Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

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

	)	
In re DELL INC. ERISA LITIGATION	)	Case No. A-06-CA-758-SS
	)	

DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS

Brian S. Greig
Peter A. Stokes
FULBRIGHT &
JAWORSKI L.L.P.
600 Congress Avenue
Suite 2400
Austin, Texas 78701
(512) 474-5201 – Telephone
(512) 536-4598 – Facsimile

Patricia J. Villareal
Thomas R. Jackson
Greg L. Weselka
Michael L. Davitt
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939 – Telephone
(214) 969-5100 – Facsimile

James P. Baker
JONES DAY
555 California Street
26th Floor
San Francisco, California
94104
(415) 626-3939 – Telephone
(415) 875-5700 – Facsimile

COUNSEL FOR DEFENDANTS

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

A. Plaintiffs' Imprudence Theory Fails As A Matter Of Law As Plaintiffs Have Not Alleged And Cannot Show That Dell's Financial Situation Has Seriously Deteriorated 2

B. The Prudence Claim Fails Whether Couched As An "Artificial Inflation" Claim Or A "Diversification" Claim. 4

C. The Presumption of Prudence Applies Even Where The Plan Does Not "Require" Investment In Company Stock 7

D. The Dell Plan Document Does Not Mandate "Actual Diversification" Of Each Participant Account 8

E. Plaintiffs' Claims Fail As They Have Not Shown Materiality, Reliance or Causation...9

F. Plaintiffs' Remaining Claims Are Derivative And Should Be Dismissed 10

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

TABLE OF AUTHORITIES

Page

CASES

Basic, Inc. v. Levinson,
485 U.S. 224 (1988) 3

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983) 6

Edgar v. Avaya, Inc.,
503 F.3d 340 (3rd Cir. 2007) .... *passim*

Ferrer v. Chevron Corp.,
484 F.3d 776 (5th Cir. 2007) 10

Harzewski v. Guidant,
489 F.3d 799 (7th Cir. 2007) 4

Horn v. McQueen,
215 F. Supp. 2d 867 (W.D. Ky. 2002) 6

Houston Police Officers' Union v. City of Houston,
330 F.3d 298 (5th Cir. 2003) 7

In re Calpine Corp. ERISA Litigation,
No. C-03-1685, 2005 WL 1431506 (N.D. Cal. Mar. 31, 2005) 4, 7

In re CMS Energy ERISA Litigation,
312 F. Supp. 2d 898 4

In re Coca-Cola Enterprises, Inc. ERISA Litigation,
No. 1:06-CV-0953, 2007 WL 1810211 (N.D. Ga. Jun. 20, 2007) 6, 7

In re Dynegy, Inc. ERISA Litigation,
309 F. Supp. 2d 861 (S.D. Tex. 2004) 1, 9

In re Enron Corp. Securities, Derivative & ERISA Litigation,
284 F. Supp. 2d 511 (S.D. Tex. 2003) 9

In re Ferro Corp. ERISA Litigation,
422 F. Supp. 2d 850 (N.D. Ohio 2006) 6

In re JDS Uniphase Corp. ERISA Litigation,
No. 03-4743, 2005 WL 1662131 (N.D. Cal. Jul. 14, 2005) 6, 7

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

TABLE OF AUTHORITIES
(continued)

Page

In re McKesson, HBOC Inc. ERISA Litigation,
391 F. Supp. 2d 812 (N.D. Cal. 2005)....................6, 7

In re Sears, Roebuck & Co. ERISA Litigation,
No. 02 C 8324, 2004 WL 407007 (N.D. Ill. Mar. 3, 2004)....................6

In re Sprint Corp. ERISA Litigation,
388 F. Supp. 2d 1207 (D. Kan. 2004)....................6

Keys v. Barnhart,
347 F.3d 990 (7th Cir. 2003)....................7

Lalonde v. Textron, Inc.,
369 F.3d 1 (1st Cir. 2004)....................6

Langbecker v. Electronic Data Systems Corp.,
476 F.3d 299 (5th Cir. 2007)....................5, 7

Melo v. Sara Lee Corp.,
431 F.3d 440 (5th Cir. 2005)....................9

Pedraza v. Coca-Cola,
456 F. Supp. 2d 1262 (N.D. Ga. 2006)....................7

Smith v. Delta Air Lines, Inc.,
422 F. Supp. 2d 1310 (N.D. Ga. 2006)....................4, 5, 6, 7

Ward v. Avaya, Inc.,
487 F. Supp. 2d 467 (D.N.J. 2007)....................4, 6, 7

Wright v. Oregon Metalurgical Corp.,
360 F.3d 1090 (9th Cir. 2004)....................*passim*

OTHER AUTHORITIES

ERISA § 3(18), 29 U.S.C. § 1002(18)....................4

ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2)....................*passim*

ERISA § 404(c)(1), 29 U.S.C. § 1104(c)(1)....................9

ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3)....................8

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

TABLE OF AUTHORITIES
(continued)

Page

H.R. Rep. 93-1280 (1974) 8

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

INTRODUCTION

Plaintiffs' Opposition to Defendants' Motion to Dismiss, when reduced to its essence, raises three straw man arguments. None of those arguments withstands analysis:

- First, Plaintiffs attempt to recast the issue of whether it was imprudent for Defendants to ever allow any investment in Dell stock in the Dell Inc. 401(k) Plan ("Plan") to the issue of whether it was imprudent to allow Plan participants to purchase "artificially inflated" Dell stock. Both these legal theories, however, ignore the Complaint's core allegations and fail under the controlling legal standards.

- Second, Plaintiffs assert that Plan Section 12.3(c) "imposed a duty to diversify" that trumps ERISA section 404(a)(2)'s diversification exception. This argument misconstrues both the Plan and ERISA. These same lawyers pressed this same argument in *In re Dynegy, Inc. ERISA Litigation*, 309 F. Supp. 2d 861, 894-96 (S.D. Tex. 2004), and the *Dynegy* court properly rejected it.

- Third, Plaintiffs suggest that the elements of materiality, reliance, and causation need not be pleaded or do not apply to their claims. This argument also fails because all four of Plaintiffs' fiduciary breach claims are predicated on equitable estoppel and thus must satisfy those elements.

Plaintiffs' core allegation is that Defendants acted imprudently and put participant retirement accounts in jeopardy by allowing Dell stock to be an investment option in the Plan. The facts that are incorporated in the Complaint or subject to judicial notice, however, tell a different story. From May 16, 2002, to the present (the putative "Class Period"), the price of Dell stock never closed below $19.91 per share. (*See* Chart of Dell Stock Prices (Exh. 3 to Defs.' Mot. Dismiss).) Dell's financial reports referenced in Plaintiffs' Complaint show that, during this same time period, Dell's business operations thrived: net annual revenue at Dell mushroomed from $35.3 billion to $57.4 billion, total company assets increased from $15.5 billion to $25.6 billion, and Dell remained quite profitable with more than $2.0 billion in annual net income. (*See* Dell Inc. Annual Report

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

(Form 10-K), at 21 (Oct. 30, 2007) (Exh. 1 to Defs.' Mot. Dismiss).) Given Dell's strong financial performance, Plaintiffs' primary legal theory – that, throughout the Class Period, Dell stock was so imprudent the Plan fiduciaries abused their discretion in failing to discontinue it as a Plan investment – fails as a matter of law. Because Plaintiffs' three remaining claims are derivative of the prudence claim, the entire Complaint must be dismissed.

ARGUMENT

A. Plaintiffs' Imprudence Theory Fails As A Matter Of Law As Plaintiffs Have Not Alleged And Cannot Show That Dell's Financial Situation Has Seriously Deteriorated.

Plaintiffs simply ignore a key requirement of a stock drop imprudence claim. In particular, such claims fail as a matter of law unless Plaintiffs are able to allege a precipitous decline in the company's stock price or an impending financial collapse. As the Ninth Circuit explained in dismissing similar claims in *Wright v. Oregon Metallurgical Corp.*:

> Unlike *Moench*, this case does not present a situation where a company's financial situation is seriously deteriorating and there is a genuine risk of insider self-dealing. … The published accounts of [the employer's] earnings and financial fundamentals during the relevant period, attached to the complaint, demonstrate that [the employer] was far from the sort of deteriorating financial circumstances involved in *Moench* and was, in fact, profitable … throughout that period.

360 F.3d 1090, 1098-99 (9th Cir. 2004). In such circumstances, "'mere stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence to rebut the *Moench* presumption.'" *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 (3d Cir. 2007) (quoting *Wright*, 360 F.3d at 1099).

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

Here, Plaintiffs have not made, and cannot make, the required allegations. Dell's stock price at the beginning of the class period was $27.85. Since that time, the stock price has never closed below $19.91 and has reflected at most the "mere stock fluctuations" that, under *Avaya*, are insufficient as a matter of law to support an imprudence claim. Further, as the restated financials Dell filed on October 30, 2007 show, Dell's profitability throughout the class period remained robust.

Indeed, the market's reaction to that restatement further demonstrates the utter implausibility of Plaintiffs' claims. The "efficient markets theory" dictates that "the market price of shares traded on well-developed markets reflects all publicly available information." *Basic, Inc. v. Levinson*, 485 U.S. 224, 246 (1988); *see also Avaya*, 503 F.3d at 350. If, as Plaintiffs suggest, the price of Dell's stock was artificially inflated as a result of Defendants' alleged failure to disclose certain "material" information, the market would have corrected itself once that information was brought to light. Under Plaintiffs' theory, this market correction process should have resulted in a drop in Dell's stock price. But that is not what happened. Rather, the price of Dell stock actually *increased* by 80 cents the next day (from $29.80 to $30.60).[1] The rise in Dell's stock price after these allegedly curative public disclosures negates any suggestion that Dell's stock price was "artificially inflated."[2]

---

[1] Similarly, when Dell announced the preliminary results of its internal investigation on August 17, 2007, the price of Dell shares also went up. Exhibit 1 lists the allegedly corrective disclosures identified in the Complaint and shows that, following each disclosure, Dell's stock price either increased or barely moved lower. The Company's substantial stock repurchases during the Class Period also undermine Plaintiffs' suggestion that Defendants knew Dell's stock price was "inflated." Indeed, as explained in Defendants' Motion, Dell repurchased over $14.4 billion of its stock during fiscal years 2005 through 2007. (Defs.' Mot. Dismiss at 3 n.4.) Dell has also recently announced a program to buy back up to an additional $10 billion in Dell stock. (*See* Dell Inc. Quarterly Report (Form 10-Q), at 30

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

B. The Prudence Claim Fails Whether Couched As An "Artificial Inflation" Claim Or A "Diversification" Claim.

The courts have repeatedly held that an "artificial inflation" claim of breaching the duty of prudence for holding company stock in a 401(k) plan is a disguised claim for failure to diversify. *See, e.g., Ward v. Avaya, Inc.*, 487 F. Supp. 2d 467, 477 (D.N.J. 2007); *Smith v. Delta Air Lines, Inc.*, 422 F. Supp. 2d 1310, 1327 (N.D. Ga. 2006); *In re Calpine Corp. ERISA Litig.*, No. C-03-1685, 2005 WL 1431506, at *4-5 (N.D. Cal. Mar. 31, 2005) (Exh. 3). Plaintiffs concede their theory reduces to whether "it was prudent for [Defendants] to permit this over-concentration of investment in Dell stock." (Pls.' Opp'n at 12.) These "artificial inflation"/"over-concentration" claims are barred by the text of ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2). *See Wright*, 360 F.3d at 1097-98; *Ward*, 487 F. Supp. 2d at 477; *In re Calpine Corp.*, 2005 WL 1431506, at *4-5 (Exh. 3).[3]

(continued…)

(Dec. 10, 2007) (Exh. 2).) Plaintiffs' fundamental claim that it was imprudent to hold Dell stock in the Plan when, at the same time, Dell was buying back *billions* worth of stock at prices that Defendants allegedly knew were artificially inflated defies credulity.

[2] Furthermore, Plaintiffs' artificial inflation theory only works if Defendants could take advantage of the purported "artificial inflation" by selling the Plan's Dell stock at an "inflated" price based on non-public inside information. The three Circuit Courts of Appeals that have considered this issue have recognized that it is unlawful to trade company stock held by an ERISA-regulated plan based on "insider" information. *See Avaya*, 503 F.3d at 350; *Harzewski v. Guidant Corp.*, 489 F.3d 799, 808 (7th Cir. 2007) ("the fiduciary's duty of loyalty does not extend to violating the law"); *Wright*, 360 F.3d at 1098 n.4.

[3] To the extent Plaintiffs are alleging that the Plan paid more than "adequate consideration" for Dell stock because it was "artificially inflated," this claim fails because Plaintiffs' interpretation of the term "adequate consideration" flies in the face of its express definition under ERISA – "the price of the security prevailing on a national securities exchange." ERISA § 3(18), 29 U.S.C. § 1002(18); *see In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 917 (E.D. Mich. 2004) (dismissing "artificial inflation claim" based on ERISA statutory language).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

Plaintiffs fare no better in attempting to defend the sustainability of their claims under a failure to diversify theory. Under the text of the controlling statute, Defendants were exempt from ERISA's duty to "diversify" out of the Dell Stock Fund and ERISA's prudence requirement (to the extent it requires diversification). ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2); *Avaya*, 503 F.3d at 347; *Wright*, 360 F.3d at 1094; *Smith*, 422 F. Supp. 2d at 1325.[4] Plans like Dell's are exempt from these requirements, and are presumed to have acted prudently by investing in Dell stock, because of the strong policy favoring investment in employer stock. ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2); *Avaya*, 503 F.3d at 347; *Wright*, 360 F.3d at 1094; *Smith*, 422 F. Supp. 2d at 1325. In *Langbecker v. Electronic Data Systems Corp.*, the Fifth Circuit cited with approval the Third Circuit's abuse of discretion standard of review in considering ERISA "stock drop" claims. 476 F.3d 299, 308-09 (5th Cir. 2007).[5] Nine months after the decision in *Langbecker*, the Third Circuit announced that it would apply the abuse of discretion standard in considering a motion to dismiss. *Avaya,* 503 F.3d at 349 ("We find the Ninth Circuit's reasoning [in *Wright*] to be logical, and see no reason to allow this case to proceed to discovery when, even if the allegations are proven true, Edgar cannot establish that defendants abused their discretion.").

Plaintiffs' assertion that "The Presumption of Prudence Does Not Apply in Artificial Inflation Cases" is simply wrong. (Pls.' Opp'n at 14.) None of the cases cited

---

[4] Plaintiffs concede that the Dell Plan is an eligible individual account plan ("EIAP") (Pls.' Opp'n at 13) and, as such, ERISA § 404(a)(2) applies.

[5] Plaintiffs never seriously consider this deferential abuse of discretion standard.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

supports this proposition.[6] For example, in *In re McKesson HBOC, Inc. ERISA Litigation*, the court dismissed with prejudice plaintiffs' "stock drop" claims, ruling that "the court respectfully disagrees with *Moench* and holds that section 404 prohibits claims against fiduciaries for failing to diversify an ESOP." 391 F. Supp. 2d 812, 829 (N.D. Cal. 2005).

Plaintiffs rely primarily on *In re JDS Uniphase Corp. ERISA Litigation*, No. 03-4743, 2005 WL 1662131 (N.D. Cal. Jul. 14, 2005) (Exh. 4), in support of their "artificial inflation" argument. (Pls.' Opp'n at 9-10.) Factually, *JDS* is more like Enron, than Dell. The price of JDS Uniphase stock fell from $145 to $5 resulting in substantial losses to the plan. *JDS,* 2005 WL 1662131, at *1 (Exh. 4). Plaintiffs also alleged that the company's "sales had collapsed" and that it lost $51.1 billion and had written down $44.8 billion more. *Id.* at *7. Plaintiffs in this case make no such allegations – nor could they. Thus, *JDS* actually supports Defendants, not Plaintiffs, as the *JDS* court explained that it could not

---

[6] To the contrary, numerous cases – including many of the cases upon which Plaintiffs rely – apply the presumption of prudence notwithstanding allegations that the employer's stock price was inflated. *See, e.g.*, *Smith*, 422 F. Supp. 2d at 1325; *Ward*, 487 F. Supp. 2d at 477; *In re Coca-Cola Enters. ERISA Litig.*, No. 1:06-cv-0953, 2007 WL 1810211, at *2, *8-10 (N.D. Ga. June 20, 2007) (Exh. 2 to Defs.' Mot. Dismiss); *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 859-60 (N.D. Ohio 2006); *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1222 (D. Kan. 2004); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02 C 8324, 2004 WL 407007, at *4 (N.D. Ill. Mar. 3, 2004) (Exh. 5). Plaintiffs also rely on *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), and *Horn v. McQueen*, 215 F. Supp. 2d 867 (W.D. Ky. 2002). Those cases involve allegations that the plan purchased assets directly from an insider in violation of the prohibited transaction provisions of ERISA § 406. *Donovan*, 716 F.2d at 1465; *Horn*, 215 F. Supp. 2d at 875. As Plaintiffs make no such allegation here, *Donovan*, *Horn* and cases relying on them are inapposite. Plaintiffs' reliance on *Lalonde v. Textron, Inc.* is equally misplaced as that court neither accepted nor rejected the presumption of prudence. 369 F.3d 1, 7 (1st Cir. 2004).

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

grant the motion to dismiss because JDS, unlike Calpine and Dell, did not have "steady revenue and profit." *Id.* at 8 n.5.[7]

Plaintiffs are also mistaken in suggesting that this presumption does not apply in the motion to dismiss context (Pls.' Opp'n at 15) or that Defendants "fashioned" this presumption "out of whole cloth" (Pls.' Opp'n at 18). As explained in detail in the Motion, many courts have required a showing of "impending collapse" and "precipitous decline" and have granted motions to dismiss where the company is not alleged to be teetering on the brink of financial ruin.[8] (Defs.' Mot. Dismiss at 11-18.) In support of their argument, Plaintiffs confuse the question before this Court – whether an ERISA prudence claim has been properly stated – with one of what the proper measure of damages might be *if* such a claim is both properly stated and proven. (Pls.' Opp'n at 20-21.)

C. The Presumption of Prudence Applies Even Where The Plan Does Not "Require" Investment In Company Stock.

The presumption of prudence under ERISA section 404(a)(2) applies to all EIAPs, including the Dell 401(k) Plan. *See Avaya*, 503 F.3d at 347; *Langbecker*, 476 F.3d at

---

[7] Plaintiffs also cite the Secretary of Labor's amicus brief filed in the *Calpine* appeal. Because the Ninth Circuit has not yet ruled on that appeal, it has not analyzed (much less adopted) the Secretary's argument. Department of Labor amicus briefs are litigating positions and are not entitled to *Chevron* deference. *Houston Police Officers' Union v. City of Houston*, 330 F.3d 298, 304-05 (5th Cir. 2003); *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (collecting cases) ("It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.").

[8] *See, e.g., Wright*, 360 F.3d at 1098-99; *Smith*, 422 F. Supp. 2d at 1325-33; *Ward*, 487 F. Supp. 2d at 476-80; *Pedraza v. Coca Cola Co.*, 456 F. Supp. 2d 1262, 1273-76 (N.D. Ga. 2006); *In re Coca-Cola Enters.*, 2007 WL 1810211, at *10 (Exh. 2 to Defs.' Mot. Dismiss); *In re Calpine Corp.*, 2005 WL 1431506, at *5-6 (Exh. 3); *In re McKesson HBOC*, 391 F. Supp. 2d at 822-29.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

308-11.[9] Page 1 of every Summary Plan Description ("SPD") states: "The Plan's investment choices *include* the Dell Stock Fund which invests in shares of the Company's common stock." (2003 SPD at 1 (Exh. M to Complaint) (emphasis added); *see also* 2004 SPD at 1 (Exh. L to Complaint); 2005 SPD at 1 (Exh. K to Complaint); 2007 SPD at 1 (Exh. J to Complaint).) The Third Circuit in *Avaya* found almost identical SPD plan language to require application of the abuse of discretion standard. 503 F.3d at 343-45. Furthermore, Plan Section 16.5 expressly states that the Plan is "authorized to acquire and hold up to 100% of its assets in Company Stock." (Exh. B to Complaint.) The Ninth Circuit in *Wright* found the same provision to require application of the abuse of discretion standard (or perhaps an even more favorable standard). 360 F.3d at 1095.

D. The Dell Plan Document Does Not Mandate "Actual Diversification" Of Each Participant Account.

Plaintiffs attempt to buttress their ability to assert these claims by relying on a "duty to diversify" under Plan Section 12.3. (Pls.' Opp'n at 10-11.) This section, however, merely recites the fiduciary standards of care set forth in ERISA section 404(a). It does not give plan fiduciaries the right to either micromanage or override an individual participant's investment choices. (*See* Plan § 12.3 (Exh. B to Complaint).) ERISA states that, where individual 401(k) plan participants choose their own retirement plan investments, the Plan's fiduciaries are not responsible for any loss that results from these choices. ERISA

---

[9] A careful reading of ERISA section 404(a)(2) shows that all EIAPs are exempt from the diversification requirement – not just those EIAPs that "require" the plan to invest in company stock. 29 U.S.C. § 1104(a)(2). Additionally, Congress could have restricted the definition of an EIAP to just those plans requiring investment in company stock, but it chose not to do so. *See* ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3); H.R. Rep. 93-1280 (1974), *as reprinted in*, 1974 U.S.C.C.A.N. 5038, 5097.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

§ 404(c)(1), 29 U.S.C. § 1104(c)(1). Critically, Plaintiffs ignore that, under the Plan, every share of Dell stock in a Plan account is there because of participant choice – not Dell mandate. (*See* Plan § 5.1 (Exh. B to Complaint).) Consequently, individual investment decisions made by participants are not fiduciary decisions and are not actions for which a fiduciary can be held accountable under ERISA. Plaintiffs' "plan-imposed diversification" theory would make 401(k) plan fiduciaries liable every time a participant chooses to invest too heavily in any single investment option. What Plan Section 12.3(c) requires is simple – when plan fiduciaries provide investment choices to 401(k) plan participants, they must offer a diversified menu of investment options. It is undisputed the Dell Plan did just that.[10]

E. Plaintiffs' Claims Fail As They Have Not Shown Materiality, Reliance or Causation.

Plaintiffs argue that equitable estoppel "has no application here" (Pls.' Opp'n at 23), yet they do not contest that their claims are predicated on alleged misrepresentations and the purportedly resulting artificial inflation in the price of Dell stock. (*See* Pls.' Opp'n at 8; Complaint ¶¶ 68-92, 113, 130, 144, 154.) It is hornbook law that, to state a misrepresentation claim, a plaintiff must plead both materiality and reliance. *Melo v. Sara Lee Corp.*, 431 F.3d 440, 444-45 (5th Cir. 2005). An ERISA fiduciary breach claim also requires a

[10] The sole authority upon which Plaintiffs rely in support of the argument that the language of the Plan itself imposed a diversification requirement more stringent than ERISA is *In re Enron Corp. Sec., Derivative & ERISA Litigation*, 284 F. Supp. 2d 511 (S.D. Tex. 2003). Plaintiffs claim – as these same Plaintiffs' lawyers did in *Dynegy* – that Dell's plan language is virtually identical to Enron's plan language. The *Dynegy* court rejected that argument because, although Dynegy's employer contributions were made in employer stock (as they were in Enron), Dynegy participants could immediately diversify those matching contributions out of company stock and, thus, participant choice drove plan investments. 309 F. Supp. 2d at 895-96. Dell participants have even greater control over their plan investments – they control both their own contributions as well as Dell's matching contributions. Consequently, as in *Dynegy*, Plaintiffs' "plan imposed diversification" theory fails to state a claim.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

plaintiff to plead (and eventually prove) that the damages his 401(k) account suffered were caused by the fiduciary's improper conduct. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 781-82 (5th Cir. 2007). The Amended Complaint (which contains four claims premised on the same set of misrepresentations), however, contains no such allegations. The Complaint fails to allege any particular Defendant made misrepresentations. It does not identify any 401(k) Plan Dell Stock Fund losses experienced by a Plan participant who relied on these misrepresentations. Finally, the Complaint nowhere demonstrates why any of the alleged misrepresentations was material.[11]

F. Plaintiffs' Remaining Claims Are Derivative And Should Be Dismissed.

Plaintiffs do not dispute that their claims for failure to disclose accurate information to Plan participants (Count II), failure to prudently monitor the other Plan fiduciaries (Count III), and co-fiduciary liability (Count IV) are derivative of their prudence claim and therefore fail as a matter of law if – as here – the Complaint fails to state a claim for breach of the duty of prudence.

* * *

For the foregoing reasons and the reasons set forth in Defendants' Motion to Dismiss, Defendants respectfully request that the Complaint be dismissed with prejudice and that judgment be entered for Defendants.

---

[11] The restatement indicates Dell's financial mistakes were not material. Dell overstated its income by $92 million during a five-year period when it generated over $12 billion in net income. (Dell Inc. Annual Report (Form 10-K), at 22, 108 (Oct. 30, 2007) (Exh. 1 to Defs.' Mot. to Dismiss).)

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

January 24, 2008

Respectfully submitted,

/s/ Thomas R. Jackson

Brian S. Greig (bgreig@fulbright.com)
Texas State Bar No. 08439800
Peter A. Stokes (pstokes@fulbright.com)
Texas State Bar No. 24028017
FULBRIGHT & JAWORSKI L.L.P.
600 Congress Avenue, Suite 2400
Austin, Texas 78701-3271
Telephone: (512) 474-5201
Facsimile: (512) 536-4598

Patricia J. Villareal (pjvillareal@jonesday.com)
Texas State Bar No. 20581830
Thomas R. Jackson (trjackson@jonesday.com)
Texas State Bar No. 10496700
Greg L. Weselka (gweselka@jonesday.com)
Texas State Bar No. 00788644
Michael L. Davitt (mldavitt@jonesday.com)
Texas State Bar No. 00796445
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939 – Telephone
(214) 969-5100 – Facsimile

James P. Baker (jpbaker@jonesday.com)
Admitted *pro hac vice*
JONES DAY
555 California Street, 26th Floor
San Francisco, California 94104
(415) 626-3939 – Telephone
(415) 875-5700 – Facsimile

COUNSEL FOR DEFENDANTS

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

CERTIFICATE OF SERVICE

I hereby certify that on the 24th 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:

Albert A. Carrion, Jr.
Thomas H. Watkins
Brown, McCarroll LLP.
111 Congress Ave., Suite 1400
Austin, TX 78701

David R. Scott
Scott & Scott, LLC
108 Norwich Ave.
P.O. Box 192
Colchester, CT 06415

Kip B. Schuman
The Shuman Law Firm
801 East 17th Ave.
Denver, CO 80218

Jeffrey A. Berens
Law Office of Jeffrey A. Berens, LLC
8691 East 26th Avenue
Denver, CO 80238

W. Thomas Jacks
Jacks Law Firm
1205 Rio Grande Street
Austin, TX 78701

James M. McCormack
Tomblin Carnes McCormack, LLP
816 Congress Ave., Suite 1510
Austin, TX 78701

Geoffrey M. Johnson
Scott & Scott, LLC
33 River Street
Chagrin Falls, OH 44022

Gary A. Gotto
Keller Rohrback LLP
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012

Lynn L. Sarko
Raymond J. Farrow
Derek W. Loeser
Erin M. Riley
Keller Rohrback LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101

Robert A. Izard
Mark P. Kindall
Schatz Nobel Izard, P.C.
20 Church Street, Suite 1700
Hartford, CT 06103

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=38575f6d-20e7-4474-82d8-4fd472bf2123

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Thomas J. McKenna
Gainey & McKenna
295 Madison Avenue
New York, NY 10017

Lori G. Feldman
Milberg Weiss Bershad & Schulman LLP
One Pennsylvania Plaza
New York, NY 10119-0165

/s/ Thomas R. Jackson

DLI-6133260v5