UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO CERTAIN DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Lead Plaintiffs David L. McKeehan, James A. Syracuse and Timothy E. Ferguson, on behalf of themselves (hereinafter collectively "Plaintiffs") and all other persons similarly situated (hereinafter the "Participants"), and on behalf of the Cardinal Health 401(k) Savings Plan (together with its predecessors,[2] the "Plan"), respectfully submit this Memorandum of Law in Opposition to Certain Defendants' Motion to Dismiss the Consolidated and Amended Complaint ("Complaint").

Plaintiffs bring this action for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") to recover losses suffered by the Plan containing the retirement savings of the employees of Cardinal Health, Inc. ("Cardinal"). The Plan, and its Participants, lost massive amounts as a result of the breaches of fiduciary duty by the Plan's fiduciaries.

Plaintiffs' Complaint is the paradigmatic example of an ERISA breach of fiduciary duty case. The principal object of ERISA is to protect plan participants and beneficiaries. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). The statute's goal is to safeguard employee retirement savings by requiring full disclosure of financial information and to ensure the prudent management of retirement plan assets. 29

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[2] The "Plan" as used herein, includes the Cardinal Health Profit Sharing, Retirement and Savings Plan, which was amended and restated in its entirety, generally effective as of January 1, 2005, and renamed the Cardinal Health 401(k) Savings Plan. The "Plan" as used herein also includes all eligible individual account plans which have been merged into the Cardinal Health 401(k) Savings Plan at times relevant to this Complaint, including but not limited to 401(k) defined contribution retirement plans of the following employer entities:

Allegiance Corporation
Bindley Western Industries, Inc.
Automatic Liquid Packaging, Inc.
Pacific Surgical Innovations, Inc.
Ransdell Surgical, Inc.
International Processing Corp.
American Threshold Industries, Inc.
Premier Pharmacy Services, P.C.
Beckloff Associates, LLC
Snowden Pencer, Inc.

See Consolidated and Amended Erisa Complaint and Jury Demand ("Compl."), at 1.

U.S.C. § 1001(b).[3] To fulfill this goal, ERISA requires that retirement plans be managed by fiduciaries, whose duties are "the highest known to the law." *Chao* v. *Hall Holding Co., Inc.*, 285 F.3d 415, 426 (6th Cir. 2002), *cert. denied*, 527 U.S. 1168 (2003), *quoting Howard* v. *Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996).

All of the Defendants in this case were fiduciaries. These Defendants breached their fiduciary duties by offering the Employer Common Stock Fund ("Fund"), a Fund containing primarily Cardinal common stock, as an investment option under the Plan, and by permitting the Plan to purchase and hold shares of the Fund and the Fund to purchase and hold shares of Cardinal common stock when it was imprudent to do so. The Complaint sets forth many facts of which the fiduciaries should have been aware in the exercise of normal prudence and diligence which rendered the Fund and Cardinal stock imprudent retirement investments during the proposed Class Period (October 24, 2000 to the present). *See* Compl., ¶¶ 78-85. Defendants compounded their breach of fiduciary duty by negligently failing to disclose and negligently misrepresenting information that was essential to Participants' decisions to direct the Plan to invest in, or to remain invested in, the Fund. The Defendant Directors also breached their duties to appoint, monitor and inform other fiduciaries to ensure that all fiduciaries had the knowledge, experience and information necessary to protect the Plan and the Participants.

Cardinal and its employees and Directors who managed the Plan now move to dismiss the Complaint based on a number of overriding themes which are plainly wrong. First, they wrongly contend

[3] "It is hereby declared to be the policy of this chapter [ERISA] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

that this is a failure to diversify case. Defendants' Brief, at 13-20. It is not. Plaintiffs allege that the Plan imprudently invested in the Fund when the price of Fund shares was artificially inflated as a result of Defendants' failure to disclose material adverse information. Plaintiffs do not allege that the Fund was imprudent because it was not diversified. Therefore, the Defendants' arguments which are premised on failure to diversify cases are irrelevant.

Second, Defendants erroneously argue that they are not liable because Participants directed the Plan to invest in the Fund. Defendants' Brief, at 5-7. In fact, because the Defendants did not inform Participants of all material information necessary to make appropriate decisions, Participants' choices were not informed and, as a matter of law, Defendants are deemed to have made all Plan investment decisions under ERISA Section 404(c), 29 U.S.C. § 1104(c). Therefore, Defendants are liable for all imprudent Plan investments, including those chosen by Participants.

Third, Defendants claim "no harm, no foul" because the price of Cardinal Stock ultimately recovered from Defendants' wrongdoing. Defendants' Brief, at 16-18. That argument ignores the fact that there were substantial losses during the period of artificial inflation which Plaintiffs can easily prove at trial.

In conclusion, this case will not discourage responsible companies from offering appropriate retirement plans managed by responsible fiduciaries. To the contrary, it will, prevent irresponsible companies from offering plans managed by irresponsible fiduciaries from concealing material adverse information from their participants and foisting artificially inflated stock on their employees.

STANDARD FOR DECIDING A MOTION TO DISMISS

A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v.*

Gibson, 355 U.S. 41, 45-6 (1957). Dismissal is not warranted even if the plaintiff is unlikely to prevail on the merits. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

A Complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a). "Such a statement must simply 'give the Defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002), *citing Conley*, 355 U.S. at 47. Rule 8(a)'s simplified pleading standard "relies on liberal discovery rules and summary judgment motions to define disputed facts and to dispose of unmeritorious claims." *Id.*, at 512; *see also Grizzell v. City of Columbus*, 2003 U.S. Dist. LEXIS 13393, *9 (S.D. Ohio 2003); *Reed Elsevier, Inc. v. TheLaw.net Corp.*, 269 F. Supp. 2d 942, 949 (S.D. Ohio 2003) (citing *Swierkiewicz* and noting that noting that the Supreme Court "has consistently admonished the district courts about imposing heightened pleading requirements"). Cases brought under ERISA for breach of fiduciary duties are subject to this simple notice-pleading standard. *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 822 (S.D. Ohio, 2004).

ARGUMENT

I. Count I Alleges A Breach of Fiduciary Duty

Count I alleges that Defendants breached their fiduciary duty of prudence by (1) permitting the Plan to offer the Fund as an investment option; (2) permitting the Plan to purchase and hold shares of the Fund; and (3) permitting the Fund to purchase and hold shares of Cardinal common stock when Defendants knew or should have known that the prices of Fund and Cardinal common stock shares were artificially inflated. When the truth became known, Cardinal restated three years worth of earnings results, and the prices of Fund and common stock shares dropped precipitously. *See* Compl., ¶¶ 78-79. As a consequence of Defendants' breaches, the Plan suffered massive losses. Compl., ¶ 88.

Defendants argue that continued investment in the Fund and Cardinal stock were not imprudent *as a matter of law*, even if (as alleged), the Defendants knew or should have known that the prices of shares of the Fund and Cardinal stock were artificially inflated. Apparently, according to the Defendants, a prudent retirement plan manager would have bought Fund shares even if he knew they were overvalued unless he also knew that Cardinal was on the verge of collapse. Defendants' Brief, at 15-16. The argument misconstrues the complaint, misreads the law, requires the Court to make inappropriate findings of fact, and is, above all, absurd on its face. Prudent investors simply *don't* buy or hold stock at prices they know to be artificially inflated.

A. This Is An Artificial Inflation Case, Not a Failure to Diversify Case

Defendants' argument concerning Count I is premised on Defendants' misstatement of Plaintiffs' claims. This is an artificial inflation case, not a failure to diversify case. Specifically, Plaintiffs allege that Defendants breached their fiduciary duties by permitting the Plan to invest in the Fund and Cardinal stock because the prices of Fund and stock shares were artificially inflated as a result of undisclosed material adverse information, not because they were not diversified. *See* Compl., ¶¶ 78-86. However, the cases on which the Defendants rely – *Kuper* v. *Iovenko*, 66 F.3d 1447 (6th Cir. 1995), *Moench* v. *Robertson*, 62 F.3d 553 (3rd Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996), and *Wright* v. *Or. Metal. Corp.*, 222 F. Supp. 2d 1224, 1232-34 (D. Or. 2002), *aff'd*, 360 F.3d 1090 (9th Cir. 2004) – alleged that the investments were imprudent because of a failure to diversify. *Moench*, *Kuper*, and *Wright* do not apply because this is not a failure to diversify case.[4]

[4] Although in *Moench* there was a companion securities fraud case that settled for a nominal amount, artificial inflation claims do not appear to have been alleged in the ERISA case. *Moench*, 62 F.3d 553.

The importance of distinguishing failure to diversify from artificial inflation cases is demonstrated by the plain language of ERISA. ERISA expressly requires that plan purchases be for adequate consideration. 29 U.S.C. § 1108(e)(1) (acquisition of company stock not prohibited if such acquisition is for "adequate consideration"); *Donovan* v. *Cunningham*, 716 F.2d 1455, 1465 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (a plan "may acquire employer securities in circumstances that would otherwise violate Section 406 if the purchase is made for 'adequate consideration. The crux of the Secretary's case is his claim that the appellees purchased MCS stock from Cunningham for more than adequate consideration.'").[5] By contrast, ERISA specifically states that plan investments in company stock do not have to be diversified. 29 U.S.C. § 1107(b)(1).[6] Accordingly, while *Donovan* and the artificial inflation cases seek to *enforce* the express language of the ERISA statute, the failure to diversify cases seek to *override* the express language of the statute. While a presumption in favor of investing in company stock may make sense where the claim is a failure to diversify – a failure to override ERISA – the opposite is true in an artificial inflation case – a failure to follow the statute.

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[5] "Adequate consideration" is "the price of the security prevailing on a national securities exchange. . . ." 29 U.S.C. § 1002(18)(A)(i). However, because here material information was withheld from the market, the price of Cardinal shares on the national securities exchange cannot be relied upon. *Basic* v. *Levinson*, 485 U.S. 224, 241-242 (1988) ("The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if purchasers do not directly rely on the misstatements.") (internal citations omitted); *Finkel* v. *Docutel/Olivetti Corp*., 817 F.2d 356, 360 (5th Cir. 1987) ("When one fails to disclose or misrepresents material information about a security, the market's efficient pricing mechanism is skewed and the price of the security is distorted."), *cert. denied*, 485 U.S. 959 (1988); *Unger* v. *Amedisys, Inc.*, 401 F.3d 316, 322 (5th Cir. 2005) (same). Accordingly, many Courts have recognized claims for imprudent investment in publicly traded stocks where the price was artificially inflated. *Lalonde* v. *Textron, Inc.*, 369 F.3d 1, 6 (5th Cir. 2004); *In re Enron*, 284 F. Supp. 2d 511, 672-74 (S.D. Tex., 2003) (refusing to dismiss claims based on artificial inflation); *Henry* v. *Champlain Enterprises, Inc*., 288 F. Supp. 2d 202, 226 (N.D.N.Y. 2003) (same); *Hill* v. *Bellsouth Corp.*, 313 F. Supp. 2d 1361, 1367-68 (N.D. Ga. 2004) (same); *In re ADC Telecommunications, Inc. ERISA Litig.*, 2004 WL 1683144, *1, 6 (D. Minn. 2004) (same).

[6] This is an exception to the requirement that fiduciaries use Modern Portfolio Theory. *Laborers Nat'l Pension Fund* v. *Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317-18 (5th Cir.), *reh'g and reh'g en banc denied*, 184 F.3d 820, *cert. denied*, 528 U.S. 967 (1999).

The recent case of *In re JDS Uniphase Corp. ERISA Litig.*, 2005 WL 1662131 (N.D. Cal. July 14, 2005), exemplifies this distinction. Plaintiffs alleged that company stock was an imprudent investment. Defendants argued under the principles of the failure to diversify cases that they were entitled to a presumption of reasonableness. The Court found no presumption applied because the claim was for imprudent investment in artificially inflated stock, not for failure to diversify:

> Plaintiffs allege that defendants breached their fiduciary duties because JDSU stock was – itself – an imprudent investment, not because defendants breached a duty to diversify. Although [a] .. . fiduciary may be exempt from the duty to diversify and the duty of prudence *to the extent that it requires diversification*, the duty of prudence otherwise applies to EIAP fiduciaries. 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 defendants knew about JDSU and the risk of investing in JDSU stock. Plaintiffs' claim in therefore not a diversification claim, and the section 404(a)(2) exemption and *Wright* do not resolve this issue.

Id. at *7 (emphasis in original) (citations omitted).

The First Circuit noted this distinction in *Lalonde* v. *Textron, Inc.*, 369 F.3d 1 (1st Cir. 2004). The district court dismissed plaintiff's claim, citing *Moench* and stating "Plaintiffs must plead facts that, if proven at trial, would establish that [the Textron defendants] abused their discretion in failing to diversify Textron stock . . . ." *Id*. at 3-4. In vacating the dismissal, the First Circuit pointed out that the district court had "failed to take account of plaintiffs' allegation that . . . Textron artificially inflated its stock price. . . ." *Id.* at 6.

Kuper also implicitly acknowledged this distinction when, after quoting *Donovan*, the Court stated that the conflict between the competing Congressional policies "becomes particularly evident" in a failure to diversify case [as opposed to an artificial inflation case such as *Donovan*]. *Kuper* at 1458. Since Count I does not allege a failure to diversify, *Donovan* sets the proper standard:

> A court reviewing the adequacy of consideration under Section 3(18) is to ask if the price paid is "the fair market value of the asset as determined in good faith by the . . . fiduciary . . . . [T]his is not a search for subjective good faith – a pure heart and an empty head are not enough. The statutory reference to good faith in Section 3(18) must be read in light of the overriding duties of Section 404. Doing so, we hold that the . . . fiduciaries will carry their burden to prove that adequate consideration was paid by showing that they arrived at their determination of fair market value by way of a prudent investigation in the circumstances then prevailing.

716 F.2d at 1467-68; *see also Horn* v. *McQueen,* 215 F. Supp. 2d 867, 875 (W.D. Ky. 2002) (finding *Donovan* to be "more factually and legally on point" than *Moench* or *Kuper* with respect to an artificial inflation claim).

In Count I, Plaintiffs claim that the prices of both the Fund and stock shares were artificially inflated as a result of undisclosed material adverse information. Since it would have been imprudent for the Plan to purchase any shares of the Fund, or for the Fund to purchase any shares of Cardinal stock, Count I does not allege a failure to diversify, and thus, falls squarely under *Donovan*.

B. The Kuper/Moench Presumption Does Not Apply Because the Plan is Not An ESOP

Even assuming that this is a failure to diversify case, which it is not, the cases that the Defendants identify as "seminal" with respect to their "verge of collapse" standard – the Third Circuit's decision in *Moench* and the Sixth Circuit's decision in *Kuper* – only apply to "Employee Stock Option Plans," or "ESOPs." The Cardinal Plan, unlike the plans at issue in *Kuper* and *Moench*, is *not* as ESOP. The parties agree that the Cardinal Plan was an "eligible individual account plan" ("EIAP"). *See* Defendants' Brief, at 19. ERISA defines an EIAP as "(i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities." 29 U.S.C. Sec. 1107(d)(3)(A). EIAPs, therefore, include several different types of Plans, only one of which is an ESOP. However, the Cardinal Plan is not an ESOP because it was a traditional 401(k)-type retirement plan, offering numerous funds for the Plan to invest in, including stock index mutual funds, growth stock mutual funds and international stock mutual funds in addition to the Employee Common Stock Fund at issue here.[7]

In *Kuper*, plaintiffs brought suit against the fiduciaries of an ESOP for failure to diversify or liquidate company stock held by the ESOP during a period when the stock was declining. The court determined, first, "that the purpose and nature of ERISA and ESOPs preclude a plan's per se prohibition against diversification or liquidation." 66 F.3d at 1450. However, the court held that ESOP fiduciaries were entitled to some latitude when deciding whether to diversify or liquidate an ESOP because of the special role of ESOPs themselves:

> ERISA . . . contains specific provisions governing ESOPs. An ESOP is an ERISA plan that invests primarily in "qualifying employer securities," which typically are shares of stock in the employer creating the plan. Congress envisioned that an ESOP would function both

[7] *See* Defendants' Appendix, Exh. D, p. 22. Defendants *do* make several attempts to make the Plan *sound* like an ESOP. On page 15 of their brief, Defendants argue that the Plan "has strong provisions requiring that a company stock fund be one of the investment offerings" and that the Plan mandates that the Fund "shall consist of stock of the Company and cash or cash equivalents needed to meet obligations of such fund . . . ." Similarly, the Defendants argue that "the Plan specifically required that Cardinal stock be offered as an investment vehicle, and the Plan must be administered according to its terms." Defendants' Brief, at 14. In each of its incarnations, however, the Plan *authorized* the maintenance of the Fund, it did not *require* it. *See* Appendix in Support of Certain Defendants' Motion to Dismiss the Consolidated Amended ERISA Complaint ("Defendants' Appendix"), at Tab A, p. 71 (1998 Plan states "[t]he Trustee is *authorized* to maintain the "Employer Common Stock Fund" as one of the Investment Funds."), and at Tab B, p. 71 (same language in 2002 Plan) (emphasis added). The Plan thus *authorized* the creation of the Fund, it did not *require* it, as Defendants argue.

More fundamentally, an ESOP is a type of *plan* – not a type of fund within a plan. Since Cardinal's Plan consists of multiple funds, of which the Fund is only one, the Plan (as opposed to the Fund), is *not* designed to be "primarily invested in" employer securities, and the Defendants do not claim the contrary. The Plan does not even require that *the Fund* be invested in the employers' stock – instead, as the Defendants' quote indicates, the Fund can also invest in "cash or cash equivalents needed to meet" its obligations. Moreover, the Defendants pointedly ignore the Plan provisions cited in the Complaint that specifically *prohibit* the Plan from investing in the Fund, *regardless of the direction of Plan participants,* until "Cardinal Health, the Plan, the Trustee and all other relevant parties have fully complied with . . . federal and state securities laws . . . ." Compl., ¶ 73. As alleged in the Complaint, this Plan requirement was not met. Compl., ¶ 78. In short, the Fund is not the Plan, and neither the Plan nor the Fund is an ESOP.

> as "an employee retirement plan and a ***'technique of corporate finance' that would encourage employee ownership.*** Because of these dual purposes, ESOPs are not designed to guarantee retirement benefits, and they place employee retirement assets at much greater risk than the typical diversified ERISA plan.

Id. (emphasis added). Because of these circumstances, unique to ESOPs, the Court adopted a *presumption* that an ESOP fiduciary acts consistently with ERISA if it invests the assets of the ESOP in employer securities, a presumption first crafted by the Third Circuit in *Moench*. However, the *Kuper* presumption does not apply to other types of EIAPs. In *Unaka Co., Inc. v. Newman*, 2005 WL 1118065, *21 (E.D. Tenn., Apr. 26, 2005), the court correctly found that the Sixth Circuit had not ratified the use of the *Kuper* standard in the context of other EIAPs. *Id.* The *Unaka* court concluded that the EIAP at issue in that case was primarily intended to be a retirement plan and the holding of employer securities appeared to be incidental to that purpose. Accordingly, the Court found that "the actions of the fiduciaries of this Plan are to be judged by the prudent man standard and that no presumption of reasonableness attaches to the decision of the fiduciaries" to continue to hold the company stock. The Third Circuit, which authored *Moench*, also specifically declined to apply the *Moench* standard to a non-ESOP 401(k) plan, finding that ESOPs presented unique issues not applicable to other types of individual asset plans such as a 401(k) plan like the Cardinal Plan. *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 238 (3rd Cir. 2005). Like the *Schering-Plough* and *Unaka* courts, this Court should decline to apply irrelevant presumptions to an ordinary retirement plan that is not an ESOP. The "prudent investor" standard governs, and since reasonably prudent retirement plan managers do not buy or remain invested in artificially inflated stock (as alleged in the complaint here), Count I should not be dismissed.[8]

[8] The cases cited by Defendants which applied the *Moench/Kuper* standard to other EIAPs ignore the very real differences between ESOPs and traditional 401(k) retirement plans. The courts in *Wright* v. *Or. Metal. Corp.*, 360 F.3d 1090, 1098 n.3 (9th Cir. 2004), and *In re Calpine Corp. ERISA Litig.*, 2005 WL 1431506, * 4-5 (N.D. Cal., March 31, 2005), both declined to adopt a particular standard, but suggested that stock bonus plans and ESOPs should be treated the

C. The Defendants Misstate the Kuper Standard

Even assuming that the "presumption of reasonableness" applies to this case, which it does not, Defendants have asserted that to overcome the *Kuper* presumption requires the Plaintiffs to allege that Cardinal was "on the brink of collapse." Defendants' Brief, at 16. As authority for this proposition, the Defendants erroneously cite *Kuper,* 66 F.3d at 1458-60. Defendants have fashioned this standard completely of whole cloth. *Kuper* never even discusses deteriorating financials or impending collapse. In fact, the *Kuper* standard is met simply upon a showing "that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper,* 66 F.3d at 1459; *see also Unaka* at * 21. The Complaint here clearly meets that standard in that it alleges that the price of Cardinal stock was artificially inflated, that the Defendants knew or should have known that this was the case, and that a reasonable fiduciary would not have invested under these circumstances. (Compl., ¶¶ 78-87). *See, e.g., Lalonde,* 369 F.3d at 6-7 (allegation of artificial inflation sufficient, under *Kuper* standard, to survive a motion to dismiss).

The genesis for the Defendants' alleged "impending collapse" standard appears to be *Moench*, even though the Third Circuit never adopted any such standard. The *Moench* court held that "the plaintiff may overcome that 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 the plaintiff *in that case* met

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same for purposes of fiduciary duty analysis *because* both are EIAPs. In *Landgraff* v. *Columbia/HCA Healthcare Corp.,* 2000 WL 33726564 (M.D. Tenn., May 24, 2000), *aff'd,* 30 Fed.Appx. 366 (6th Cir. 2002), the Court was somewhat more expansive, reasoning that the *Kuper/Moench* standard should be applied to all EIAPs, because Congress exempted all EIAPs from the requirement to diversify. *Id.* at * 6 (plaintiffs in *Landgraff* did not appeal this portion of the decision, and thus the Sixth Circuit's affirmance did not address or adopt it). Neither the Third Circuit in *Moench* nor the Sixth Circuit in *Kuper* based their rationale for creation of the presumption of reasonableness for ESOP fiduciaries simply on the lack of a diversification requirement. Rather, both courts specifically noted that ESOPs by definition invested primarily in employer's stock for purposes of "corporate finance" which were not necessarily related to retirement savings. *Kuper,* 66 F.3d at 1457; *Moench,* 62 F.3d at 568.

this burden by alleging 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 attempt to transform the factual allegations which the *Moench* found to be adequate in that case into the legal standard itself. As the court in *In re Sprint Corp. ERISA Litig*., 2004 WL 1179371 (D. Kan. 2004), stated: "[T]he court rejects the Sprint defendants' impending collapse theory . . . *Moench* does not stand for the proposition that a plaintiff cannot state a claim if he or she does not allege that the employer company was inevitably doomed to failure." *Id*. at *13. *See also In re Syncor ERISA Litig*., 351 F. Supp. 2d 970, 982 (C.D. Cal. 2004) ("The Court finds the analysis in *Sprint* persuasive and declines to impose an impending collapse requirement."); *In re ADC Telecommunications, Inc., ERISA Litig*., 2004 WL 1683144 (D. Minn. 2004) ("[T]here exists no uniform rule that a plaintiff must plead that the defendant company's viability was in jeopardy to state a claim for imprudent investment in company stock. As Defendants concede, where fraudulent practices are alleged there is no need to plead impending collapse of the corporation."). Consequently, even in a case where the *Kuper* "presumption of reasonableness" applies, there is no "impending collapse" requirement.

D. The Kuper Presumption Is Not a Pleading Requirement

This Court has rejected the claim that *Kuper's* "presumption of reasonableness" for ESOP fiduciaries creates a heightened *pleading* requirement. *In re AEP ERISA Litig.*, 327 F. Supp. 812, 828-29 (S.D. Ohio, 2004). The Court correctly held that it was inappropriate, at the pleading stage, to determine whether a plan was an ESOP, whether the fiduciaries of a plan were entitled to the *Kuper* presumption, and, if so, whether the plaintiffs could overcome that presumption. The Court specifically held that "requiring Plaintiffs to affirmatively plead facts overcoming the ESOP presumption violates Rule 8(a)'s notice pleading requirement." *Id.* at 829; *accord*, *Lalonde*, 369 F.3d at 6; *Sprint*, 2004 WL 1179371 at *12.

Defendants seek to distinguish *AEP*, or, failing that, to convince the Court that the decision was incorrect. Based on their reading of *Kuper*,[9] Defendants argue that it is appropriate to dismiss the case unless "the complaint states facts that, if true, would prove that defendants abused their discretion by allowing the plan to invest in company stock." Defendants' Brief, at 19. While the Defendants have found cases from other jurisdictions that have followed that logic with respect to the "presumption of reasonableness," the cases are inconsistent with the notice pleading requirements of Rule 8(a), the Supreme Court's decision in *Swierkiewicz* and the Sixth Circuit's decision in *Hill* v. *Blue Cross-Blue Shield of Michigan*, 409 F.3d 710, 720 (6th Cir. 2005).[10] As this Court observed, "presumptions are evidentiary standards that should not be applied to motions to dismiss." *AEP*, 327 F. Supp. 2d, at 829, *quoting In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 312 F. Supp. 2d 1165, 1180 (D. Minn. 2004).

Defendants argue that "[n]either *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." Defendants' Brief, at 20. Since neither case involved a motion to dismiss, the courts said *nothing* about pleadings. However, presumptions are "evidentiary" by their nature: A "presumption imposes on the party

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[9] Defendants argue that *Kuper* is applicable based on the uncontested fact that the Plan is an EIAP, and on their mistaken belief that the *Kuper* standard applies to all EIAPs. As noted above, the Sixth Circuit has *not* extended *Kuper* to all EIAPs.

[10] The decisions cited by the Defendants fail to consider *Swierkiewicz* and Rule 8(a). *Crowley* v. *Corning Inc. Investment Plan*, 234 F. Supp. 2d 222, 230 (W.D.N.Y. 2002) states that "it is fitting to require plaintiffs to allege underlying facts" to rebut the "presumption," but fails to suggest legal authority for a heightened pleading requirement. Both *In re Calpine Corp. ERISA Litig.*, 2005 WL 1431506, * 5 (N.D. Cal., March 31, 2005), and *In re Duke Energy ERISA Litig.*, 281 F. Supp. 2d 786, 795 (W.D.N.C., June 23, 2003), take judicial notice of financial data supplied *by the defendants* and determine, on motions to dismiss, that the plaintiffs could not even *plead* facts to rebut the *Kuper/Moench* presumption. Only the last case cited by the Defendants, *Wright* v. *Or. Metal. Corp.*, 360 F.3d 1090, 1998 (9th Cir. 2004), considers the pleading standard. However, the *Wright* court specifically found that the allegations in the complaint itself were incompatible with any theory of recovery.

against whom it is directed the burden of going forward with *evidence* to rebut or meet the presumption, but does not shift to such party the burden of proof . . . ." Fed. R. Evidence 301 (emphasis added). Such presumptions do not require additional factual pleading on the part of plaintiffs. *See, e.g., Swierkiewicz*, 534 U.S. at 510 (2002) (court-imposed rules regarding allocation of evidentiary burdens and presumptions in employment discrimination cases do not change the pleading requirements of Rule 8(a), or require that a plaintiff plead particularized facts); *Galbraith* v. *County of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002) (the "district court should not have converted an evidentiary presumption applicable to the order of proof into a heightened standard for pleading"). This Court's ruling in *AEP*, therefore, correctly applied Rule 8(a), and should be followed in this case as well. The complaint clearly provides "a short and plain statement of the claim showing that the pleader is entitled to relief"; nothing more is required.

III. The Complaint Adequately Pleads Causation

Defendants argue that the Complaint should be dismissed for failure to plead proximate causation. Defendants' Brief, at 21-25. Their entire argument is based on the flawed premise that the Supreme Court's recent securities fraud decision in *Dura Pharmaceuticals, Inc.* v. *Broudo*, __ U.S. __, 125 S. Ct. 1627 (2005), applies in the ERISA context. Moreover, even if *Dura* were controlling, which it is not, the requirements set forth by the Supreme Court in that decision are amply met by the allegations of the Complaint.

A. The Complaint Pleads Causation as Required by ERISA

An ERISA plaintiff seeking to recover on behalf of a retirement plan under Section 502(a)(2) must establish a causal link between the breach of duty and the harm suffered by the plan. *Kuper*, 66 F.3d at 1459. To establish this link, however, a plaintiff need only demonstrate "that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Id.* at 1460.

Kuper itself was decided at the summary judgment stage, and thus did not discuss what plaintiffs are required to *plead* with respect to this causal element. As noted above, however, the sufficiency of the pleading in this case is governed by the "short and plain statement of a claim" standard of Rule 8(a). *See AEP* (considering each of the pleaded elements of an ERISA claim under the notice pleading standard of Rule 8(a), citing *Swierkiewicz*). *See also generally In re JDS Uniphase Corp. ERISA Litig.*, 2005 WL 1662131, * 9 (N.D. Cal., July 14, 2005) (refusing to decide on motion to dismiss whether plan losses were unavoidable based on allegations of the complaint).

The Complaint clearly and unambiguously alleges that the Defendants should have known that Cardinal stock, and the Fund, were imprudent investments during the Class Period, which is all that the *Kuper* Court required to establish the "causal link" between breach and loss. Indeed, the Complaint's allegations go much farther:

> ¶ 3. As a result of Defendants' actions and inactions, the Plan and the Participants suffered substantial losses. The assets of the Plan, to the extent the assets consisted of Cardinal Health common stock, *lost a substantial portion of their value during the Class Period and the Plan and the Participants have been deprived of the value of prudent alternative investments.*
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> * * *
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> ¶ 76. At certain times during the Class Period, including as of December 31, 2002 and December 31, 2003, the Plan held over $300 million worth of Company common stock. *The Plan was thus substantially invested in Company stock at various times during the Class Period, even though Company stock was not a prudent investment for the Plan for the reasons alleged herein*. As of the filing of this Complaint a substantial portion of the value of the Plan's assets has been destroyed, and Defendants are liable for all losses suffered by the Plan and the Participants.
>
> * * *
>
> ¶ 78. Cardinal common stock and the Fund were imprudent investments during the Class Period because the price of Cardinal's stock was artificially inflated as a result of undisclosed materially adverse information. Cardinal engaged in accounting improprieties in

> violation of generally accepted accounting principles which led to an October 2003 informal inquiry, and a May 6, 2004 formal investigation by the SEC, and eventually required the company to restate three years of earnings results.
>
> * * *
>
> ¶ 86. Based on the foregoing, *Defendants knew or should have known that Cardinal stock and the Fund were not prudent investment options throughout the Class Period. As a result, the Plan should have terminated the Fund and Cardinal stock as investment options, halted the purchase of shares of the Fund* and Cardinal stock and disclosed all undisclosed materially adverse information.

(Emphasis added).

The Complaint thus provides more than ample notice of how the Plan suffered loss as a result of Defendants' breaches of fiduciary duty. The Complaint clearly alleges that the Plan invested in employer stock during the Class Period while the Company was engaging in accounting and financial reporting violations which caused Cardinal stock to be valued in excess of its true value, and that the Plan suffered loss when the Fund "lost a substantial portion of [its] value during the Class Period." Under *Kuper* and the pleading standards of Rule 8(a), this is more than adequate.

B. The Supreme Court's **Dura Pharmaceuticals** *Decision Does Not Apply*

The Defendants argue that the Complaint's loss allegations are inadequate for failure to allege loss causation pursuant to *Dura*. However, since *Dura* was not an ERISA case and did not involve breaches of fiduciary duties, it does not apply.[11]

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[11] Defendants' insistence that *Dura* is "dispositive" contrasts sharply with their subsequent insistence that the "fraud on the market" presumption, initially developed in securities law, "applies only in securities cases" and cannot be employed in the ERISA context. Defendants' Brief, at 27. However, while the rationale for the "fraud on the market" presumption is, if anything, *more* applicable in cases involving breaches of fiduciary duties than in the securities context, the important differences between the proof requirements and loss causation for both types of actions make securities law pleading requirements inappropriate for ERISA cases. *See Rankin* v. *Rotts*, 278 F. Supp. 2d 853, 865-66 (E.D. Mich. 2003).

In *Dura*, the Supreme Court found that plaintiffs had failed to state a cause of action for securities fraud with allegations that they had "'paid artificially inflated prices for Dura's securities' and suffered 'damages.'" 125 S. Ct. at 1634. In rejecting the Ninth Circuit's presumption that a plaintiff who proved that he purchased at an artificially inflated price established a securities fraud claim, the Supreme Court specifically relied upon the common law of fraudulent misrepresentation, which (the Court noted) resembles securities fraud actions in many respects. *Id.* at 1632.

Dura causation rules do not apply here because breach of fiduciary duty claims under ERISA are based on the law of trusts, not common law fraud. *See, e.g., Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996). Not surprising, pleadings rules based on the law of fraud do not translate well into the ERISA context. *See, e.g., Rankin* v. *Rotts*, 278 F. Supp. 2d 853, 865-66 (E.D. Mich. 2003) (differences between fraud and breaches of fiduciary duty actions create lesser pleading standard for latter type of case).

The Defendants fail to cite any authority for the proposition that *Dura* applies in an ERISA case. The authorities that they cite for the proposition that federal courts have applied "similar reasoning in dismissing ERISA claims on causation grounds" hold nothing of the sort. Indeed, most of the decisions Defendants cite did not even *involve* dismissal of claims, since they were decided on motions for summary judgment.[12] The remaining cases provide equally weak support. In *Kane* v. *United Indep. Union Welfare Fund*, 1997 WL 411208, at *2 (E.D. Pa., July 22, 1997), the complaint specifically *conceded* that there was no *present* injury to the Fund, pleading only that there might be injury in the future. While the Court in *Lewis* v. *Hermann*, 775 F. Supp. 1137, 1151 (N.D. Ill. 1991) did apply the "loss causation" standard

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[12] This is true of *Kuper, Henry* v. *Champlain Enterps.*, 288 F. Supp. 2d 202, 230-32 (N.D.N.Y. 2003), *Kemmerer* v. *ICI Americas Inc.*, 70 F.3d 281, 290-91 (3rd Cir. 1995), *cert. denied*, 517 U.S. 1209 (1996), *Armstrong* v. *Amsted Indus., Inc.*, 2004 WL 1745774, *7 (N.D. Ill., July 30, 2004), and *Tardiff* v. *General Elec. Co.*, 2000 WL 33376644, *9 (D. Conn., Sept. 30, 2000). *See* Defendants' Brief, at 25 & n.13.

from securities law to an ERISA claim, the court pointedly noted that, while Defendants had failed to cite any "authority that loss causation is an essential element" of an ERISA claim, the plaintiff "effectively conceded" that it was, and accordingly, the court was willing to apply it as well. *Id.* Finally, the court in *McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588 (N.D. Cal. Sept. 30, 2002) dismissed an ERISA pleading – with leave to amend – based in part on a theory that, by virtue of the securities laws, there was "no lawful action that could have been taken by the fiduciaries that would have avoided the subsequent loss occurring after public disclosure of the accounting problem" alleged by the plaintiffs. *Id.* at * 8. That theory has since been widely discredited. *See, e.g.*, *Gee* v. *UnumProvident Corp.*, 2005 WL 534873, *12 (E.D. Tenn., Jan. 13, 2005) (analyzing cases and finding an "evolving consensus" that the securities laws do not preclude ERISA actions as suggested by the *McKesson* court); *accord*, *Rankin*, 278 F. Supp. 2d at 874.[13]

Nothing in *Dura*, or in any other case cited by the Defendants, suggests that securities fraud standards apply to pleading loss in ERISA cases, nor do they suggest that loss must be pled with any greater degree of specificity than the substantive standard of *Kuper*, and the procedural requirements of Rule 8(a), demand. Accordingly, securities precedents should be ignored for purposes of this action.

C. Even If **Dura** *Were Applicable, the Plaintiffs Have Satisfied Its Requirements*

Even if, as Defendants argue, *Dura* was "dispositive," the Complaint has amply satisfied the pleading requirements set forth in that case. The Defendants argue that "under *Dura*, until there is a disclosure of the 'truth' of what was previously omitted or misrepresented and that disclosure causes the

[13] *McKesson* also dealt with an unusual fact pattern quite unlike the case at bar. The plaintiffs in that case alleged that, as a result of a merger, stock was deposited into a plan that was already tainted with fraud as the result of actions by non-fiduciaries. 2002 WL 31431588 at * 3. Here, in contrast, the improper accounting activities that caused Cardinal stock and the Fund to become imprudent investments occurred over a significant period of time and on the Defendant fiduciaries' watch.

price to decline, a sale of the security would result in no loss due to the omission or misrepresentation." Defendants' Brief, at 23-24. This wholly misreads *Dura*, however, and once again conflates the specific factual circumstances of that case with the rule of decision the Court announced. While the *Dura* Court clearly held that "allegation of purchase price inflation alone" is *not* sufficient to show loss causation, the Court did *not* delineate what allegations *would* be sufficient. *In re Initial Public Offering Sec. Litig.*, 2005 WL 1529659, *1 (S.D.N.Y., June 28, 2005).[14]

Here, the Plaintiffs have alleged far more to show the connection between the Defendants' breaches of fiduciary duty and their loss than the simple allegations of artificially inflated stock found to be deficient in *Dura*. The Complaint alleges that the accounting improprieties made the price of Cardinal stock, and the Fund, artificially inflated, that the accounting improprieties led to an October 2003 informal inquiry, and a May 6, 2004 formal investigation by the SEC, which eventually required the company to restate three years of earnings results – *i.e.,* a "corrective disclosure" – and that the assets of the Plan, to the extent the assets consisted of Cardinal Health common stock, lost a substantial portion of their value. Thus, even if *Dura*

[14] If *Dura* had created the rule suggested by the Defendants, it would be even more clear that the rule did not apply in ERISA cases. The measure of damages in ERISA cases is not the difference between the price of shares at the time of purchase and the price following disclosure of the true state of affairs, as in securities law. In an ERISA imprudent investment case, the later disclosure of information is irrelevant. Rather, at the moment an investment becomes imprudent, the law presumes that the assets are invested in a reasonably prudent alternative, and the measure of damages is the difference between the actual value of the plan that is imprudently invested and the amount that the plan would have earned if its assets had been invested in a prudent alternative. *Donovan* v. *Bierwith*, 754 F.2d 1049, 1056 (2d Cir. 1985). *See, e.g., Harris Trust and Savings Bank* v. *John Hancock Mut. Life Ins. Co*., 302 F.3d 18 (2d Cir. 2002) ("We reiterate that the proper measure of damages is to be calculated by determining what the Plan would have earned had Hancock exercised its discretionary authority with respect to its investment and allocation decisions in accordance with its fiduciary duties under ERISA.") (citing *Donovan*); *Meyer* v. *Berkshire Life Ins. Co*., 250 F. Supp. 2d 544, 572 (D. Md. 2003) ("[T]he proper measure of damages is the difference between the actual value of the plans and the 'value prudent investments would bear.'") (quotation omitted), *aff'd*, 372 F.3d 261 (4th Cir. 2004); *Babcock* v. *Computer Assocs. Int'l, Inc*., 186 F. Supp. 2d 253, 261 (E.D.N.Y. 2002) (same); *Dasler* v. *E.F. Hutton & Co., Inc*., 694 F. Supp. 624 (D. Minn. 1988) (holding that to measure damages court must compare plan's actual earnings with those earnings which would have been reasonable and using S&P 500 Index as basis for comparison). This so-called "make-whole" standard of damages "'indicates that Congress' intent was 'to provide the full range of legal and equitable remedies available in both state and federal courts.'" *Chao* v. *Trust Fund Advisors*, 2004 WL 444029 *6 (D. D.C. Jan. 20, 2004) (*quoting Donovan*).

applied, and even if *Dura* actually *required* a showing of a corrective disclosure followed by a drop in value, the requirements are met by the Complaint.[15] Accordingly, the Defendants' motion should be denied.

IV. Count II of the Complaint Adequately Pleads Reliance

Defendants argue that Count II of the Complaint is deficient because it does not contain any claim that the Plaintiffs detrimentally relied on any particular misstatement made by the Defendant fiduciaries. Defendants are incorrect. Even if pleading actual reliance were the only way to state an ERISA claim based on negligent misrepresentations, plaintiffs have adequately done so.[16] The Complaint states that "the Plan, and the Participants relied upon, and are presumed to have relied upon, the representations and nondisclosures of the Defendants named in this Count to their detriment."[17]

Perhaps recognizing the infirmity of their "actual reliance" argument, Defendants focus the bulk of their argument disputing the existence of a presumption of reliance in an ERISA action. Noting that this Court in *AEP* denied a motion to dismiss where allegations of reliance were almost identical to those at issue here, the Defendants argue that "[n]early a year later, however, there is still no support for applying a fraud-on-the-market presumption" in ERISA cases. Defendants' Brief, at 27. Defendants might equally

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[15] Even if the Court found the level of detail in the Complaint to be insufficient, it would not be difficult to supply additional details in an amended pleading. The ultimate question, however, is whether that level of detail is presently required in ERISA cases, and because of the applicability of Rule 8(a) to the Complaint, Plaintiffs respectfully suggest that it is not.

[16] Reliance is not an element of Claim 1, the imprudent investment claim. Moreover, Defendants do not distinguish between claims based on negligent misrepresentations and those based on negligent omissions. Detrimental reliance is not an element of a negligent non-disclosure case. Consequently, the reliance issue does not apply with respect to that portion of Count II.

[17] Compl., ¶ 96. Defendants characterize this allegation as "evasive" and state that it "does not plead actual reliance." Defendants' Brief, at 26. The Defendants go on to argue, "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." *Id*. Whether pleading particularized facts is easy or difficult is immaterial; it is not required by the Federal Rules. ERISA plaintiffs are only required to meet the "simplified notice pleading standard [that] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *AEP*, 327 F. Supp. 2d at 822, *quoting Swierkiewicz*, 534 U.S. at 512.

have said, however, that nearly a year later, no subsequent rulings have *denied* that the fraud-on-market presumption applies in ERISA cases.[18] The Defendants' only argument against applying the presumption to ERISA cases is that it did not *originate* in an ERISA case. The rationale for the presumption, however, applies even more strongly in the context of fiduciary violations under ERISA than it does in the securities context.

Plaintiffs allege that Defendants breached their duty to provide complete and accurate information in the company's SEC filings which became fiduciary representations as a result of their incorporation into Plan documents. Because of this breach, the market price of Cardinal stock and, therefore, the price of Fund shares, were artificially inflated. The price of the Fund was based on all material information available, including the information contained in the SEC filings made available to the Plan and its Participants, and that information was incorporated into the price of the Fund shares. *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). The Supreme Court explained, the market is performing a substantial part of the valuation process performed by the investor in a face-to face transaction. The market is acting as the unpaid agent of the investor, informing him that given all information available to it, the value of the stock is worth the market price. *Id*. at 244 (quotations omitted). Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. *Id.* at 241-42 (quotations omitted). For

[18] The only subsequent case cited by the Defendants is *Del Rio* v. *Toledo Edison*, 2005 WL 1001430 (6th Cir., April 23, 2005). The Defendants' failure to comply with Sixth Circuit Rule 28(g) in their citation to this unpublished decision would be easier to understand if *Del Rio* actually advanced their argument. However, the case involved denial of specific benefits under ERISA to a particular person; the "fraud on the marketplace" theory was not even implicated in the case, much less discussed, analyzed, or decided. The court merely indicated in passing that reliance was an element of a misrepresentation claim under ERISA. Since the court found no misrepresentations, it never even reached the reliance issue or discussed the ways that reliance might be established. The only other ERISA cases cited by the Defendants are equally inapt. Neither *In re Unisys Corp. Retiree Med. Benefits Litig.*, 2003 U.S. Dist. LEXIS 1577 (E.D. Pa., Feb. 4, 2003), nor *Cerasoli* v. *Xomed*, 47 F. Supp.2d 401 (W.D.N.Y. 1999) were claims for plan-wide relief pursuant to Section 502(a)(2), and neither involved any "fraud-on-the-market" claims. *Compare In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d at 236 (Section 502(a)(2) claims may be brought on behalf of the Plan regardless of any role that individual participants in the decisionmaking process).

this reason, it does not matter whether the Plan or Participants relied on the allegedly misleading SEC filings because that information was already relied upon by the market in setting the price of Fund shares.

Just as a presumption of reliance supports the congressional policy embodied in the 1934 Act, *Id.* at 245, applying the market presumption to an ERISA case involving Plan-wide misrepresentations and omissions supports the legislative objectives of ERISA in protecting employee retirement assets by authorizing participants to bring suit on behalf of the Plan for Plan-wide relief. Indeed, where an employer seeks to cause a plan to invest in company stock, the duty to protect participants is even greater because of the influence companies could exert on their employees. *See* H.R. Conf. Rep. No. 1280, 93th Cong., 2nd Sess. 1974, 1974 WL 11542, *5086 (The conferees expect that the regulations will provide more stringent standards . . . where the investments may inure to the direct or indirect benefit of the plan sponsor since, in this case participants might be subject to pressure with respect to investment decisions.). Conversely, failure to apply the presumption in this case would render ERISA's plan-wide enforcement provisions and the protection afforded by the statute meaningless. *Cf*. *Basic*, 485 U.S. at 242 (This case required resolution of several common questions of law and fact. . . . proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action.).[20]

[20] Furthermore, all of the practical considerations for applying the presumption of reliance to securities cases apply to this context as well. Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult . . . Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed or if the misrepresentation had not been made would place an unnecessarily unrealistic evidentiary burden . . . . *Basic Inc.*, 485 U.S. at 245 (Citations omitted). In addition, [a]rising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties. *Id*. The same considerations apply to Plaintiffs Plan-wide claim for Defendants' breach of fiduciary duty to disclose.

Material misrepresentations and/or omissions have the same effect on a company stock fund as they do on the price of the company's publicly traded securities. Participants can be expected to rely on the integrity of the price of a company stock fund as a reflection of its value in exactly the same way that investors in a 10b-5 securities case do. *Basic*, 485 U.S. at 244-48. Indeed, under 29 U.S.C. 1002(18), ERISA defines "adequate consideration" as the price of the security prevailing on a national securities exchange."

Plainly, Congress expected that Participants would rely on the operation of the market to reflect and incorporate all available information into the price of investments in the Plan so that the market price is conclusively viewed as the fair price. Indeed, the presumption is more warranted in a case such as this seeking Plan-wide relief. Here, the Plan made the investments that are the subject of this action and the fiduciaries are liable for these imprudent investments. If a plan cannot be presumed to rely on its own fiduciaries, then no one should be presumed to rely. Consequently, as set forth above, ERISA relies on the same materiality principles applicable to the securities laws.

In addition, a failure to presume reliance makes no sense where, as here, the Plan, as opposed to the Participants, asserts the claim under ERISA § 502(a)(2). The Plan is a trust. *See* Profit Sharing and Retirement Savings Plan, p. 70 (July 1, 1998 and July 1, 2002), Defendants' Appendix, Exh. A and B). Just like any other trust, the Plan bought, sold and held all shares of the Common Stock Fund. Individual plan accounts are merely bookkeeping entries that do not buy or sell any shares of the Common Stock Fund. *See* Summary Plan Description, pp. 13-14, Defendants' Appendix, Exh. C ("The Committee and the Trustee will set up a *recordkeeping* Account in your name"; "[a]fter deducting withdrawals, distributions, and any expenses of Plan administration paid out of the Trust Fund, and adding all contributions made since the last Valuation Date, the gains or losses incurred by each specific investment fund . . . will be allocated proportionately among all Account Balances that are invested in that fund.") (emphasis added). Thus, the Plan engaged in all transactions at the Plan level. For example, if account A "bought" 100 shares of the Common Stock Fund and account B "sold" 100 shares on the same day, the Plan in effect "transferred" the shares from B to A by debiting one account and crediting another. No actual purchase or sale of Fund shares occurred. Since the Plan is the claimant under the section 502(a)(2) claim, the Plan should be presumed to rely on its own fiduciaries and the market. Indeed, if reliance is not presumed but is instead considered on a Participant by Participant basis, then the Plan would have to in effect split its claim and recover with respect to some but not all of its purchases, even though it is a single entity that makes those purchases.

Defendants' reliance arguments ignore the fact that Defendants, not the individual Participants, are deemed as a matter of law to have made Plan investment decisions. Under ERISA, fiduciaries are liable for all imprudent Plan investments selected by Participants unless the Plan complies with ERISA § 404(c), 29 U.S.C. § 1104(c). *In re Enron Corp. Securites, Derivative and "ERISA" Litig.*, 284 F. Supp. 2d 511, 574 (S.D. Tex 2003). To meet this burden, the Plan must provide to the Participants all material information about the financial condition and performance of Plan investments and developments which materially affect the financial status of investments. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 447 (3d Cir.), *cert. denied*, 519 U.S. 810 (1996). Since the Complaint alleges that Defendants failed to disclose material adverse information about Cardinal, it follows that the Plan did *not* comply with section 404(c), and thus Defendants are liable as a matter of law for Plan investments selected by Participants. Since the express language of ERISA holds that the fiduciary Defendants are deemed to have made all investment decisions, and Plan Participants are deemed to have made *no* investment decisions, it makes no sense to require a showing of individual reliance by Plan Participants, because individual reliance is irrelevant. More to the point, the Plan should be presumed to rely on Plan fiduciary representations with respect to Plan investments.

Reliance should also be presumed because, in a breach of fiduciary duty action, the focus of the Court is on the Defendants' actions, *not* the Participants' actions. *See In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 465 (E.D. Pa. 2000) (in an analogous action involving company stock held in a 401(k) plan, the court rejected defendants' argument that individual reliance issues prevented class certification, and stated "[d]efendants' position also ignores the fact that the appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs") (emphasis added). Consequently, the actions/inactions implicated by Plaintiffs' misrepresentation and omission claims illustrate Defendants' fiduciary breaches, *not* Participants' actions. *See Xcel Energy*, 312 F. Supp. 2d at 1182-83 (noting that the misstatements and omissions proffered by plaintiffs are mere "indicia of defendants' failure to take affirmative steps to protect the plan in breach of duties of prudence and loyalty and the duty to disclose"). Plaintiffs allege that Defendants materially misrepresented and failed to disclose the true financial health of Cardinal during the Class Period through filings with the SEC that were incorporated by reference in documents disseminated to *all* Plan participants uniformly through Plan-wide communications. *See* Compl. ¶¶ 93-95. Once a fiduciary issues misleading information regarding investment in a defined contribution plan, liability attaches. *See, e.g., In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 767 (S.D.N.Y. 2003) (denying motion to dismiss where defendant-fiduciary disseminated false information to plan participants). Individual Participants' "reliance" on these "Plan-wide" breaches is immaterial to the issue of Defendants' liability.

Even assuming, *arguendo*, that "reliance" is required, under basic trust law -- upon which ERISA is based [21] -- where a defendant-fiduciary's breach includes material misrepresentations and omissions, the trust beneficiary is presumed as a matter of law to have relied on such misrepresentations and omissions to his or her detriment. *See, e.g.*, Restatement (Second) Trusts § 216 (1959); *Roth* v. *Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994) (burden of proving causation of damages shifts to the defendant after the plaintiff has established a breach of fiduciary duty). The possibility that there may be some individual variations among Plan Participants regarding the effect of Defendants' misrepresentations is immaterial. *See AEP,* 327 F.Supp. 2d at 833 (upholding the allegation that "the Plan, and the Participants acting on behalf of the Plan, relied upon, and are presumed to have relied upon, Defendants' representations and nondisclosures to their detriment" on defendants' motion to dismiss over the exact same "individualized" reliance arguments raised here); *Xcel,* 312 F. Supp. 2d at 1182-83.[22]

V. Plaintiffs Have Adequately Pled Liability for Each Defendant

The remainder of the Defendants' motion contains arguments that one or another group or individuals should not be held liable. While each argument appears to be relatively insignificant, taken together they amount to an argument that no one is responsible for anything. This strategy has been tried

[21] *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985)(citations omitted).

[22] *See also Rankin* v. *Rotts,* 220 F.R.D. 511, 522-23 (E.D. Mich. 2004) ("Rankin's claims relate to defendants unitary actions with regard to the Plan. Defendants treated the entire class identically. Although there may be factual differences as to whether, in the case of voluntary employee contributions, a class member relied on any alleged misrepresentations, the alleged misrepresentations are alleged to have been made to the entire class of participants. This is not the case where defendants are alleged to have had individualized communications with a participant. Rather this is a case where defendants' *uniform communications* with its participants . . . forms the basis of Rankin's claims."); *In re CMS Energy*, 225 F.R.D. 539, 545-46 (E.D. Mich. 2004) (certifying a class of analogous plan participants bringing identical claims, including disclosure claims, and rejecting defendants' arguments that the disclosure claims required individualized analysis – the Court agreed with plaintiffs that the Plan-wide breach of fiduciary duty claim involved "failing to provide [material] information" regarding the true financial condition of the Company/Plan sponsor;" and cited *Rankin* for the proposition that "the appropriate focus is whether the alleged statements – or omissions – are asserted to have been made on a class-wide basis.").

before and it failed. *Rankin* v. *Rots*, 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003) ("To accept defendants' positions that they are not fiduciaries would mean that there was no one responsible for discretionary decision making. Their position is reminiscent of the 'old shell game.'"). It should fail again.

A. The Committee Defendants Are Liable for Misleading SEC Filings

Defendants argue that the Court should dismiss Count II (misrepresentation) as to the Committee Defendants because the Complaint does not allege that the Committee either knew or should have known the misleading information in the Company's SEC filings that they disseminated to Participants. Defendants' Brief, at 29. They are wrong.

When an ERISA fiduciary conveys information to plan participants, that fiduciary "has a duty under section 1104(a) to convey complete and accurate information . . . ." *AEP*, 327 F. Supp. 2d at 831, *quoting In re Unisys Sav. Plan Litig.*, 74 F.3d at 441, and *citing James* v. *Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 455 (6th Cir. 2002), *cert. denied*, 538 U.S. 1033 (2003). When ERISA fiduciaries incorporate SEC filings by reference in communications to plan participants, they have a duty to investigate and determine whether the information that they are incorporating is accurate. If they know *or have reason to know* that the information is inaccurate, they have breached their duty. *See, e.g., In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 881 (S.D. Tex. 2004) (finding "knew or should have known" allegations sufficient "because these allegations challenge the adequacy of the investigation that the . . . defendants undertook prior to distributing the" plan document that incorporated inaccurate SEC filings); *In re Enron Corp. Securites, Derivative and "ERISA" Litig.*, 284 F. Supp. 2d 511, 658-59 (S.D. Tex 2003) (finding sufficient allegations of failure to disclose "what they knew or should have known, through prudent investigation, was a threat to the pension plans or to correct any material misinformation"). Even the cases cited by the Defendants at pages 29-31 of their brief agree that the standard is whether the defendants "knew or should have known" the true state of affairs. *See Howell* v. *Motorola, Inc.*, 337 F. Supp. 2d 1079, 1100 (N.D. Ill. 2004) (declining to dismiss misrepresentation claim against defendant based on allegations that he knew or should have known that the information in attached SEC filings was misleading); *Crowley* v. *Corning*, 337 F. Supp. 2d at 230 (finding that the plaintiff had failed to allege that the defendants "participated in the dissemination of information they knew or should have known was misleading"); *Hull* v. *Policy Mgmt. Sys. Corp.*, 2001 WL 1836286, *9 (D.S.C., Feb. 9, 2001) (same).[23]

The Complaint adequately pleads that the Committee Defendants knew or, based on reasonable investigation, should have known, that the information that they were providing to Plan Participants was materially misleading. The Complaint alleges that the Committee Defendants – Miller, Adloff, Williams, Brandin, Rucci, Bennett, Watkins and Nelson – all held senior positions with Cardinal, and therefore they (and through them, the Plan Committee itself) knew or should have known about the undisclosed adverse information set out in the Complaint. Compl., ¶ 22. For example, Miller is alleged to be Executive Vice President, Chief Financial Officer and Principal Accounting Officer. Compl., ¶ 13. Watkins is also alleged to be an Executive Vice President. Compl., ¶ 19.[24] The alleged misrepresentations concern significant material facts about Cardinal's financial condition that senior management at Cardinal should have known.

[23] The Third Circuit case cited by the Defendants, *Horvath* v. *Keystone Plan E., Inc.*, 333 F.3d 450, 461-62 (3d Cir. 2003), does not address the applicable standard, as it only involved a claim that the defendant had failed to make an affirmative disclosure, *not*, as here, a claim that the Defendant had both failed to disclose truthful information, *and* affirmatively provided information that was false or misleading.

[24] While the titles and offices of the other Committee Defendants are not listed in the Complaint, according to information on Cardinal's website, all are or were senior officers of the company, holding the following positions: Defendant Adloff (Senior Vice President, Finance); Defendant Williams (Executive Vice President, Chief Legal Officer and Secretary); Defendant Brandin (Senior Vice President and Treasurer); Defendant Rucci (Executive Vice President, Human Resources); Defendant Bennett (Executive Vice President, General Counsel and Secretary); Defendant Watkins (Senior Vice President, Human Relations). If the Court believes that these additional facts are significant, the Complaint can be amended to include them.

Compl., ¶ 94. These allegations are virtually identical to those which were upheld by the *Dynegy* court. *See* 309 F. Supp. 2d at 881. Moreover, they are "a short and plain statement of the claim showing that the pleader is entitled to relief," and nothing more is required under Rule 8(a).

B. The Complaint Adequately Alleges Co-Fiduciary Liability

The Defendants next argue that the complaint fails to state a claim for co-fiduciary liability, based, once again, on an alleged lack of specificity: "The Complaint does not say what any specific defendant supposedly knew or concealed about the conduct of any other defendant, which is the necessary predicate for co-fiduciary liability."[25] Whether these findings are a "necessary predicate for co-fiduciary liability," however, is entirely beside the point; the question is whether the *pleading* of such particularized facts is required under Rule 8(a). Significantly, Defendants do not contest that the complaint fails to give them notice of the claim. They wrongly contend that Plaintiffs must plead the evidence that would be used to prove that claim. However, Plaintiffs are not required to do so. *See, e.g., In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 479-80 (S.D.N.Y. 2005) (Complaint which "closely tracks the statutory language" is sufficient); *citing WorldCom*, 263 F. Supp. 2d at 759. The decisions cited by the Defendants are simply not in conformity with the Sixth Circuit's admonition that "insistence on highly specific factual allegations disregards the concept of notice pleading and the standards for adjudicating a motion to dismiss." *Hill*, 409 F.3d at 721 n.5, nor are they consistent with the Supreme Court's decision in *Swierkiewicz* v. *Sorema, N.A.*, 534 U.S. 506 (2002). This Court denied a motion to dismiss virtually identical allegations of co-fiduciary liability in *AEP*, 327 F. Supp. 2d at 833, finding that they "amply put Defendants on notice."

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[25] Defendants' Brief, at 36-37, *citing* 29 U.S.C. § 1105(a). Defendants also argue that the Directors are not alleged to have been fiduciaries with respect to plan investments (Count I) or communications to plan participants (Count II), and therefore (they argue), the Directors cannot be liable under ERISA for the causes of action set forth in those counts. Defendants' Brief, at 32-36. Plaintiffs' claims against the Director Defendants in Counts I and II are based solely on their liability as co-fiduciaries; accordingly, the Plaintiffs will not address this argument separately.

The rationale for not following the Defendants' push to adopt fact pleading – apart from the fact that it is plainly inconsistent with the Federal Rules of Civil Procedure – is eloquently summarized by Judge Cohn's decision in *Rankin:* "[T]he manner in which each defendant, which are in the universe of possible decision makers, operated is for now something of a black box. To expect a plaintiff to be able to turn on the light and point to the particular individuals who exercised decision making authority is simply too much to require at this stage of the case." 278 F. Supp. 2d at 879. Co-fiduciary liability is adequately pled.

C. The Court Should Not Dismiss Count III

Defendants argue to dismiss Count III of the Complaint for the sole reason that Counts I and II fail to state a claim. However, for the reasons set forth above, Defendants' arguments with respect to Counts I and II are wrong. Accordingly, the Court should not dismiss Count III.

D. The Complaint Properly Alleges Respondeat Superior Liability

Defendants argue that Cardinal cannot be liable for the Directors' failure to monitor under the doctrine of *respondeat superior* because "there is no *respondeat superior* liability under ERISA." Defendants' Brief, at 38. However, Defendants admit that the Sixth Circuit considers this an open question, while other courts have supported the application of the doctrine in ERISA cases. *Id.* at 39-40.

Contrary to Defendants' arguments, *respondeat superior* makes perfect sense in an ERISA context. Courts have repeatedly interpreted ERISA to include common law agency principles. *Moriarty* v. *Glueckert Funeral Home, LTD.*, 155 F.3d 859, 866 fn.15 (7^{th} Cir. 1998) ("Because this case arises under ERISA . . . we look to the federal common law of agency to supply the governing principles of law"); *Anderson* v. *Int'l Union United Plant Guard Workers of Am.*, 150 F.3d 590, 592-93 (6th Cir. 1998) (In ERISA action, "we are guided by the law of agency as developed and interpreted as a matter of federal common law"); *Taylor* v. *Peoples Natural Gas Co.*, 49 F.3d 982, 988 (3d Cir. 1995) (Under ERISA, "we are governed by the law of agency"). Under the common law of agency, employers are liable for the torts of their employees. *See* Restatement of Agency (Second), § 219; *Cileck* v. *Inova Health Sys. Servs.*, 115 F.3d 256, 259-60 (4th Cir. 1997) (To determine the general common law of agency, the Supreme Court has "traditionally looked to sources such as the Restatement of Agency"), *cert. denied,* 522 U.S. 1049 (1998). As the Supreme Court stated over 75 years ago, "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy" than *respondeat superior*. *Gleason* v. *Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929).

Many courts have determined that *respondeat superior* applies in the ERISA context. *See Banistor* v. *Ullman*, 287 F.3d 394, 408 (5th Cir. 2002) (Clarifying that "[i]n the context of *respondeat superior* liability [under ERISA], the issue is whether the principal, by virtue of its de facto control over the agent, had control over the disposition of plan assets"); *National Football Scouting Inc.*, v. *Continental Assurance Co.*, 931 F.2d 646, 649-50 (10th Cir. 1991) (Applying *respondeat superior* and finding that question of fact concerning agency relationship precluded summary judgment on plaintiff's ERISA claim); *see also Meyer* v. *Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 563-64 (D. Md. 2003) (Applying *respondeat superior* and finding that employer, "having had de facto control over [its employee] also had control over the disposition of the plans' assets"), *aff'd*, 372 F.3d 261 (4th Cir. 2004); *Stanton* v. *Shearson Lehman/American Express*, 631 F. Supp. 100, 104-05 (N.D. Ga. 1986) (Applying *respondeat superior* to ERISA claim). Other courts, finding the matter to be in some doubt, have expressly declined to rule on the question in the context of a motion to dismiss. *Howell* v. *Motorola, Inc.*, 337 F. Supp. 2d 1079, 1095 (N.D. Ill., 2004); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 2004 WL 2903889, *5 (D.N.H., Dec. 2, 2004).

Defendants' subsidiary argument is that "it makes no sense under corporation law to say that a company "controls" its directors." Defendants' Brief, at 40. The case relied upon by the Defendants, *Arnold* v. *Soc'y for Sav. Bancorp*, 678 A.2d 533 (Del. 1996), found that the corporation could not be liable for directors' breach of fiduciary duties *which they owed to the corporation and shareholders*, because this would shift the cost of the breach from the directors to the shareholders, "the class harmed by the breach." *Id.*, at 540 (internal quotations omitted). Here, in contrast, the Director's fiduciary duty at issue is owed, not to the stockholders, but to the employees of the company who are participating in the company's retirement plan. That the cost should be borne by the corporation and its stockholders, as well as by the directors themselves, does not involve the same circularity that troubled the court in the *Arnold* case. Thus, the more normal rule, aptly summarized by Judge Easterbrook, remains applicable: "Corporations are liable for the acts of their officers and directors, not the other way 'round." *Citizens Elec. Corp.* v. *Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1021 (7th Cir. 1995). To establish that Cardinal is liable under *respondeat superior*, plaintiffs are only required to show that Cardinal's employees took the actions that caused the harm, and did so within the scope of their employment. *Hamilton* v. *Carrell*, 243 F.3d 992, 1001 (6th Cir. 2001).

E. The Complaint Adequately Identifies Susan Nelson As a Fiduciary

Defendants wrongly argue that all claims should be dismissed as to Susan Nelson on the grounds that the Complaint does not allege that she was actually a member of the Committee. Defendants' Brief, at 39-40. The Complaint alleges that Ms. Nelson was Cardinal's Vice President of Compensation and Benefits, and that she served as Secretary of the Committee from June to December of 2004. Compl., ¶ 20. The Complaint notifies Ms. Nelson that she is being sued because of her role on the Committee. Ms. Nelson may want to argue, as a factual matter, that she had no role in these decisions, but that is not a question best addressed at this stage in the proceedings. *AEP*, 327 F. Supp. 2d at 827 (determining fiduciary status is generally "inappropriate for a motion to dismiss"), *citing Rankin*, 278 F. Supp. 2d at 879, *In re Elec. Data Sys. Corp. "ERISA" Litig.*, 305 F. Supp. 2d 658, 665 (E.D. Tex. 2004), and *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 907-09 (E.D. Mich. 2004).

VI. THE RELIEF SOUGHT IN THE COMPLAINT IS FULLY AUTHORIZED BY ERISA

Defendants also argue that the Plaintiffs have improperly sought monetary damages in all three counts of the Complaint pursuant to Section 502(a)(3) of ERISA. Defendants' Brief, at 11-13.[26] The argument misconstrues the complaint.

Section 502(a)(3) gives plan participants the right to request appropriate equitable relief for breach of fiduciary duties. Defendants claim that "[n]one of the relief plaintiffs request can be fairly characterized as 'equitable.'" Defendants' Brief, at 12. This assertion is absurd. The Prayer for Relief requests statutory costs and attorney's fees, declaratory, injunctive, and equitable relief, and the imposition of a constructive trust on any amounts by which any Defendant was unjustly enriched. These are all clearly equitable remedies. *See, e.g., Mertens* v. *Hewitt Assoc.*, 508 U.S. 248, 256 (1993) (injunctions typically available in equity); *U.S.* v. *Mitchell*, 463 U.S. 206, 207 (1983) (describing declaratory and injunctive relief as equitable); *Great West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002) (describing constructive trust as equitable remedy). Defendants cite no case to the contrary; rather, they simply claim

[26] Defendants do not appear to challenge the Plaintiffs' authority, pursuant to Section 502(a)(2) of ERISA, to recover losses *on behalf of the Plan*. *See, e.g.,* Compl., ¶ 1(Plaintiffs "bring this action for Plan-wide relief on behalf of the Plan, and on behalf of a class of all Participants in the Plan ("the Class") for whose individual accounts the Plan purchased and/or held shares of" the Fund."); Compl., Prayer for Relief, ¶¶ a-i (requesting order compelling Defendants to pay all losses to the Plan resulting from their breaches, and "actual damages in the amount of any losses the Plan suffered, to be allocated among the Participants' individual accounts in proportion to the accounts' losses.").

that all the Plaintiffs are "really" seeking is money. The Prayer for Relief, rather than the Defendants' characterization of it, should govern.

CONCLUSION

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

DATED: October 11, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/James E. Arnold
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