A Plan participant who buys stock in his Plan account when an alleged omission has supposedly inflated the stock price is no differently situated than an open-market purchaser who buys at the same time. Neither of them will suffer any loss caused by the omission until the disclosure of the omitted "truth" removes the artificial inflation from the price. If the price goes down for some reason other than the revelation of the "truth" about what was supposedly previously misstated, then both investors have suffered a loss, but it is not a loss that the misstatement caused. See id.

It does not matter that Dura involved securities claims as opposed to claims under ERISA, because, to recover under ERISA just as under the securities laws, a plaintiff still must plead and prove the fundamental element of proximate causation. Whether a plaintiff seeks to

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[12] As the Supreme Court noted, other federal courts of appeals have also found that the "inflated purchase price" is not a valid causation theory. See Dura, 125 S. Ct. at 1632-33 (citing Emergent Capital Inv. Mgmt., LLC v. Stone Path Group, Inc., 343 F.3d 189, 198 (2d Cir. 2003); Semerenko v. Cendant Corp., 223 F.3d 165, 185 (3d Cir. 2000); Robbins v. Koger Props., Inc., 116 F.3d 1441, 1448 (11th Cir. 1997); Bastian v. Petren Res. Corp., 892 F.2d 680, 685 (7th Cir. 1990)). See also Fryling v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 593 F.2d 736, 743-44 (6th Cir. 1979) (noting that plaintiff must establish causation and that "market conditions, and not any representations or omission" of defendant caused securities related losses); Rubin v. Schottenstein, Zox & Dunn, 119 F. Supp. 2d 787, 790-91 (S.D. Ohio 2000) (granting summary judgment for defendant where "alleged misstatements and failure to disclose are too remote from plaintiff's loss to establish loss causation").

recover under securities law or ERISA, the causation inquiry is the same: Did the defendant's alleged nondisclosure proximately cause actual loss to the plaintiff? Indeed, other federal courts have applied similar reasoning in dismissing ERISA claims on causation grounds. See Kuper, 66 F.3d at 1459-60; Kane v. United Indep. Union Welfare Fund, 1997 WL 411208, at *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").[13]

Dura's reasoning applies four-square here. The Court should dismiss Count II because it fails to allege proximate causation.

D. Count II Fails Because Plaintiffs Have Not Pleaded Actual Reliance On Any Specific Alleged Misstatements.

Count II asserts that the Plan and plaintiffs were harmed by alleged misstatements in Cardinal's SEC filings that were incorporated by reference into the SPDs provided to Plan participants. (¶¶ 93-98.) But the Complaint fails to plead that plaintiffs actually saw or relied

[13] See also In re McKesson HBOC, Inc. ERISA Litig., 2002 WL 31431588, at *5, 15-17 (N.D. Cal. Sept. 30, 2002) (citing Kuper in ERISA context and stating that "[p]laintiffs must also demonstrate a causal link, specifically, that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident" and dismissing claim where no facts were alleged to establish that defendants failed to communicate information or "what harm allegedly resulted from this particular breach"; plaintiffs must "identify more clearly what damages or harm is alleged to have resulted from each of the specific breaches of duty"); Armstrong v. Amsted Indus., Inc., 2004 WL 1745774, at *7 (N.D. Ill. July 30, 2004) (stating that "[a] causal connection between plan losses and the breach of fiduciary duty is necessary" in granting summary judgment); Henry v. Champlain Enterps., 288 F. Supp. 2d 202, 230-32 (N.D.N.Y. 2003) (dismissing ERISA claims where plaintiffs failed to demonstrate that alleged breaches caused damages); Kemmerer v. ICI Americas Inc., 70 F.3d 281, 290-91 (3d Cir. 1995) (affirming summary judgment for defendants in ERISA case where participants failed to prove that they suffered any damages as a result of breach); Tardif v. General Elec. Co., 2000 WL 33376644, at *9 (D. Conn. Sept. 30, 2000) (plaintiff must demonstrate that the alleged breach caused damages recoverable under § 502(a)(3) to bring claim under § 404(a)(1)); Lewis v. Hermann, 775 F. Supp. 1137, 1151 (N.D. Ill. 1991) (applying loss causation to dismiss ERISA claims on motion to dismiss); Restatement (Second) of Trusts § 212, cmt. e (1992) (noting that a trustee is not liable for a loss resulting from breach of trust if the same loss would have occurred if there had been no breach).

upon any of the supposed misstatements. Actual, not presumed, reliance is a required element of an ERISA claim based on misrepresentations. Accordingly, Count II fails as a matter of law.

The Complaint does not allege that any of the plaintiffs actually saw any specific SEC filing that was incorrect, or that they relied on a particular item of supposed misinformation in one of those filings. Indeed, it does not allege that any Plaintiff saw any specific SEC filing at all. The Complaint tries to tiptoe around the reliance requirement instead, ambiguously saying that "Plaintiffs, the Plan and the participants relied upon, and are presumed to have relied upon, the representations and nondisclosures . . . to their detriment." (¶ 96) (emphasis added).

That manner of pleading does not measure up. Under ERISA, plaintiffs must plead and prove actual reliance, a requirement the Sixth Circuit re-emphasized quite recently. See Del Rio v. Toledo Edison Co., 2005 U.S. App. LEXIS 7576, *11-12 (6th Cir. Apr. 29, 2005) (listing elements of misrepresentation claim under ERISA, including that plaintiff "relied on those misrepresentations to [his] detriment"). See also Cerasoli v. Xomed, Inc., 47 F. Supp. 2d 401, 405 (W.D.N.Y. 1999) (same); In re Unisys Corp. Retiree Med. Benefits Litig., 2003 U.S. Dist. LEXIS 1577, at *14, 17-18 (E.D. Pa. Feb. 4, 2003) ("Contrary to Plaintiffs' contention, reliance may not be presumed in this case"; holding that each plaintiff's reliance on alleged misrepresentations must be determined individually in ERISA case).

Plaintiffs' evasive statement that they are "presumed to have relied upon" the alleged misstatements in the SEC filings obviously does not plead actual reliance. If any plaintiff actually saw a particular SEC filing, noted a statement in a filing that is now alleged to be false or incomplete, and took action as a consequence, it would be easy to allege. The Complaint conspicuously does not take this step (nor, we suspect, could it under Rule 11). The three individual plaintiffs obviously know which, if any, alleged misrepresentation by a

defendant they read and relied upon; it is not unfair to ask plaintiffs to identify them in the Complaint so that defendants know against what they must defend. (Cardinal made literally hundreds of public statements about its business during the five-year Class Period, so defendants cannot be expected to answer and defend without the Complaint providing notice of the specific statements plaintiffs say misled them.) If, by contrast, there was no actual reliance, there is no point in allowing a misrepresentation claim to proceed at all.

In AEP, this Court correctly noted that an ERISA misrepresentation claim requires reliance. See 327 F. Supp 2d at 831. It declined, however, to address whether the fraud-on-the-market presumption of reliance that is unique to securities law applies in the ERISA context, reasoning that this area of the law is controversial and evolving. Id. at 831-32. Nearly a year later, however, there is still no support for applying a fraud-on-the-market presumption outside the context of Rule 10b-5. No such presumption exists under ERISA. Neither the Sixth Circuit, nor any district court in the Circuit, nor any other federal circuit has recognized it.

The fraud-on-the-market doctrine is a judicial creation that is limited to implied rights of action under the securities laws. See Basic, Inc. v. Levinson, 485 U.S. 224, 243-49 (1988) ("the presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 [Securities Exchange] Act."). It applies only in securities fraud cases and has been recognized as a distinct departure from the traditional requirements of causes of action based on misrepresentation. See, e.g., Sikes v. Telelin, Inc., 281 F.3d 1350, 1363 (11th Cir. 2002) ("[N]either this circuit nor the Supreme Court has extended a presumption of reliance outside the context of securities cases."); Sec. Investor Protection Corp. v. BDO Seidman LLP, 222 F.3d 63, 73 (2d Cir. 2000) ("federal courts repeatedly have refused to apply the fraud on the market theory to state common law cases

despite its wide acceptance in the federal securities fraud context"); Mirkin v. Wasserman, 858 P.2d 568, 570-72, 574, 579-84 (Cal. 1993) (declining to incorporate the fraud-on-the-market doctrine into the common law of deceit; recognizing the doctrine as a distinct departure from the traditional requirements of causes of action based on misrepresentation).

Outside the narrow context of Rule 10b-5, courts require plaintiffs both to allege and to prove that they in fact relied upon the representations alleged to be misleading. See Sec. Investor Protection Corp. v. Munninghoff Lange & Co., 2004 Bankr. LEXIS 1955, at *16-17 (Bankr. S.D. Ohio Nov. 23, 2004) (court was unaware of any Ohio authority applying the fraud-on-the-market theory "within the context of a common law action" and, although the Ohio Supreme Court had not addressed the issue, "if it did, this Court is persuaded that it would require proof of direct reliance so characteristic of suits predicated upon common law fraud and reject the presumption of reliance arising under the 'fraud on the market' and 'fraud on the regulatory process' theories"); BDO Seidman, 222 F.3d at 73 (affirming dismissal of fraud claim where plaintiffs failed to allege actual reliance); In re Managed Care Litig., 209 F.R.D. 678, 690-92 (S.D. Fla. 2002) (since fraud-on-the-market theory does not apply to RICO claims, plaintiffs must allege actual reliance). Nothing in ERISA's text suggests Congress intended the fraud-on-the-market doctrine to apply to claims under the statute; indeed, the Supreme Court did not adopt the doctrine into the law of Rule 10b-5 until thirteen years after Congress enacted ERISA. See Basic, 485 U.S. at 243-49 (adopting fraud-on-the-market doctrine under Rule 10b-5); 29 U.S.C. § 1001, et seq. (1974).

In short, plaintiffs ask the Court to apply a presumption of reliance that simply does not exist under ERISA. Because the Complaint does not plead that any plaintiff actually relied on any specific alleged misrepresentation, Count II legally fails.

E. The Non-Disclosure Claim Against The Committee Defendants Fails To State A Claim For Relief Because The Complaint Does Not Show The Committee Defendants Had Any Knowledge Of The Alleged Misstatements.

Count II charges that members of the Employee Benefits Policy Committee violated ERISA by failing to correct erroneous statements in Cardinal's SEC filings about Cardinal's revenues and earnings and by failing to disclose supposed "accounting irregularities [and] violations of generally accepted accounting principles." (¶ 94.) The Complaint fails to show, however, that the Committee Defendants bringing this motion[14] had any knowledge of these allegedly erroneous statements, or any reason to know about the supposedly "undisclosed materially adverse information." (Id.) Count II therefore fails as against these defendants.

Members of a plan administrative committee are not guarantors of the accuracy of every item of information in every document that a plan participant may receive or that a plan document may incorporate by reference. See Howell v. Motorola, Inc., 337 F. Supp. 2d 1079, 1082, 1091-92 (N.D. Ill. 2004) (dismissing misrepresentation and failure to disclose claims against plan committee; plaintiff failed to allege that committee defendants had any knowledge of the company's allegedly improvident transaction or had any reason to investigate the transaction despite allegedly misleading statements in SEC filing). Just as the Committee Defendants would not be liable for an accounting error in a mutual fund prospectus that the Plan's summary description incorporated by reference, so they are not liable for accounting errors in Cardinal SEC filings that were incorporated by reference by the SPDs, unless they knew about those errors or ignored red flags that should have led to their discovery.

[14] Defendants Richard C. Adloff, Paul Williams, Donna Brandin, Anthony J. Rucci, Steven A. Bennett, Carole Watkins, and Susan Nelson are or were alleged members of the Committee and are referred to here as the "Committee Defendants." See above at 5. Defendant Richard Miller, Cardinal's former chief financial officer, was also a member of the Committee during part of the Class Period.

A complaint that does not allege that the committee defendants "actually possessed the 'adverse information'" fails to state a nondisclosure claim. See Crowley, 234 F. Supp. 2d at 230. Where a complaint does not allege that committee members "had any actual knowledge of misinformation or that they participated in the dissemination of information they knew or should have known was misleading," there can be no claim against those committee members. Id. (quotation omitted).

Significantly, the Complaint does not allege that Cardinal's SEC filings contained any intentional misrepresentations. Instead, because plaintiffs want to avoid the heightened pleading requirements of Rule 9(b), they allege only that the filings negligently failed to reveal certain financial information. (¶¶ 94, 97.) In other words, the Complaint seeks to assign liability against the Committee Defendants based on allegedly negligent misstatements contained in documents other people prepared. That is untenable.

The Complaint does not allege that the Committee Defendants had any specific involvement in preparing Cardinal's SEC filings. It does not charge that the Committee Defendants were responsible for any of the supposedly erroneous statements in any filings. In fact, the Complaint does not even identify the positions that any of the Committee Defendants held at Cardinal, other than Watkins and Nelson, who held human resources positions that are not alleged to have been involved with accounting or financial reporting. (¶¶ 14-20.) For defendants Adloff, Williams, Brandin, Rucci and Bennett, the Complaint says nothing more specific than that each was "a member of the Plan Committee" "[a]t certain times relevant to this Complaint," and that each one signed a plan amendment. (¶¶ 14-18.)

To be sure, the Complaint contains the undifferentiated assertion that these defendants "knew or should have known the undisclosed material adverse information" about

errors in Cardinal's SEC filings (¶ 22), but that is not enough to save Count II. For starters, the Complaint itself rebuts any assertion of actual knowledge by affirmatively alleging that accounting errors in the SEC filings other people prepared were merely negligent. (¶¶ 94, 97.) And there are no facts to support the conclusory assertion that any of the Committee Defendants "should have known" that other unidentified people made mistakes in Cardinal's SEC filings.

In similar circumstances, courts have dismissed claims against administrative committees where there was no indication they knew about supposedly omitted information that plaintiffs charged should have been disclosed to plan participants. In Crowley, for example, the plaintiff brought misrepresentation and failure-to-disclose claims against a plan committee, claiming that its members failed to disclose material non-public information about Corning and failed independently to investigate Corning's earnings statements. See 234 F. Supp. 2d at 230. The court dismissed the claims against the committee because "all of plaintiff's causes against Committee members rest on the assumption that [the members] possessed the 'adverse information' outlined in the Amended Complaint . . . . However, the Court repeats that the Amended Complaint makes no specific allegation that the Committee members actually possessed the 'adverse information.'" Id. at 230 (emphasis in original); see also Horvath v. Keystone Plan E., Inc., 333 F.3d 450, 461-62 (3d Cir. 2003) (only circumstances "known" to the plan fiduciary can give rise to an expanded affirmative duty to disclose information necessary to protect a participant); Hull v. Policy Mgmt. Sys. Corp., 2001 WL 1836286, at *9 (D.S.C. Feb. 9, 2001) ("Quite critically, plaintiff does not allege that the committee defendants themselves had any actual knowledge of any misinformation or that they participated in the dissemination of information they knew or should have known was misleading.").

The same is true here. Plaintiffs do not allege that these Committee Defendants had actual knowledge of any misinformation or that they participated in the dissemination of information they knew or should have known was misleading. The Complaint also does not include any facts capable of explaining how an investigation by the Committee would have revealed the truth underlying the alleged errors in the SEC filings. See Kuper, 66 F.3d at 1460 (failure to fulfill an investigatory responsibility is not a breach unless an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident).

Because the Complaint fails to plead any facts suggesting that these Committee Defendants knew about, or were negligent in not knowing about, the supposed mistakes in the SEC filings, the Complaint does not state a claim against them for nondisclosure. See Howell, 337 F. Supp. 2d at 1091 ("Nothing in the Complaint suggests that Committee Defendants, some of whom may not have been Motorola employees, had any reason to know that they should seek out information regarding one or a few of Motorola's transactions when it is undisputed that such information was not disclosed to the public.").

F. The Director Defendants Did Not Function As Fiduciaries With Respect To Selecting Investments And Communicating With Participants.

In support of their prudence and misrepresentation claims against the Director Defendants in Counts I and II, plaintiffs merely mimic the language of the statute defining a fiduciary. (See, e.g., ¶ 93.) That is insufficient to state claims for relief against the Director Defendants. The Complaint never alleges any facts showing that the directors had any role in selecting 401(k) investment alternatives or communicating with Plan participants. It therefore fails to plead that the directors functioned as fiduciaries with respect to those activities.

Fiduciary status is not an all-or-nothing proposition under ERISA. A person can be a fiduciary for some purposes but not others. To be a "functional" fiduciary, a person must

exercise discretion with respect to the aspect of plan administration that is in question.[15] See Confer v. Custom Eng'g Co., 952 F.2d 34, 37-38 (3d Cir. 1991) (affirming summary judgment for defendant corporate officers on breach of fiduciary duty claim because officers did not exercise discretion with respect to the aspect of plan administration at issue); 29 U.S.C. § 1002(21)(A) ("a person is a fiduciary with respect to [an ERISA] plan to the extent . . . he has any discretionary authority or discretionary responsibility in the administration of such plan") (emphasis added). Individual officers or directors are not liable as functional fiduciaries based on their titles alone. See Torchetti v. IBM, 986 F. Supp. 49, 51-52 (D. Mass 1997) (dismissing claims against CEO, stating that "[t]he only facts alleged in the complaint regarding Gerstner is that the [plan] gives management the sole discretion to designate which employees are surplus and essential. However, there is no allegation of an express delegation to Gerstner personally. These allegations are insufficient to render Gerstner a fiduciary under the functional definition set forth in 29 U.S.C. § 1002(21)(A) or 1105(c)(1)(B).").

Instead, a plaintiff must allege specific facts about each officer's or director's exercise of discretion with respect to the aspect of plan administration at issue. As the Third Circuit has explained, "when an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of that corporation are not fiduciaries within the meaning of section 3(21)(A)(iii), unless it can be shown that these officers have individual discretionary roles as to plan administration." Confer, 952 F.2d at 37 (emphasis in original).[16]

Thus, to state a claim for breach of fiduciary duty, a complaint must show that a defendant acted as a fiduciary ***with respect to the subject matter of the alleged breach***. To do

[15] The Plan does not make the directors "named" fiduciaries, and the Complaint does not allege otherwise.

[16] See also Crowley, 234 F. Supp. 2d at 229 dismissing complaint where directors exercised no discretion in selecting investment options, communicating with plan participants, or managing plan assets).

this, a complaint must identify specific facts demonstrating that a defendant was a fiduciary with respect to specific acts or omissions. See Milofsky v. Am. Airlines, 404 F.3d 338, 342 n.8 (5th Cir. 2005), reh'g en banc granted, 2005 U.S. App. LEXIS 15122 (5th Cir. July 19, 2005). If the complaint fails to do so, those claims are subject to dismissal. See id.; Custer v. Sweeney, 89 F.3d 1156, 1161-63 (4th Cir. 1996) (affirming dismissal of fiduciary duty claims against pension fund attorney where complaint did not allege facts "capable of demonstrating that [the defendant] transcended his role as legal counsel" with respect to the fund); Metro. Life Ins. Co. v. Palmer, 238 F. Supp. 2d 826, 829-31 (E.D. Tex. 2002) (dismissing third-party plaintiff's fiduciary duty claim against employer because there was no factual allegation that the employer was a fiduciary when it committed the alleged negligence; stating that "a plaintiff must allege specific facts, not conclusory allegations."). Courts have repeatedly recognized that merely asserting that a defendant was a fiduciary or exercised discretion with respect to plan administration or assets does not state a claim under ERISA. See Milofsky, 404 F.3d at 342 ("conclusional allegations" that defendant was fiduciary are insufficient to defeat motion to dismiss); In re Reliant Energy ERISA Litig., 336 F. Supp. 2d 646, 663-64 (S.D. Tex. 2004) (rejecting similar statute-mimicking allegation as "nothing more than a conclusory assertion"); Custer, 89 F.3d at 1163 (same).

Here, the Complaint fails to identify any facts that, if true, would establish that any of the Director Defendants was a fiduciary with respect to choosing the Plan's investment alternatives or communicating with Plan participants about them. The Complaint does not allege that any of the Director Defendants had any role in choosing the Plan's investment options or in designating the Cardinal Stock Fund as an option.[17] Nor does the Complaint identify any

[17] In fact, the Plan expressly does not allocate those duties to the directors. Instead, it gives the Committee the power to designate investment options, except with respect to the Cardinal Stock Fund, which the Plan itself establishes as an investment alternative. (Ex. A at § 8.05; Ex. B at § 8.05.)

instance where the Director Defendants communicated with participants about the Plan or Plan benefits or exercised discretion with respect to any participant communications.

In fact, the section of the Complaint titled "The Director Defendants Were Fiduciaries of the Plan" (¶¶ 56-58) makes allegations only about the Directors' alleged role in appointing and monitoring the Plan committee (the subject of Count III), not about any involvement in investment selection or participant communications (the subjects of Counts I and II). It is fundamental, however, that the mere fact that directors may appoint the members of a plan committee does not make them fiduciaries with respect to everything the committee later may do, such as designating investment options or communicating with participants. See In re Williams Cos. ERISA Litig., 271 F. Supp. 2d 1328, 1338 (N.D. Okla. 2003), reconsideration denied, 2003 U.S. Dist. LEXIS 25042 (Oct. 24, 2003) ("[T]he only power the Board had under the Plan was to appoint, retain, or remove members of the Benefits Committee. Thus, the Board's fiduciary obligations can extend only to those acts."); Calpine, 2005 U.S. Dist. LEXIS 9719, at *10-13 (dismissing prudence and disclosure claims against directors; finding that directors at most had a duty to monitor committee members they appointed and that complaint did not adequately allege a failure in that regard).[18] Paragraphs 56-58 thus cannot support fiduciary duty claims against the directors for investment selection or participant communications, and nothing else in the Complaint even purports to address this gap.

In AEP, this Court declined to dismiss claims against two individual defendants for failure to allege their fiduciary status, reasoning that such a determination was better reserved for later proceedings, given the circumstances of that case. See AEP, 327 F. Supp. 2d at 825-27.

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[18] See also In re McKesson, 2002 WL 31431588, at *15-16 (dismissing claims against directors where directors had duty to appoint plan committee and provide channels for the committee to communicate with participants, but had no discretion in selecting investment options; concluding that only possible fiduciary duty claim that could be asserted against directors was claim for failure to monitor committee).

In that case, however, the individual defendants were the company's chief executive officer and chief operating officer, whereas here the entire board is named as defendants, with no allegations of any individual acts by any of them. Moreover, several courts recently have dismissed claims against directors where a complaint's factual allegations failed to establish a fiduciary capacity or where plaintiffs have made conclusory allegations regarding the directors' fiduciary status, underscoring that this is an appropriate inquiry on a 12(b)(6) motion. See Milofsky, 404 F.3d at 342 ("conclusional allegations" of fiduciary status insufficient to withstand motion to dismiss); Williams, 271 F. Supp. 2d at 1339 (dismissing disclosure claims against directors because their only duties were to appoint and remove members of benefits committee).[19] In addition, the decision in AEP predated Milofsky, in which the Fifth Circuit recently emphasized that a plaintiff must plead "specific facts" to state a claim based on functional fiduciary status. See 404 F.3d at 342. Accordingly, the Court should dismiss Counts I and II against the Director Defendants.

G. The Complaint Fails To State A Claim For Co-Fiduciary Liability.

Plaintiffs cannot state a claim for co-fiduciary liability by lumping together the 25 defendants into a wrongdoing monolith and making an undifferentiated assertion that each is responsible for all of the actions of all the others over a five-year period. But that is exactly what the Complaint does here: the basis for the co-fiduciary claims in Counts I and II is the recitation that "[e]ach Defendant is liable for the acts of the other Defendants as a co-fiduciary." (¶¶ 90, 100.) The Complaint does not say what any specific defendant supposedly knew or concealed

[19] See also Hamilton v. Carrell, 243 F.3d 992, 997 (6th Cir. 2001) ("Where the facts are not in question, a party's status as an ERISA fiduciary is purely a question of law."); Grindstaff v. Green, 133 F.3d 416, 425-26 (6th Cir. 1998) (affirming dismissal of claims where the complaint failed to establish a defendant's fiduciary capacity); Crowley, 234 F. Supp. 2d at 228 (dismissing prudence, misrepresentation, and nondisclosure claims against directors because the board did not control investment options and was not charged with the duty to communicate information to plan participants).

about the conduct of any other defendant, which is the necessary predicate for co-fiduciary liability. See 29 U.S.C. § 1105(a). The co-fiduciary liability claims are therefore defective.

To state a claim for co-fiduciary liability, a complaint must specify what each allegedly breaching co-fiduciary knew, concealed, or enabled. If it does not say "which breach by which putative fiduciaries were known of and/or facilitated by which co-fiduciaries," its co-fiduciary claims cannot proceed. See Stein v. Smith, 270 F. Supp. 2d 157, 175 (D. Mass. 2003). This is especially so when there are many defendants; in such a case, merely lumping them together results in a pleading that does not contain allegations that put Defendants on notice of the particular charges against each defendant. See In re 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).

Parroting the statutory standard for co-fiduciary liability — which is all this Complaint does — does not satisfy the pleading obligations. See In re Sprint Corp. ERISA Litig., 2004 U.S. Dist. LEXIS 9622, at *58-59 (D. Kan. May 27, 2004) (dismissing co-fiduciary claims where complaint "simply parrot[ed] the language of the co-fiduciary liability statute"). Just as a plaintiff must allege specific facts to plead fiduciary status for a primary liability claim (see supra at 32-34), so must the plaintiff allege specific facts for co-fiduciary claims. See Milofsky, 404 F.3d at 342 (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).

This Complaint does not begin to meet that requirement. It simply lumps all of the defendants together in alleging co-fiduciary liability. (¶¶ 90, 100.) It does not state what each (or any) alleged fiduciary supposedly knew, concealed, or enabled. Indeed, the Complaint

contains no allegation of any fact that, if proven, would allow any identifiable defendant to be held liable under a co-fiduciary theory. The Court should thus dismiss the co-fiduciary claims.[20]

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

Count III alleges the Director Defendants and Cardinal breached their fiduciary duties because the Director Defendants "knew or should have known" that the Committee Defendants were "not performing their duties properly during the Class Period." (¶¶ 103-05.) Count III is entirely derivative of Counts I and II and contains no new factual allegations.

As explained above, Counts I and II fail to state a claim for relief on multiple grounds. As a result, the derivative failure-to-monitor claim fails as well. Other courts have dismissed derivative failure-to-monitor claims in analogous circumstances. See, e.g., Calpine, 2005 U.S. Dist. LEXIS 9719, at *19-20 (dismissing failure to monitor claim as moot where plaintiffs failed to allege that it was imprudent to offer or hold interests in company stock fund). The same reasoning applies here. The Court should therefore dismiss Count III to all defendants.

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

Plaintiffs invoke the doctrine of *respondeat superior* in Count III to argue that Cardinal is liable for the Director Defendants' alleged failure to monitor the Plan committee. (¶ 109.) This fails to state a claim for relief because there is no *respondeat superior* liability under ERISA. See Tool v. Nat'l Employee Benefits Servs., Inc., 957 F. Supp. 1114, 1120-21 (N.D. Cal. 1996) (holding that *respondeat superior* does not apply to ERISA fiduciary duty claim). Count III must be dismissed as against Cardinal Health on this basis as well.

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[20] Although the Court in AEP declined to dismiss the co-fiduciary liability claims, there were only two individual defendants in that case, the company's chief executive officer and chief operating officer. See 327 F. Supp. 2d at 817. It is obviously very different to allege that two individuals, the company's chief executive officer and chief operating officer, are liable for the alleged breaches of each other than to allege that the 25 individual defendants in this case, who each have different responsibilities for different aspects of the Plan — or even no Plan responsibilities at all — are liable for all the acts of all the other defendants.

Applying *respondeat superior* in the ERISA context makes no sense. ERISA requires fiduciaries to act independently and in the exclusive interest of plan participants, not in the interest of their employers. See 29 U.S.C. §§ 1002(21), 1132, 1104. Neither the Supreme Court nor the Sixth Circuit has recognized *respondeat superior* liability in ERISA cases, and the ERISA statute itself does not provide for it.

To the contrary, the Supreme Court has warned that ERISA liability must not be expanded beyond the terms of the statute. See Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985); Mertens, 508 U.S. at 254 ("In Russell we emphasized our unwillingness to infer causes of action in the ERISA context"); 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") (emphasis in original); 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]"). The Sixth Circuit has characterized the law regarding vicarious liability under ERISA as "muddled," and has declined to decide "whether the doctrine of *respondeat superior* applies in ERISA cases." Hamilton, 243 F.3d at 1000-03.

Even if the Court concluded — contrary to the High Court's cautions — that *respondeat superior* liability under ERISA might exist under certain circumstances, the claim here still would fail. In those few instances where lower courts have decided that *respondeat superior* might theoretically be available, they have not allowed such a claim to go forward without factual allegations that the employer de facto controlled the agent's management of the

plan. 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).

There are no such allegations here. The Complaint fails to assert that Cardinal exercised de facto control over the Director Defendants. Nor could the Complaint do so, because it makes no sense under corporation law to say that a company "controls" its directors. See Arnold v. Soc'y for Sav. Bancorp, 678 A.2d 533, 539-40 (Del. 1996) (declining to apply *respondeat superior* to corporate directors; "Directors, in the ordinary course of their service as directors, do not act as agents of the corporation . . . . A board of directors, in fulfilling its fiduciary duty, controls the corporation, not *vice versa*.").[21] Instead, the Complaint states the conclusion, without a single fact allegation to support it, 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.) That is insufficient as a matter of law to state a claim for relief based on *respondeat superior* principles. Thus, even if the Court expanded *respondeat superior* liability to ERISA (which it should not do in light of Supreme Court precedent), the Complaint would still fail to state any such claim against Cardinal.

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

Plaintiffs have not alleged facts sufficient to state any claim against Susan Nelson. The Complaint does not allege that she functioned in any fiduciary role.

All the Complaint says about Ms. Nelson is that she was Cardinal's Vice President of Compensation and Benefits and was the secretary for the Plan committee at certain times

[21] Ohio corporation law reflects the same principle. See Ohio Rev. Code § 1701.59(A) ("all of the authority of a corporation shall be exercised by or under the direction of its directors").

during the Class Period. (¶ 20.) The Complaint does not allege that she was a member of the Committee (and she was not). (See id.) Indeed, the Plan expressly states that the secretary of the Committee "may or may not be a Committee member" and does not assign any fiduciary functions to that position, merely stating that "[t]he secretary shall keep a record of all meetings and forward all necessary communications to the Employer, or the Trustee, as appropriate." (Ex. A at § 10.03; Ex. B at § 10.03.) Nor does the Complaint allege that Ms. Nelson assumed any fiduciary functions in selecting investment options or communicating with Plan participants.

As discussed in Section F, to be a "functional" fiduciary, a person must exercise discretion with respect to the aspect of plan administration that is in question. See 29 U.S.C. § 1002(21)(A) ("a person is a fiduciary with respect to [an ERISA] plan to the extent . . . he has any discretionary authority or discretionary responsibility in the administration of such plan") (emphasis added). To state a claim for breach of fiduciary duty against Ms. Nelson, plaintiffs must allege "specific facts" about her alleged exercise of discretion with respect to the aspect of plan administration at issue. See Milofsky, 404 F.3d at 342 (affirming dismissal of fiduciary duty claims against defendant consulting firm because the complaint "fail[ed] to identify any specific discretion or decisionmaking authority that [the defendant] had with respect to the alleged breaches of fiduciary duty"). See also supra at 32-34.

Not only does the Complaint here fail to allege "specific facts" regarding any alleged exercise of discretion by Ms. Nelson, it fails to allege that she was a fiduciary at all. Accordingly, the Court should dismiss plaintiffs' claims against Ms. Nelson.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint in its entirety. Under Local Rule 7.1(b)(2), defendants respectfully request oral argument on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 22, 2005, I filed a true and accurate copy of the foregoing Certain Defendants' Motion To Dismiss The Consolidated Amended ERISA Brief, 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 Federal Express (next business day delivery):

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