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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

IN RE DELL INC. ERISA LITIG.	)	Case No. 06-CA-758-SS
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs bring this case against the fiduciaries of the Dell Inc. 401(k) Plan (the "Plan") in order to recover tens of millions of dollars of losses to the Plan caused by Defendants' breaches of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et. seq.*[1] As set forth in great detail in the Second Amended Class Action Complaint ("Complaint" or "Compl."), over a period of five years, Dell's management systematically and deliberately inflated the price of Dell stock through accounting manipulations and materially false or misleading disclosures to the public, the SEC, and Plan participants. During this period, Defendants permitted the Plan to continue its existing investment of Plan assets in Dell stock through the Dell, Inc. Stock Fund (the "Stock Fund"). They also continued to permit the Plan to purchase *additional* shares of Dell stock at artificially inflated prices. Compl., ¶¶ 4-6, 68-88. No matter how Defendants slice it, it was imprudent under ERISA for the Plan to pay more than fair market value for Dell stock.

As increasingly negative information leaked out concerning the Company's practices, the stock's price began to fall and remained depressed throughout the remainder of the Class Period, performing dramatically worse than prudent investment alternatives.[2] Plaintiffs' claims that Defendants' imprudent investment in Dell stock and misrepresentations to Plan participants violated Defendants' fiduciary duties of prudence and loyalty are firmly grounded in ERISA and have been upheld in at least fifty reported decisions.[3] Indeed, in *Langbecker v. Elec. Data Sys.*

[1] Defendants are Dell, Inc. ("Dell" or the "Company"), Michael Jordan, Klaus S. Luft, Michael A. Miles, Thomas Welch, Dominick DiCosimo, and Brian MacDonald.

[2] The Class Period is May 16, 2002 to the present. Compl., ¶ 3.

[3] *See* Exhibit A attached to the Declaration of Lynn Lincoln Sarko ("Sarko Decl.").

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Corp., 476 F.3d 299, 308 (5th Cir. 2007), the Fifth Circuit expressly acknowledged the viability of similar claims while remanding the case for further proceedings on class certification.

As fiduciaries, Defendants owed very exacting duties: "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); *see also Pegram v. Herdrich*, 530 U.S. 211, 224 (2000); *Donovan v. Bierwirth*, 538 F. Supp. 463, 470 (E.D.N.Y 1981). As alleged in Plaintiffs' Complaint, Defendants failed to discharge these duties.

Defendants' motion to dismiss is flawed in several key respects. For example, Defendants entirely ignore the specific mandate of the Plan that its investments be diversified. Compl., ¶ 35, 58. Further, they mischaracterize the applicable legal standard when they argue that in the absence of a "precipitous decline" in Dell's stock price, no imprudence claim may be maintained. No such requirement exists where, as here, a complaint alleges that ERISA fiduciaries invested Plan assets in stock that was materially artificially inflated as the result of a substantial and sustained practice of public misstatements and omissions by the issuer. In addition, Defendants argue at length regarding whether the elements of equitable estoppel are satisfied when Plaintiffs have not made an equitable estoppel claim.[4]

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[4] In their initial motion to dismiss, Defendants raised several arguments that they now abandon. Defendants no longer argue that: (i) the "modern portfolio theory" trumps Plaintiffs' prudence claims (see Defs. Initial Motion to Dismiss at 20-22); (ii) selective disclosure of non-public information would put Dell fiduciaries at risk of violating the securities laws prohibiting insider trading (see id. at 24-25); or (iii) the Dell fiduciaries statements made to Plan participants were not fiduciary communications (see id. at 25-26).

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II. FACTS

The Plan is an ERISA-qualified plan for the benefit of Dell employees. Compl., Ex. A, Recitals. Plaintiffs allege breaches of fiduciary duty with respect to the Plan's acquisition and/or holding of Dell common stock, which represented as much as fifty percent of the Plan's assets during the Class Period. Compl., ¶ 34. Specifically, Plaintiffs' claims are:

1. Breach of Duty to Invest Plan Assets Prudently.

Count I alleges that Dell and members of Dell's Benefits Administration Committee (collectively, the "Committee Defendants") breached their fiduciary duty of prudence by permitting the Plan to buy and hold shares of Dell stock when it was not prudent to do so and by failing to evaluate the prudence of that investment. Compl., ¶¶ 113-129. The Complaint details a number of sustained, illicit practices that, by the Company's own admission, were calculated to inflate its operating performance results, thus artificially inflating the price of Dell stock, making it an imprudent investment. The undisclosed manipulative practices included the following:

- During the Class Period, the Company purposefully and regularly manipulated its accounting in order to meet quarterly performance objectives. Specifically:
    - On a periodic basis, account balances were reviewed with the goal of seeking adjustments so that quarterly objectives could be met.
    - The adjustments included the improper creation and release of accruals and reserves for the apparent purpose of enhancing internal performance measures and reported financial results.
    - These practices took place at the request, or with the knowledge, of senior executives.
    - Dell concealed these practices by providing internal and external auditors with purposefully incorrect or incomplete information. Compl., ¶ 82.

- During the Class Period, despite the breadth of the accounting abuses, the Chief Executive Officer and Chief Financial Officer personally certified the accuracy and completeness of Dell's financial results and the adequacy of its financial reporting controls, concealing the earnings manipulation throughout the period. Compl., ¶ 84.

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- Contrary to those false certifications, the Company suffered from pervasive accounting failures, including:

  - Senior management failed to maintain an appropriate financial reporting tone and control consciousness.
  - Management created an environment in which accounting manipulations were an acceptable device to compensate for operation shortfalls.
  - Instances in which management overrode accounting controls in order to attain the desired accounting results.
  - Management failed to design and maintain effective controls, resulting in the disregard of basic accounting processes, such as requiring sufficient documentation for journal entries and ensuring the accuracy of journal entries and account reconciliations. Compl., ¶ 85.

The Company also concealed unfavorable business trends, specifically:

- Dell consistently represented that it posted industry-leading results, unit volume growth substantially exceeding industry norms, substantial growth in all regional and product markets and double-digit year-over-year revenue growth; in fact, however, by early 2003 Dell was experiencing a significant decline in its profit margins. Compl., ¶¶ 69-70.

- Dell showed improving earnings and profit margins by under-accruing for standard warranty costs and thereby overstating earnings. Dell masked this practice by failing to report its standard warranty costs separately from its extended warranty costs. Compl., ¶ 71.

- Dell masked unfavorable inventory accumulation trends by failing to include products which had been ordered but not yet delivered as part of its inventory and instead included them among its "other current assets." Compl., ¶ 72.

- In August, 2006, Dell announced a massive recall of laptop computer batteries, at a cost of $200-$400 million. The Complaint alleges that Defendants had knowledge of the problems with the batteries before the recall, based on a recall of similar batteries sold in Canada in 2005. Compl., ¶ 73.

- Plaintiffs allege that Dell and the Committee Defendants knew of these circumstances, or would have known of them, had they discharged their fiduciary obligation to evaluate the Plan's investments. Compl., ¶¶ 89-92.

Importantly, Plaintiffs allege that the artificial inflation of the Company's stock price resulted from the sustained manipulation of financial reporting, which occurred with the involvement of senior management. Compl. ¶¶ 82, 85. Indeed, even the Company's own

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artfully-crafted disclosure of the internal investigation results assigns responsibility to senior management – both for the persistent failure to create and maintain an effective reporting environment (as required by law), but also for management's involvement in the accounting shenanigans designed to achieve earning targets. Compl. ¶¶ 82, 84 – 86.

Given the pervasiveness of the financial misconduct and the involvement of senior management, it is clear that the Defendants knew, or should have known, the undue risk of investing in Dell stock while its price was artificially propped up by the accounting abuses. Plaintiffs specifically allege that Defendants failed to undertake any meaningful effort to evaluate these risks. Specifically, Plaintiffs allege that Defendants "failed to take into account the changing risk profile of the Dell stock investment as a result of the above circumstances and the Company's deteriorating financial circumstances as demonstrated by, among other objective indicators, Dell's debt/equity ratio." Compl., ¶ 91. At the very time the stock price was inflated by the accounting manipulations, Defendants permitted the Plan to over-concentrate its investment in the Dell stock in violation of Article XII of the Plan, which required Defendants to diversify Plan investments "so as to minimize the risk of large losses, unless under the circumstances it is prudent not to do so." Compl., ¶ 58.

Finally, the Complaint contains allegations that Defendants had several different options for satisfying their duties under ERISA, including: making appropriate public disclosures; divesting the Plan of Dell stock; prohibiting the Plan from new purchases of Dell stock; consulting independent fiduciaries regarding appropriate conduct; and/or resigning as fiduciaries if their employment by Dell prevented them from loyally serving the Plan with respect to the Plan's investment in Dell stock. Compl., ¶ 95. Yet, "[d]espite the availability of these and other options, Defendants failed to take any action to protect participants from losses resulting from

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the Plan's investment in Dell stock. In fact, Defendants continued to invest and to allow investment of the Plan's assets in Company stock even as Dell's problems came to light." Compl., ¶ 96.

2. Breach of Duty To Provide Complete and Accurate Information.

Count II alleges that Dell and the Committee Defendants (collectively the "Communication Defendants") breached their fiduciary duty of loyalty by failing to provide Plan participants with complete and accurate information concerning the Plan's assets, particularly Dell stock. Compl., ¶ 130-143. For example, the Committee Defendants provided materially misleading and inaccurate information to Plan participants through summary plan descriptions that incorporated by reference Dell's materially false or misleading SEC filings and reports. Compl., ¶ 138.

3. Breach of Duty to Monitor.

Count III alleges that the "Director Defendants" – the members of the Compensation Committee of Dell's Board of Directors who appointed the fiduciaries who managed the Plan – breached their fiduciary duty to monitor the fiduciaries whom they appointed. This breach resulted from the failure by the Director Defendants: (i) to have procedures to evaluate the performance of the Committee Defendants whom they appointed; (ii) to ensure that the Committee Defendants appreciated the risks of the Plan's investment in Dell common stock; (iii) to provide necessary information regarding Dell common stock to any Committee Defendants who lacked such information; and (iv) to remove Committee Defendants who performed inadequately. Compl., ¶ 144-153.

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4. Co-Fiduciary Liability.

Count IV of the Complaint alleges that all Defendants are liable as co-fiduciaries under § 405(a) of ERISA, 29 U.S.C. § 1105(a), in that they: (i) enabled the breach of duty by another fiduciary; and (ii) knew of a breach of duty by fiduciaries and failed to take action to remedy the breach. Compl., ¶¶ 154-164.

III. ARGUMENT

A. The Legal Standard on a Motion to Dismiss.

In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must construe the Complaint liberally, accept all allegations of the Complaint as true, and draw all reasonable inferences in the plaintiffs' favor. *See Kane Enters. v. MacGregor (USA), Inc.,* 322 F.3d 371, 374 (5th Cir. 2003). In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Supreme Court reaffirmed that "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* at 511 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, __ U.S. ___, 127 S. Ct. 1955, 1965 (2007). Although a complaint "does not need detailed factual allegations," a plaintiff must nonetheless provide the "grounds of his entitlement to relief." *Id.* at 1964-65. The Complaint easily passes muster.

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B. Plaintiffs Properly Allege a Breach of Fiduciary Duty Claim for Imprudent Investment.

1. ERISA Does Not Immunize Fiduciaries With Respect to Their Decisions Regarding Investments In Employer Stock.

Defendants' first argument is that because § 404(a)(2) of ERISA provides that in an eligible individual account plan ("EIAP"), the general duty of prudence does not include a duty to diversify with respect to qualifying employer securities, in effect fiduciaries of such plans are immunized with respect to their decisions regarding investments in employer stock. This sweeping assault on the concept of fiduciary duty under ERISA has been almost universally rejected, and is plainly not the law in the Fifth Circuit. *Langbecker,* 476 F.3d at 308 (recognizing viability of claim for ERISA fiduciary breach with respect to investment in employer stock).[5] Defendants' argument is particularly misguided here, where the Plan itself mandated diversification of its investments. Compl., Ex. A at ¶ 58.

Plaintiffs' claims of imprudence are two-pronged. First, Plaintiffs claim that irrespective of any duty to diversify, it was imprudent for the Plan to invest in even one share of Dell stock because its price was artificially inflated as a result of material undisclosed information. Second, Plaintiffs claim that Defendants breached the duty to diversify imposed by the Plan itself.

a. The Complaint States a Claim for Breach of the Duty of Prudence Because Dell's Stock Price Was Artificially Inflated.

The Complaint describes in detail the material misstatements and omissions that caused the price of Dell stock to be artificially inflated during the Class Period. Compl., ¶¶ 68-88. Plaintiffs specifically allege that, as a result of this artificial inflation, investment in Dell stock

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[5] *See also, e.g., In re Schering-Plough Corp. ERISA Litig.,* 420 F.3d 231 (3d Cir. 2005); *Lalonde v. Textron, Inc.*, 369 F.3d 1 (1st Cir. 2004); *In re Enron Corp. Sec., Derivative & ERISA Litig.,* 284 F. Supp. 2d 511, 553-63 (S.D. Tex. 2003).

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was imprudent during the Class Period. Compl., ¶ 117.[6] Rather than address this allegation directly, Defendants erroneously argue that the claim should be dismissed because ERISA does not impose a duty to diversify investments in company stock. This argument is a non-sequitur.

ERISA expressly provides that fiduciaries have a duty to manage Plan assets prudently, regardless of any duty to diversify. *Donovan v. Cunningham,* 716 F.2d 1455 (5th Cir. 1983). Accordingly, courts distinguish claims for failure to diversify from claims that ***any*** investment in company stock was imprudent, whether due to artificial inflation or other circumstances. *See, e.g., In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1223 (D. Kan. 2004), *Horn v. McQueen*, 215 F. Supp. 2d 867, 874-75 (W.D. Ky. 2002). In *In re JDS Uniphase Corp. ERISA Litig.*, No. 03-4743, 2005 WL 1662131 (N.D. Cal. July 14, 2005), the defendants argued that under case law concerning failure to diversify, they were entitled to a presumption of reasonableness. The district court rejected this contention:

[6] While there are similarities between these allegations and allegations that generally support a securities fraud case, it is important to recognize that the two types of cases are based on different statutes, reflect different common law traditions, and have very different standards. As Judge Posner recently noted:

> The burden of proving fraud [in a securities case] is heavier than that of proving a breach of fiduciary duty (provided, of course, that a fiduciary relation is established). Such a breach might consist in imprudent management (for example, failure to diversify), mistake, self-dealing and other conflicts of interest, or failure to remedy breaches of fiduciary duty by a co-fiduciary - all examples of misfeasance rather than malfeasance, involving no misrepresentations, and in short falling short of fraud. The duty of care, diligence, and loyalty imposed by the fiduciary principle is far more exacting than the duty imposed by tort law not to mislead a stranger.

Harzewski v. Guidant Corp., 489 F.3d 799, 805 (7th Cir. 2007) (internal citations and quotations omitted).

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> Defendants argue that plaintiffs' claim of imprudence is, in reality, a claim for failure to diversify, yet plaintiffs make no such diversification claim. Contrary to what defendants appear to argue, plaintiffs' claim is not transformed into a diversification claim merely because plaintiffs argue that investment in JDSU was imprudent and that it logically follows from such an argument that defendants therefore should have invested in other stocks. . . . [P]laintiffs allege that ***any investment in JDSU stock was imprudent in light of what the defendants knew about JDSU and the risk of investing in JDSU stock. Plaintiffs claim is therefore not a diversification claim. . . ."***

Id., at * *7* (emphasis added) (citations omitted). Similarly, the First Circuit in *Lalonde v. Textron, Inc.*, 369 F.3d 1 (1st Cir. 2004), vacated dismissal of an action in which the district court "failed to take account of plaintiffs' allegation that . . . Textron artificially inflated its stock price . . . ." *Id.* at 6; *see also In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 859 (N.D. Ohio 2006); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02 C 8324, 2004 WL 407007, at *4 (N.D. Ill. March 3, 2004); *Canale v. Yegen*, 782 F. Supp. 963, 967-68 (D.N.J. 1992).[7]

[7] Defendants' cases that do not involve artificial inflation, such as *In re McKesson HBOC Inc. ERISA Litig.,* 391 F. Supp. 2d 812 (N.D. Cal. 2005) and *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004), are simply inapposite. Indeed, the *McKesson HBOC* court expressly recognized the distinction between diversification and artificial inflation claims. 391 F. Supp. 2d at 825 n.9. Equally unavailing are Defendants' citations to *Smith v. Delta Air Lines, Inc.,* 422 F. Supp. 2d 1310 (N.D. Ga. 2006) and *In re Coca-Cola Enters., Inc. ERISA Litig*., No. 1:06-CV-0953, 2007 WL 1810211 (N.D. Ga. June 20, 2007). In *Smith,* the court concluded that a single unspecified allegation of artificial inflation in the price of Delta's stock was insufficient to avoid dismissal, particularly where the complaint had numerous references to public disclosures regarding the company's difficulties. *Id.* at 1331. Here, the Complaint contains many specific references to the circumstances that caused the artificial inflation. Compl. ¶¶ 68-88. The decision in *Coca-Cola* rests on the court's conclusion that in the Eleventh Circuit the plaintiff would be required to plead its allegations of corporate misconduct with particularity under Rule 9(b). Defendants here do not make such a Rule 9(b) argument, perhaps recognizing that it has been rejected outside the Eleventh Circuit, *see, e.g., In re Polaroid ERISA Litig.,* 362 F. Supp. 2d 461, 469-70 (S.D.N.Y. 2005), including by courts in the Fifth Circuit. *See In re Enron Corp. Sec., Derivative and ERISA Litig.,* 284 F. Supp. 2d 511, 652 (S.D. Tex. 2003).

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b. The Plan Imposed a Duty to Diversify.

Regardless of the artificial inflation aspect of the imprudence claim, Defendants are liable for breach of the duty to diversify because they expressly assumed that duty under the Plan and thereby assumed management duties greater than those imposed by ERISA. Section 12.3(c) of the Plan, ignored by Defendants in their Motion, requires that each fiduciary discharge his or her responsibilities "by diversifying the investments of the Plan so as to minimize the risk of large losses, unless under the circumstances it is prudent not to do so." *See* Compl., Ex. A at ¶ 58. Importantly, Section 12.1 of the Plan provides that: "This Article shall control over any contrary, inconsistent or ambiguous provisions contained in the Plan." *Id.*

While ERISA exempts employer securities from the statutory fiduciary duty to diversify, it does not *prohibit* a plan from imposing such a requirement. 29 U.S.C. § 1104(a)(2). Moreover, ERISA § 404(a)(1)(D) provides that plan fiduciaries have a duty to adhere to plan documents "insofar as [they] are consistent with" 29 U.S.C. § 1104 (a)(1)(D), creating a fiduciary duty to adhere to Plan requirements, such as § 12.3, which exceed (but do not conflict with) ERISA. Defendants were therefore bound to follow the diversification requirement of the Plan discussed above.

Construing virtually identical plan language in *Enron*, Judge Harmon held that "[w]hile the plan authorizes the trustee to hold 'up to 100% of its assets' in Enron stock, it does not mandate that the trustee hold 100%, or even 30% or 20%, of its assets in Enron stock, and, in fact, seemingly allows complete discretion in how much may be invested in Enron stock where the circumstances make such investment imprudent." *Enron*, 284 F. Supp. 2d at 669-69. Moreover, the court found that the plan language and structure "indicate[d] diversification is the

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general rule, not the exception, and where diversification is not effected, there is a burden to justify that the absence of diversification was clearly prudent under the circumstances." *Id.*

Defendants altogether ignore the diversification requirement of the Plan. Given that they allowed as much as fifty percent of Plan assets to be invested in Dell stock (Compl., ¶ 35), they cannot seriously contend that the Plan was in fact diversified. Ultimately, to avoid liability, Defendants must demonstrate that it was prudent for them to permit this over-concentration of investment in Dell stock. While Defendants may believe that they can meet this burden at trial, the pleading stage is not the appropriate time to resolve these issues of fact.

2. No Presumption of Prudence Applies to Plan Investments.

a. The Plan Does Not Require Investment in Dell Stock.

The presumption of prudence urged by Defendants is based on Third Circuit authority that holds that a fiduciary who is required by the terms of a plan to invest in company stock is entitled to a presumption that such an investment is prudent, while a fiduciary who is not so required, but is "simply permitted" to invest Plan assets in company stock, is not entitled to such a presumption. This presumption traces back to *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), an ERISA case involving an Employer Stock Option Plan, or "ESOP," a plan designed to invest primarily in company stock. 29 C.F.R. § 2550.407d-6. The court held that, because the fiduciary was directed by the plan to invest in company stock, it was entitled to a presumption that it acted prudently. *Moench,* 62 F.3d at 571.

In *Edgar v. Avaya, Inc.,* 503 F.3d 340 (3d Cir. 2007), the court extended the "presumption of prudence" to an "eligible individual account plan" ("EIAP") which was *not* an ESOP; however, the plan at issue specifically required that a company stock fund be included as an investment option, and that the company stock fund be primarily invested in company stock.

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Id. at 343. While the Plan at issue in this case is an EIAP, unlike the *Avaya* plan, the Plan document does not even suggest, much less require, that the Plan invest in Dell stock. Rather, the Plan is simply permitted to make that investment. In *In re Schering-Plough Corp. ERISA Litig.,* 420 F.3d 231 (3d Cir. 2005), the Third Circuit ruled that *Moench* was *not* applicable to a Plan in which the fiduciary was "simply permitted" to invest in employer stock. *Id.* at 238 & n.5. Thus, the touchstone for application of the "presumption of prudence," at least in the Third Circuit, is not whether a plan is an ESOP or some other type of EIAP, but rather, the degree to which the plan affirmatively directs fiduciaries to offer company stock as an investment option. *In re Merck Sec., Derivative and ERISA Litig.,* No. 05-2369(SRC), 2006 WL 2050577, * 7 (D.N.J. July 11, 2006).[8] Even the Third Circuit would be unlikely to apply a "presumption of prudence" in this case, since Defendants were "simply permitted" to invest in Dell stock, and there is no reason to believe that the Fifth Circuit would do so.[9]

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[8] However, non-Third Circuit authorities have questioned the logic of extending the *Moench* presumption to any plans other than ESOPs. *See, e.g., In re Mutual Funds Investment Litig.*, 403 F. Supp. 2d 434, 449 (D. Md. 2005); DOL Amicus Brief of the Secretary of Labor as Amicus Curiae Opposing Motions to Dismiss, *Agway Inc. Employees' 401(k) Thrift Inv. Plan v. Magnuson*, No. 03-1060 ("*Agway Amicus Brief*") (N.D.N.Y. June 18, 2004), available at http://www.dol.gov/sol/media/briefs/agway(A)-6-18-2004.pdf, attached as Ex. C to Sarko Decl.

[9] Not surprisingly, the *Moench* "presumption of prudence" has been applied in cases where a plan, by its terms, required that employees have the option of investing in a company stock fund comprised almost entirely of company stock. *See, e.g., Wright v. Oregon Metallurgical Corp.*, 360 F.3d at 1098-99 (selling stock would have violated express terms of plan); *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995) (no discretion to diversify); *Smith v. Delta Airlines, Inc.*, 422 F. Supp. 2d at 1329-30 (plan did not permit sale of stock in ESOP); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 789 (W.D.N.C. 2003) (finding plan was ESOP designed to be invested in company stock). Compare *McKesson HBOC*, 391 F. Supp.2d 812 (court dismissed claims that it found would have required the fiduciaries to override the express terms of the plan (id. at 831-32), but declined to dismiss claims where the fiduciaries could have taken action consistent with the terms of the plan to protect participants. Id. at 839-40).

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b. The Presumption of Prudence Does Not Apply in Artificial Inflation Cases.

In any event, a presumption of prudence is inapplicable under the facts of this case. *Moench* recognized a presumption of prudence for an ESOP fiduciary's decision not to diversify investments in company stock. The investment at issue in *Moench* was not alleged to be artificially inflated in price, a circumstance specifically alleged here. Similarly, *Wright v. Oregon Metallurgical Corp.,* 360 F.3d 1090 (9th Cir. 2004), and *Kuper v. Iovenko,* 66 F.3d 1447 (6th Cir. 1995), also cited by Defendants, do not involve artificially inflated stock. In the remainder of the cases cited by Defendants, the courts found that the complaints lacked sufficient allegations to state an artificial inflation claim. *Smith v. Delta Airlines, Inc*, 422 F. Supp. 2d 1310, 1331-32 (N.D. Ga. 2006) (plaintiff failed to plead facts sufficient to support claim that defendants made misrepresentations and/or inaccurate SEC filings); *In re Duke Energy ERISA Litig.,* 281 F. Supp. 2d 786, 795 (W.D. N.C. 2003) (finding dismissal appropriate where plaintiffs made only "vague allegations of 'lack of internal controls' and some 'underreporting of profits.'"); *Avaya*, 503 F.3d at 348 (3d Cir. 2007) (finding that plaintiffs' allegations only established that company was undergoing corporate developments likely to have a negative effect on earnings). In contrast, Plaintiffs here have alleged specific facts demonstrating why the price of Dell stock was artificially inflated during the Class Period. *See* Pages 3-5, *supra.* The *McKesson HBOC* court had "no quarrel" with the notion, central to Plaintiffs' claims here, that ERISA prohibits ESOP fiduciaries from "buy[ing] employer securities at inflated prices." *In re McKesson HBOC Inc., ERISA Litig.,* 391 F. Supp. 2d 812, 825 & n.9 (N.D. Cal. 2005).

In *In re JDS Uniphase,* the defendants relied on *Wright* to argue that they could not be liable because they were exempt from the duty to diversify. The court found that neither *Wright* nor a presumption of prudence applied because the complaint alleged imprudent

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investment in artificially inflated stock, not a failure to diversify. 2005 WL 1662131, at *7; *see Schering-Plough*, 420 F.3d at 233; *Horn*, 215 F.Supp.2d at 875; Brief of the Secretary of Labor as Amicus Curie supporting Appellants and Requesting Reversal at 17-19, *Phelps v. Calpine Corp., No. 06-15013* (9th Cir. Nov. 15, 2006), (*Calpine Amicus Brief*), attached as Ex. B to Sarko Decl.. For the same reason, Defendants are not entitled to a presumption of prudence here.

c. The Presumption Does Not Apply Because the Plan Imposed a Duty to Diversify.

The presumption of prudence arising out of ERISA's exemption from the duty to diversify also does not apply because the Plan specifically imposed a duty to diversify all investments, including Dell stock. *See* Pages 10-11, *supra*. Therefore, "failure to diversify" cases that do *not* involve plans with similar provisions but instead are based on ERISA's exemption from the statutory duty to diversify are clearly inapposite.

d. The Presumption of Prudence Does Not Apply on a Motion to Dismiss.

Even if Defendants were entitled to a "presumption of prudence" – and they are not – the presumption is an evidentiary standard that controls a plaintiff's ultimate burden of proof at trial; plaintiffs are not required to plead facts rebutting such a presumption. "Rather, the Court must review the Amended Complaint under the guise of Fed. R. Civ. P. 8 and Rule 12(b)(6) and neither of these rules require plaintiffs to prove their case on the pleadings." *In re The Goodyear Tire & Rubber Co. ERISA Litig.,* 438 F. Supp. 2d 783, 794 (N.D. Ohio 2006). As explained by the *EDS* court, requiring plaintiffs to plead evidence to overcome the *Moench* presumption would violate Rule 8's notice pleading requirement:

> The Court holds that requiring Plaintiffs to affirmatively plead facts overcoming the ESOP presumption violates Rule 8(a)'s notice pleading

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> requirement. The *Moench* ESOP presumption is like the *McDonnell Douglas* framework in that it is an evidentiary standard controlling Plaintiffs' ultimate burden of proof.

In re Elec. Data Sys. Corp. "ERISA" Litig., 305 F. Supp. 2d 658, 670 (E.D. Tex. 2004).[10]

Thus, whether Defendants breached their duty of prudence is a question of fact that is properly decided by the trier of fact on a full factual record, after the completion of discovery. *Enron*, 284 F. Supp. 2d at 534, n.3. Defendants' citations to *Wright* and *Avaya* are clearly distinguishable. In *Wright,* the court dismissed the plaintiffs' claims holding that the defendants did not violate their duty of prudence when they failed to explore other investment options so

[10] *See also Lalonde v. Textron, Inc.,* 369 F.3d 1, 6 (1st Cir. 2004) (further record development is required to determine whether plaintiffs can rebut the *Moench* presumption); *Smith v. Aon Corp.,* No. 04-6875, 2006 WL 1006052, at *5 (N.D. Ill. Apr. 12, 2006) ("requiring Plaintiffs to affirmatively plead facts overcoming one ESOP presumption violates Rule 8(a)'s notice pleading requirements"); *In re Ferro Corp. ERISA Litig.,* 422 F. Supp. 2d 850, 859-60 (N.D. Ohio 2006) (same); *Sherrill v. Fed.-Mogul Corp. Ret. Programs Comm.,* 413 F. Supp. 2d 842, 866-67 (E.D. Mich. 2006) (application of the presumption of prudence at the pleading stage would usurp the province of the trier of fact*); In re The Goodyear Tire & Rubber Co. ERISA Litig.,* 438 F. Supp. 2d 783, 793-94 (N.D. Ohio 2006) (neither *Kuper* nor *Moench* mandates dismissal on the pleadings); *In re CMS Energy ERISA Litig.,* 312 F. Supp. 2d 898, 914 n.10 (E.D. Mich., 2004) (the Moench presumption cannot be the basis for dismissal on a motion to dismiss*); In re Xcel Energy, Inc. Sec., Derivative "ERISA" Litig.,* 312 F. Supp. 2d 1165, 1180 (D. Minn. 2004) (presumptions are evidentiary standards that should not be applied to motions to dismiss); *Agway, Inc., Employees' 401(k) Thrift Inv. Plan v. Magnuson,* No. 5:03-CV-1060 (HGM/DEP), 2006 WL 2934391 at * 22 (N.D.N.Y., Oct. 12, 2006) (same); *In re AEP ERISA Litig.,* 327 F. Supp. 2d 812, 829 (S.D. Ohio 2004) (neither necessary nor appropriate for court to address presumption on motion to dismiss because it is evidentiary); *In re ADC Telecomms., Inc., ERISA Litig.,* No. 03-2989, 2004 WL 1683144, at *6 (D. Minn. July 26, 2004) (presumption is evidentiary and should not be applied on a motion to dismiss); *Pa. Fed'n, Bhd. of Maint. of Way Employees v. Norfolk S. Corp. Thoroughbred Ret. Inv. Plan,* No. 02-9049, 2004 WL 228685 at *7 (E.D. Pa. Feb. 4, 2004 (premature to consider dismissing the complaint without first allowing plaintiffs to present evidence to overcome the presumption of prudence) (citing *In re Ikon Office Solutions, Inc. Sec. Litig.,* 86 F. Supp. 2d 481, 492 (E.D. Pa. 2000)); *Stein v. Smith,* 270 F. Supp. 2d 157, 172 (D. Mass. 2003) (same); *Rankin v. Rots,* 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003) (citing *Kuper*, 66 F. 3d at 1449) (plaintiff may rebut presumption of reasonableness by factual showing that prudent fiduciary would have made a different investment decision); *Vivien v. WorldCom, Inc.,* No. 02-01399, 2002 WL 31640557, at *5 (N.D. Cal. July 26, 2002) (refusing to apply the presumption of prudence at the pleading stage because "a presumption relates to the proof and not to the pleadings").

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that the participants could capture the "premium" generated by a merger. *Wright* thus did not involve an artificial inflation claim or any allegations of stock price manipulation.

Although the *Avaya* court upheld the application of the *Moench* presumption at the pleadings stage, it did so only because it found, on the facts alleged, that "the duty of prudence claim" was "on its face inadequate as a matter of law." *Avaya,* 503 F.3d at 349 n.14. Defendants' argument that the facts in *this* case are at all akin to *Avaya,* however, is ludicrous. In *Avaya,* the court found that plaintiff's allegations, accepted as true, demonstrated nothing more than "that during the Class Period, Avaya was undergoing corporate developments that were likely to have a negative effect on the company's earnings and therefore, on the value of the company's stock," and that these developments did, in fact, have a brief negative impact which lasted just a couple of months. *Id.* at 348-49 & n.13. This, the court determined, was insufficient to "require defendants to disobey the terms of the Plans by not offering the Avaya Stock Fund as an investment option, or by divesting the Plans of Avaya securities." *Id.* at 348. In stark contrast, the Plaintiffs here have alleged hard facts, largely based on Defendants' own admissions, demonstrating that Dell's senior management systematically and deliberately inflated the Company's stock price over a period of *years*, using accounting gimmicks to make up revenue shortfalls and produce the illusion that the Company was meeting or exceeding quarterly revenue projections. Compl., ¶¶ 68-88. Unlike *Wright* or *Avaya,* therefore, at very least the prudence of Defendants' continuing investment in Dell stock is an issue of fact that cannot be decided at the pleading stage.

3. Even Assuming that a "Presumption of Prudence" Applies, Plaintiffs Have Pled Sufficient Facts to Overcome It.

Even if the *Moench* presumption could apply, Plaintiffs have pled allegations sufficient to overcome it. Plaintiffs have pled, in detail, facts demonstrating that Defendants knew or should have known that Dell common stock was an imprudent investment because Dell's management

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was systematically manipulating revenue reports to cover for disappointing quarterly results. Compl., ¶¶ 68-88. These undisclosed facts caused the price of Dell stock to be artificially inflated and exposed the Plan to undue risk. *Id.*

Defendants argue that the presumption can only be overcome by pleading the precise facts alleged in *Moench* itself – a "precipitous" decline in the stock's price, coupled with knowledge of "dire circumstances" such as the company being on the brink of collapse. *See* Defs.' Br. at 12-14. Defendants have fashioned this standard out of whole cloth. *Moench* held only that "the plaintiff may overcome th[e] presumption [of reasonableness] by establishing that the fiduciary abused its discretion by investing in employer securities." 62 F.3d at 571. The court went on to find that the plaintiff *in that case* met this burden by showing that the Committee should have been alerted to the corporate problems due to "the precipitous decline in the price of Statewide stock, as well as the Committee's knowledge of its impending collapse . . . ." *Id.* at 572.

Here, Defendants improperly attempt to transform the factual allegations that *Moench* found to be adequate into the legal standard itself:

> The "impending collapse" language originates from the *Moench* decision itself. In *Moench*, the Third Circuit recognized that a fiduciary's knowledge of impending collapse, coupled with his conflicted status, can constitute an abuse of discretion. 62 F.3d at 571-72. However, *Moench* involved a company that was, in fact, on the brink of financial collapse. *Id*. at 557. Nowhere in the opinion does the Third Circuit limit its holding to companies facing such dire circumstances. More importantly, the Sixth Circuit opinion adopting the *Moench* presumption, has a much broader holding: "[a] plaintiff may then rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper,* 66 F.3d at 1459. Nowhere in the opinion does the Sixth Circuit use the words "impending collapse."

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Ferro, 422 F. Supp. 2d at 860-61; *see also Sprint*, 388 F. Supp. 2d at 1224-25; *In re Honeywell Int'l ERISA Litig.,* No. 03-1214, 2004 WL 3245931, at *11 (D.N.J. Sept. 14, 2004); *In re ADC Telecomms., Inc.,* No. 03-2984, 2004 WL 1683144, at *6 (D. Minn. July 26, 2004); *In re Syncor ERISA Litig.,* 351 F. Supp. 2d 970, 982 (C.D. Cal. 2004); *Smith,* 422 F. Supp. 2d at 1331; *Goodyear,* 438 F. Supp. 2d at 794; *In re Mutual Funds Invest. Litig.*, 403 F. Supp. 2d 434, 449 (D. Md. 2005). The Third Circuit subsequently clarified that "[w]e do not interpret *Moench* as requiring a company to be on the brink of bankruptcy before a fiduciary is required to divest a plan of employer securities." *Avaya,* 503 F.3d at 349 n.13.

An "impending collapse" standard also makes no sense in a case alleging breach of the duty of prudence arising out of artificial inflation. It is fundamentally imprudent to pay too much for a Plan investment, regardless of the Company's financial health. Defendants' argument wholly ignores the fact that Defendants not only continued their existing investment in the Company stock fund when it was imprudent to do so, they *continued to buy shares,* throughout the Class Period, at artificially inflated prices. If Congress had intended that fiduciaries be liable for imprudent investment in company stock only if the company is on the brink of bankruptcy, it would have said so in the ERISA statute. It did not. Instead, Congress expressly said that all prudent investment duties, other than the duty to diversify, apply with respect to company stock. *See Cunningham*, 716 F.2d 1455 . If adopted, Defendants' proposed rule would permit fiduciaries to grossly overpay for company stock with impunity, in clear violation of ERISA's imposition of strict standards derived from the law of trusts. Fortunately, Defendants' unsound proposal is not law. "Allegations that ERISA fiduciaries promoted

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company stock to prop up its value or misled participants could also state plan-wide breaches of fiduciary duties." *Langbecker,* 476 F.3d at 308.[11]

Defendants also wrongly argue that they cannot be liable because the Company stock price did not suffer a "precipitous decline," and ended the Class Period at about the same place it was at the beginning. Defendants' Brief, at 18-21.[12] Defendants' argument is premised on the incorrect measure of damages in an ERISA breach of fiduciary duty case such as this one. The issue is not the return on Dell stock, rather, it is the "amount that affected accounts would have earned if prudently invested." *Graden v. Conexant Sys.,* 496 F.3d 291, 301, (3d. Cir. 2007). As the Third Circuit recently made clear in *Graden:*

> Thus, if Graden succeeds on the merits, the District Court will look to the prudent investment alternatives that the Conexant plan offered during this period to determine what the Conexant Stock Fund B investors would have earned but for Conexant's breach.

Id.

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[11] The artificially inflation allegation distinguishes this case from cases cited by Defendants, such as *In re McKesson HBOC, Inc. ERISA Litig.,* 391 F. Supp. 2d 812 (N.D. Cal. 2005), *Nelson v. IPALCO Enterprises, Inc.,* 480 F. Supp. 2d 1061 (S.D. Ind. 2007) and *Steinman v. Hicks,* 252 F. Supp. 2d 746 (C.D. Ill. 2003), which were merger cases. Defendants' Brief, at 16. Defendants' citation to *McKesson* is even more puzzling; as noted above, that court had "no quarrel" with the notion that ERISA prohibits ESOP fiduciaries from "buy[ing] employer securities at inflated prices." *McKesson HBOC,* 391 F. Supp. 2d at 825 & n.9.

[12] Even Defendants concede that Dell stock declined substantially *during* the Class Period, going from a high of $42 in December of 2004 to approximately $25 as of the end of December, 2007. Defendants' Brief, at 15. Even cases cited by Defendants establish that a declining stock price coupled with allegations of stock manipulation is sufficient to rebut the *Moench* presumption. *See, e.g., Smith v. Delta Air Lines,* 422 F. Supp.2d 1310 (N.D. Ga. 2006), cited by Defendants at page 16 of their brief, where the Court noted that a decline in stock value *alone* was insufficient to show imprudence under *Moench*, but indicated that such a decline *would be* sufficient if, as here, it was coupled with allegations of misrepresentations and stock fraud. *Id.* at 1331 (citing *In re: Sprint Corp. ERISA Litig.,* 388 F. Supp. 2d 1207, 1223-24 (D. Kan. 2004), *Hill v. BellSouth Corp.,* 313 F. Supp. 2d 1361 (N.D. Ga. 2004), and *In re: Sears, Roebuck & Co. ERISA Litig.,* 2004 WL 407007, *2-3, 2004 U.S. Dist. LEXIS 3241 (N.D. Ill. 2004)).

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When viewed in the proper context, the performance of Dell stock over the course of the Class Period strongly supports Plaintiffs' claims. For the Court's reference, Plaintiffs submit herewith Ex. E to the Sarko Declaration, which shows that over the course of the Class Period as proposed in the current Complaint (May 16, 2002 – the present), Dell stock underperformed the Nasdaq Composite Index (IXIC) by roughly 68%, the S&P 500 Index by roughly 52% and the Dodge & Cox Large Cap Value Fund (DODGX), one of the mutual fund options in the Plan, by roughly 52%.[13] In other words, $100 invested in Dell stock on May 16, 2002, would be worth approximately $76.34 today; had that same $100 been invested in the Nasdaq, S&P 500 or Dodge & Cox Fund, it would be worth $144.74, $128.95 or $128.40, respectively. Thus, at the stage in this case when it is appropriate to assess the Plan's losses - as opposed to the pleading stage - Plaintiffs will present abundant evidence supporting their damages claims.[14]

Finally, Defendants' claim that the amounts involved in its accounting chicanery – $92 million – were trivial (Defendants' Brief, at 18) ignores reality. Dell's own investigation revealed that the amounts in question reflect manipulative "adjustments" which "typically occurred at the close of a quarter . . . sometimes at the request or with the knowledge of senior

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[13] This stands in stark contrast to cases cited by Defendants at page 16 of their brief, where the company stocks *outperformed* relevant indexes. *See, e.g., In re Syncor ERISA Litig.*, 410 F. Supp. 2d 904, 912 (C.D. Cal. 2006) (noting that "Syncor stock outperformed both the NASDAQ index and the S&P 500 index during the class period"); *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 795 (W.D. N.C. 2003) (during class period, Duke's stock "substantially exceeded the S&P 500 index.").

[14] Defendants' reliance on *Edgar v. Avaya* is unavailing. In *Avaya,* the Third Circuit found that the stock suffered only a very brief setback – a period of three months – after a weak quarter and a poor earnings announcement. *Avaya,* 503 F.3d at 348-49 & n.13. Here, in contrast, the Complaint alleges that Dell management used accounting gimmicks over a period of years for the express purpose of meeting earnings projections. Compl., ¶¶ 74-88. These deliberate actions artificially inflated the price that the Plan continued to pay for Dell stock throughout the Class Period.

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executives . . . so that quarterly performance objectives could be met." Compl., ¶ 82 (quoting Dell's August 16, 2007 Announcement). *See* Sarko Decl. Ex. D, Dell's Form 8-K, dated August 16, 2007. In other words, Dell's restatement was not needed to correct minor, inadvertent errors, but rather deliberate manipulations of prior financial results. Courts have found that when the purpose of overstating revenue is to meet quarterly projections or analysts' expectations, even relatively small amounts may be material. *Ganino v. Citizens Utilities, Co.,* 228 F.3d 154, 166 (2d Cir. 2000); *Takara Trust v. Molex Inc.,* 429 F. Supp. 2d 960, 979 (N.D. Ill. 2006). This only makes sense. Since the whole *purpose* of the "adjustments" was to convey a more positive impression of Dell's performance than reality warranted, if the "adjustments" would have been immaterial to investors, Dell's senior executives would not have made them in the first place.

In short, Plaintiffs have properly alleged that Dell's stock price was artificially inflated, through the deliberate manipulation of the Company's senior executives. Prudent investors do not hold investments in artificially inflated stock; they certainly do not purchase more stock at artificially-inflated prices. That Defendants continued to do both throughout the Class Period is sufficient to overcome any "presumption" that they acted prudently.

C. Defendants' Equitable Estoppel Argument Goes Nowhere.

Defendants' equitable estoppel argument begins with a flawed premise: (i) that the claims asserted here are "all equitable in nature;" proceeds with an unfounded proposition: (ii) that a claim of fiduciary imprudence arising out of artificial inflation must satisfy the requirements of equitable estoppel; and, not surprisingly, reaches a false conclusion: (iii) that dismissal is warranted here. But this is not an equitable estoppel case. It is a breach of fiduciary duty case with claims for imprudent investment, failure to monitor, and failure to provide complete and

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accurate information, claims that have been upheld in at least fifty reported decisions.[15] Defendants offer no authority for the proposition that fiduciary breaches of the type asserted here must satisfy the requirements of the doctrine of equitable estoppel. Nor can they; equitable estoppel simply has no application here.

Defendants' equitable estoppel argument rests entirely on their citation to *Weir v. Fed. Asset Disposition Ass'n,* 123 F.3d 281 (5th Cir. 1997) and *Mello v. Sara Lee Corp.,* 431 F.3d 440 (5th Cir. 2005).[16] But *Weir* and *Mello* are utterly inapposite here. Both cases dealt with classic estoppel scenarios: whether employers who provide participants with inaccurate information regarding plan benefits are later estopped from correcting that information. *Weir,* 123 F.3d at 289-90; *Mello*, 431 F.3d at 444-45. Plaintiffs here bring no such claims, however. Only Count II is based on statements (and omissions) of the Defendants, and it does not assert that Defendants are estopped to deny those statements, rather it seeks to recover the losses suffered by the Plan as a result of the Defendants' failure to provide complete and accurate information to the Plan.

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[15] *See* Exhibit A to the Sarko Decl. All of these decision involve one or more of the claims asserted here, i.e., imprudent investment in employer stock, failure to provide complete and accurate information, and failure to monitor. Equitable estoppel had nothing to do with any of these cases as is plainly the case here as well.

[16] The three Supreme Court cases Defendants cite, *Mertens v. Hewitt Assocs*., 508 U.S. 248 (1993), *Varity Corp. v. Howe*, 516 U.S. 489 (1996) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), have nothing to do with equitable estoppel or its alleged application here. *Mertens* deals only with the issue of whether money damages may be sought from a non-fiduciary as appropriate equitable relief under § 502(a)(3) of ERISA. 508 U.S. at 254-58. In *Varity*, the Court held that while an individual may not seek monetary damages under ERISA § 502(a)(2), individual equitable relief may be sought under § 502(a)(3). 516 U.S. at 502-12. *Great-West* simply holds that specific performance of a plan's reimbursement provision is not equitable relief available under § 502(a)(3), which is simply beside the point here.

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The remaining cases cited in Defendants' equitable estoppel argument are no more germane. *EDS,* 476 F.3d 299 and *In re Enron Corp. Sec., Derivative, and "ERISA" Litig.*, No. MDL 1446, Civ. A. H-01-3913, 2006 WL 1662596 (S.D. Tex. June 7, 2006) deal with the interplay of the issues of reliance and class certification. In *EDS*, the Fifth Circuit remanded for further consideration of the class certification issues. In *Enron*, the class was certified. Neither opinion suggests that dismissal is warranted unless a complaint pleads the elements of estoppel set forth in *Weir* and *Mello*.[17]

Defendants' attempts to argue that their misrepresentations to Plan participants were immaterial is equally unavailing. In *Martinez v. Schlumberger, Ltd.,* 338 F.3d 407 (5th Cir.

[17] Indeed, Defendants' efforts to recast Plaintiffs' claims as equitable estoppel appears to be nothing more than a vehicle for arguing that detrimental reliance must be pled in breach of fiduciary duty claims such as those asserted here. But no such pleading requirement exists. Indeed, on class certification, where Defendants' reliance arguments typically are raised, courts routinely conclude that issues of reliance are irrelevant where, as here, the complaint alleges a uniform, plan-wide failure to provide complete and accurate information to participants regarding the prudence of a particular investment. *See, e.g., Rankin v. Rots*, 220 F.R.D. 511, 522-23 (E.D. Mich. 2004) (rejecting reliance argument where, plaintiffs' "claims relate[d] to defendants['] unitary actions with regard to the Plan. Defendants treated the entire class identically" (citing *In re IKON Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000)); *In re CMS Energy ERISA Litig.,* 225 F.R.D. 539, 544 (E.D. Mich. 2004) (citing *Rankin,* 220 F.R.D. at 519 with approval); *Furstenau v. AT&T Corp.*, No. 02-5409, 2004 U.S. Dist. LEXIS 27042, at *8-12 (D.N.J. Sept. 2, 2004) (individual reliance irrelevant, as "the same communication was alleged for each individual"). Moreover, to the extent reliance is necessary at all in the type of disclosure claim asserted here based on Plan-wide, uniform communications, it may be presumed. *See, e.g.*, *In re JDS Uniphase Corp. ERISA Litig.,* No. 03-4743, 2005 WL 1662131 at *13 (N.D. Cal. July 14, 2005) (noting distinction between individual benefits claims pursuant to ERISA § 502(a)(1)(B) for which reliance is necessary, and a plan-wide claim under § 502(a)(2) and finding that under the latter reliance may be presumed); *In re Xcel Energy, Inc., See, Derivative & "ERISA" Litig.*, 312 F. Supp. 2d 1165, 1182-83 (D. Minn. 2004) (rejecting reliance argument where complaint, in compliance with Rule 8 and ERISA sufficiently alleges that "the alleged losses result from the breach.") (citing 29 U.S.C. § 1009(a)); *In re Tyco Int'l. Ltd., Multidistrict Litig.,* No. MD-02-1335-PB, 2006 WL 2349338, at *6 (D.N.H. Aug. 15, 2006); *Finley v. Dun & Bradstreet Corp.,* 471 F. Supp. 2d at 485, 496 (D.N.J. 2007) ("the key issue is whether there is a substantial likelihood that a communication would mislead a reasonable employee in making an adequately informed retirement decision . . . .").

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2003), the Fifth Circuit specifically rejected "a bright line test to determine whether a company's alleged misrepresentations are material." 338 F.3d at 428. The decision plainly counsels against Defendants' contentions that the magnitude and consequences of the misrepresentations here should be assessed at the motion to dismiss stage.[18]

D. Defendants' "Derivative" Argument Falls With Their Prudence Argument.

Defendants assert that all of Plaintiffs' claims are derivative of their prudence claims and therefore would fail if the prudence claims fail. For the reasons discussed above, the prudence claims should not be dismissed; Defendants' "derivative" argument need not be further considered.

IV. CONCLUSION

Plaintiffs assert well-pled claims for breach of fiduciary duty and co-fiduciary liability. Defendants' arguments for dismissal are contrary to the overwhelming weight of authority. Accordingly, Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied in its entirety.[19]

[18] The cases cited by Defendants are not to the contrary. *Ferrer v. Chevron Corp.*, 484 F.3d 776 (5th Cir. 2007) deals with claims of misrepresentation regarding potential involuntarily termination and associated benefits. Because the plaintiffs did not allege that, had they not voluntarily terminated, they would have been involuntarily terminated and thus received the benefits, the Fifth Circuit held that they failed to plead injury caused to them by the alleged fiduciary misconduct. 484 F.3d at 782. Here the Complaint specifically alleges that the failure to provide complete and accurate information denied participants the ability to make informed investment choices, with the Plan suffering enormous losses as a result. Compl. ¶¶ 140, 142. These allegations provide the causal link that was missing in *Ferrer*. Finally, as discussed at Page 17 above, try as they might, Defendants simply cannot equate the financial misconduct here and its resulting $92 million restatement with the facts in *Edgar v. Avaya*, 503 F.3d 340 (3d Cir. 2007).

[19] To the extent the Court grants any aspect of the Defendants' Motion to Dismiss, Plaintiffs respectfully request leave to amend the Complaint.

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Dated: January 10, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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