UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PAUL SAUMER and WALTER A. SKALSKY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CLIFFS NATURAL RESOURCES INC., CLIFFS NATURAL RESOURCES INC. INVESTMENT COMMITTEE, NORTHSHORE MINING COMPANY, EMPLOYEE BENEFITS ADMINISTRATION DEPARTMENT OF NORTHSHORE MINING COMPANY, LAURIE BRLAS, TERRANCE M. PARADIE, P. KELLY TOMPKINS, JAMES D. GRAHAM, JAMES MICHAUD, MAURICE HARAPIAK, MARY BALAZS, MATT BITTNER, CAROLYN CHEVERINE, TIMOTHY K. FLANAGAN, TRACI FORRESTER, DON GALLAGHER, KURT J. HOLLAND, DWAYNE PETISH, STEVE RAGUZ, and JOHN DOES 1-10,

Defendants.

Case No. 1:15-CV-954-DAP

Judge Dan Aaron Polster

Magistrate Judge Kenneth S. McHargh

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Dated: December 16, 2015

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STATEMENT OF THE ISSUES

1. A unanimous Supreme Court recently instructed that ESOP prudence claims are "implausible as a general rule" when based on public information about the defendant company—because efficient stock markets incorporate all public information into the stock price and fiduciaries cannot be expected to outguess the market. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). Thus, the only way to pursue a prudence claim based on public information is for a plaintiff to allege facts tending to suggest that the market for the subject stock was not efficient, which plaintiffs have not tried to do here. Should the prudence claim be dismissed, to the extent it is based on public information?

2. When an ESOP prudence claim is based on allegations about non-public information, the Supreme Court says the plaintiff must allege an "alternative course of action" that would have been legal and that a reasonable fiduciary could not have concluded would have caused more harm than good to the ESOP. Here, plaintiffs propose an alternative course of action—barring Plan participants from making further investments in Cliffs stock (contrary to the Plan's express terms) and holding those contributions in cash or investing them in other alternatives in the Plan (contrary to the participants' investment directions)—that they say could have avoided losses, but those losses could not have been avoided without violating ERISA and/or the securities laws. And modifying plaintiffs' proposed course of action so that it would have complied with ERISA and the securities laws would have created an obvious danger of harming the value of Cliffs stock already in the Plan. Should the prudence claim be dismissed, to the extent it is based on non-public information?

3. The Complaint[1] does not allege any transaction between any defendant and the Plan, or any way in which any defendant received a benefit to the Plan's detriment. Black-letter law says that a fiduciary may own stock in her employer company. And the Complaint does not allege any specific misstatement by any defendant to any Plan participant. Should the claim for breach of loyalty be dismissed?

4. The Complaint is shot through with allegations that sound in fraud, but it never sets forth particularized facts to substantiate the fraudulent nature of a single specific alleged misstatement. And, rather than making allegations about the individual defendants' actions, it treats them as a single wrongdoing monolith. Should the Complaint be dismissed under Rule 9(b)?

5. Department of Labor regulations state that a named fiduciary is not liable under ERISA when the fiduciary responsibility at issue has been allocated not to that fiduciary but, rather, to another. 29 C.F.R. § 2509.75-8, FR-13. The Plan here does not allocate any responsibility for the Cliffs Stock Fund to the Investment Committee but, rather, allocates what responsibility that existed to a different named fiduciary. Additionally, the Officer Defendants' only responsibility under the Plan is to appoint members of the Investment Committee. And the Complaint's only allegation against Cliffs is that it is liable for the Officer Defendants' actions under the doctrine of *respondeat superior*—a doctrine that does not apply to ERISA fiduciary-duty actions. Should the Investment Committee and its members, the Officer Defendants, and Cliffs be dismissed as defendants?

[1] The Second Amended Complaint (Doc. #37).

SUMMARY OF ARGUMENTS

The recent landmark case of *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), disposes of this action. In *Dudenhoeffer*, the Supreme Court confronted for the first time a 401(k) stock-drop case like this one, and it encouraged district courts to make vigorous use of Rule 12(b)(6) and the *Twombly*/*Iqbal* standard to "divide the plausible sheep from the meritless goats" and "weed[] out meritless claims." 134 S. Ct. at 2470, 2471.

Specifically, the Court's unanimous decision taught that ERISA prudence claims based on public information are "***implausible as a general rule***." *Id.* at 2471 (emphasis added). When a stock trades on an efficient market, all public information about it is impounded into its price at any given time, and a fiduciary cannot be expected to outguess the market about the future direction of price movements. Just like any other investor, ESOP fiduciaries may rely on the market price as a reliable indicator of the stock's value: failing "to outsmart a presumptively efficient market . . . is . . . not a sound basis for imposing liability." *Id.* at 2471-72 (quoting *White v. Marshall & Ilsley Corp*, 714 F.3d 980, 992 (7th Cir. 2013)). Only where there are "special circumstances" suggesting that the stock trades in an inefficient market is there a chance for a prudence claim based on public information to proceed. Here, the Complaint makes no assertion that the market for Cliffs stock was inefficient. Thus the prudence claim fails to the extent it is based on public information.

To base a prudence claim on alleged non-public information, *Dudenhoeffer* requires that a plaintiff allege an "alternative course of action" that fiduciaries could have taken that both (1) would not have been illegal, and (2) would not have created a risk of harming the ESOP more than helping it. Plaintiffs here allege an alternative course of action—going against the Plan's express terms by suspending further investments in Cliffs stock and funneling participants' contributions into cash or other investments, against the participants' directions. But that

proposed alternative would have violated ERISA and/or the securities laws, because defendants could not have taken those alternative actions without simultaneously informing Plan participants and the market of the (unspecified) non-public information that plaintiffs say showed Cliffs stock to be a bad investment. And if defendants had disclosed that (unspecified) non-public information, it surely would have caused the price of Cliffs stock already in the Plan to fall (if it were as bad as plaintiffs suggest it was), thus harming the Plan. *Dudenhoeffer* forecloses plaintiffs' prudence claim, to the extent it is based on non-public information.

The claim for breach of the duty of loyalty under ERISA largely duplicates the ill-pled prudence claim. To the extent it tries to go beyond the prudence claim, it fails. The Complaint alleges no transactions of any kind between the Plan and any defendant, much less transactions that harmed the Plan or improperly benefitted any defendant. The allegations that defendants themselves owned Cliffs stock are inapposite, as it is well-established that an ERISA fiduciary may own stock in his employer. And to the extent plaintiffs hope to sustain a loyalty claim based on "lying," they cannot succeed, as the Complaint identifies no "lie" that any defendant told to any Plan participant, let alone on which any Participant relied.

As if more were needed, the Complaint violates Rule 9(b). Over and over, it charges defendants with purposely misleading Plan participants, but those allegations are wholly unparticularized. Finally, the Complaint names as defendants a number of persons and entities who had no fiduciary duties relating to the Cliffs Stock Fund. For that reason alone, those defendants do not belong in the case in the first place, and the claims against them should be dismissed.

PRELIMINARY STATEMENT

The Complaint is fundamentally flawed and should be dismissed. It rests on two theories of liability explicitly rejected by the Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*. The crux of the first theory is that the defendants were obligated to outguess the market—based solely upon public information—in predicting the future price of Cliffs stock. Multiple courts have recently dismissed complaints making this same allegation under similar, if not more plaintiff-friendly, circumstances. *See In re Citigroup ERISA Litig.*, __ F. Supp. 3d __, 2015 WL 2226291 (S.D.N.Y. May 13, 2015); *In re Lehman Brothers Securities & ERISA Litigation*, __ F. Supp. 3d __, 2015 WL 4139978 (S.D.N.Y. July 10, 2015); *Smith v. Delta Air Lines, Inc.*, 619 F. App'x 874 (11th Cir. 2015). Under plaintiffs' second theory, the defendants would have been forced to choose between, on the one hand, breaking the law and, on the other hand, disclosing non-public facts that plaintiffs never identify but assure us would have devastated the value of the Cliffs stock already held in the Plan. Because the plaintiffs' claims are squarely foreclosed by recent Supreme Court precedent, this case should proceed no further.

I. BACKGROUND

A. The Plan

The Northshore Mining Company and Silver Bay Power Company Retirement Savings Plan (the "Plan") is a defined contribution benefit plan—commonly referred to as a 401(k) plan—that covers employees of the Northshore Mining Company ("Northshore") and Silver Bay Power Company (together, the "Company"). The Company is a wholly-owned subsidiary of Cliffs Natural Resources Inc. ("Cliffs"), a Cleveland-based mining company.

Each Plan participant has his or her own account in the Plan. Ex. B § 5.1.[2] A participant contributes to the Plan by directing that a percentage of his or her paycheck be deposited into the participant's account. *Id.* § 4.1. The Plan also provides for the Company to make matching contributions. *Id.* § 4.2.

Investment choices are within participants' sole discretion. Participants have the authority to "direct the continuing investment of" all contributions "in any one or more of the investment categories specified [in the Plan] at any time." *Id.* § 6.2. A participant "may change future investment directions at any time," and may "direct the Trustee on any business day to sell any investments in the Participant's account, and . . . direct that the proceeds of such sale be invested in any one or more of the other investment categories." *Id.* at § 6.3.

The Plan provided a broad variety of investment alternatives. During the putative class period, participants could allocate their accounts across more than two dozen mutual funds. Ex. E at Northshore 000210 (listing investment alternatives). The investment choices included stock mutual funds, bond funds, and target-date funds, among others. *Id.* Participants also could choose to invest in a fund that held Cliffs stock. *Id.* The Plan required that one of the investment alternatives be a fund devoted exclusively to holding Cliffs stock. Ex. B §§ 6.1 ("The following investment categories *will* be offered: . . . Cliffs Stock Fund." (emphasis added)); 2.8 (providing that the Cliffs Stock Fund is to be "invested *solely* in Cliffs Stock" (emphasis added)). No participant was required to hold the Cliffs Stock Fund in his or her Plan account. [3]

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[2] References to Exhibits A through J are to the lettered exhibits to the Complaint. Exhibits K and L are attached to the Declaration of Geoffrey J. Ritts filed contemporaneously with this motion.

[3] Additionally, the Plan was structured to comply with 29 U.S.C. § 1104(c), which provides:

> In the case of a pension plan which provides for individual accounts and permits a participant . . . to exercise control over the assets in his account, if a participant . . . exercises control over the assets in his account . . . *no person who is otherwise a*

While the terms of the Plan required that the Cliffs Stock Fund be offered to participants, all other funds into which participants could invest were selected by the Investment Committee, within broad parameters set out in the Plan. *Id.* § 6.1. Selecting those other investment was the Investment Committee's only responsibility under the Plan. *Id.* The Committee was composed of five members, two appointed by Cliffs' chief financial officer, two by the chief human resources officer, and one by the general counsel. *Id.* § 2.19. In contrast to the narrow scope of the Investment Committee's mandate, the bulk of authority under the Plan was apportioned to the "Plan Administrator," the Employee Benefits Administration Department of Northshore Mining Company. *Id.* § 9.1 *et seq.*

B. Plaintiffs' Claims

Plaintiffs, one former and one current Northshore employee, were participants in the Plan. They chose to invest a portion of their individual accounts in the Cliffs Stock Fund during the putative class period (which runs from April 2, 2012 through "the present"), and allege that "the value of shares in Cliffs [s]tock within their respective Plan accounts diminished by several thousand dollars." ¶ 21.[4] Indeed, Cliffs has faced a number of challenges in recent years, and the price of its stock, like that of other major mining companies, has fallen considerably.[5]

(continued…)

> *fiduciary shall be liable under this part for any loss*, or by reason of any breach, which results from such participant's or beneficiary's exercise of control . . . ."

(Emphasis added). The summary plan description advised participants that "[t]his Plan is intended to comply with section 404(c) of . . . ERISA," and that, consistent with § 404(c), the Plan's fiduciaries "will not be liable for any losses that result directly from investment decisions made by the participant." *See* Ex. E at 4.

[4] All paragraph references are to the Complaint.

[5] A long-running bear market in commodities has adversely affected the entire mining sector. From their 2011 highs through December 15, 2015, shares of four of the "Big Five" global mining companies lost over three-quarters of their value: Anglo-American plc (-92%), Vale, S.A. (-91%),

Plaintiffs contend that, on April 2, 2012 or at some other unspecified point during the class period, the defendants—Cliffs, Northshore, and certain departments, officers, and employees of both—should have banned Plan participants from making further investments in Cliffs stock and forced them to sell the shares they already owned, despite the Plan language giving participants exclusive control over their investments and requiring that Cliffs stock be one of the Plan investment alternatives. Count I alleges that, by not banning participants from investing in Cliffs stock and not forcing a fire sale of all Cliffs stock in the participants' accounts, defendants violated their duty to manage the Plan's assets prudently. ¶ 47. Count II alleges that this same conduct constituted a breach of loyalty. ¶ 185. Count III is a piggyback claim, alleging that certain of the individual defendants breached a duty to monitor other defendants. ¶ 206.

II. ARGUMENT

In a recent landmark decision telling trial courts how to address ERISA stock-drop cases like this one, a unanimous Supreme Court emphasized that a motion to dismiss is an "important mechanism for weeding out meritless claims" alleging imprudent action by ESOP fiduciaries. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). It "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently." *Id.* (vacating finding that plaintiffs had stated a plausible imprudence claim based on continued investment in company stock). To avoid dismissal, plaintiffs must "raise a right to relief above the speculative level," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), by alleging

(continued…)

Glencore plc (-84.5%), and BHP Billiton Ltd. (-77%). Shares of the outperformer, Rio Tinto plc, dropped 63%. *See* Ex. K (2011-2015 Big Five share price charts).

facts showing "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint should be dismissed when it "pleads facts that are 'merely consistent with' a defendant's liability" but has not "nudged" the claim "across the line from conceivable to plausible." *Id.* at 678, 680 (citations omitted).

A. The Complaint Fails To State A Breach-Of-Prudence Claim.

ERISA "requires the fiduciary of a pension plan to act prudently in managing the plan's assets." *Dudenhoeffer*, 134 S. Ct. at 2463. ERISA defines prudence as acting "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).[6]

ERISA also requires the terms of a plan to be set forth in a written document, 29 U.S.C. § 1102(a)(1), and it imposes a duty on fiduciaries to obey the plan document. If a fiduciary does not act "in accordance with the documents and instruments governing the plan," he or she can be sued for that failure. 29 U.S.C. § 1104(a)(1)(D).

Congress has long encouraged the formation of ESOPs (for "employee stock ownership plans") like the Cliffs Stock Fund. ESOPs, as the name suggests, invest in the stock of the company that employs the plan participants. *Dudenhoeffer*, 134 S. Ct. at 2463. Congress "has written into law its 'interest in encouraging'" ESOPs. *Id.* at 2465. Specifically,

> [t]he Congress, in a series of laws [including ERISA] has made clear its interest in encouraging [ESOPs] as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all

[6] One aspect of prudence is the duty to diversify, but Congress has specifically exempted ESOP fiduciaries from this duty, recognizing that ESOPs are inherently undiversified, since they hold a single stock, that of the employer. 29 U.S.C. § 1104(a)(2).

> corporate employees. **The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat [ESOPs] as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.**

Tax Reform Act of 1976, § 803(h), 90 Stat. 1520, 1590 (emphasis added).

Many courts, including the Supreme Court, have identified a tension between Congress' policy of encouraging ESOPs and ERISA's requirement that fiduciaries follow the terms of their plans, on the one hand, and ERISA's duty of prudence, on the other. *Dudenhoeffer*, 134 S. Ct. at 2465-66. Until recently, a number of Circuits, including the Sixth, resolved this tension by applying a "presumption of prudence" in ESOP cases. *See, e.g.*, *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585 (6th Cir. 2012); *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011); *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). Under the presumption, "a fiduciary's decision to remain invested in employer securities [was] presumed to be reasonable," but a plaintiff could "rebut the presumption by showing that a prudent fiduciary acting under the similar circumstances would have made a different investment decision." *Pfeil*, 671 F.3d at 591 (citations and internal quotation marks omitted).

The Supreme Court recently took up these issues in *Fifth Third v. Dudenhoeffer*. *Dudenhoeffer* made a clean break from past appellate-court precedent, and laid out specific directions for how trial courts should address a motion to dismiss in an ESOP stock-drop case such as this one. *Dudenhoeffer* addressed both kinds of prudence claims advanced here: claims based on public information and claims based on non-public information. Under the Supreme Court's teachings in *Dudenhoeffer*, both of the plaintiffs' prudence claims here fail.

1. **There is no plausible prudence claim based on public information.**

Plaintiffs' first prudence claim is based on public information. They say that the defendants "could and should have concluded that Cliffs Stock was an imprudent retirement savings vehicle based solely upon public information." ¶ 139. That claim is incompatible with *Dudenhoeffer*. There, the Court concluded that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule." *Dudenhoeffer*, 134 S. Ct. at 2471. That is, "a fiduciary usually is not imprudent to assume that a major stock market provides the best estimate of the value of the stocks traded on it that is available to him." *Id.* (citation and internal quotation marks omitted). *Dudenhoeffer* dooms plaintiffs' prudence claim, to the extent it is based on public information.

There is good reason for the Supreme Court's rule. An efficient market incorporates all available information about a security into the share price and reflects the price that the most sophisticated financial institutions in the world are willing to pay for the stock. Therefore, "[m]any investors take the view that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information, and accordingly they rely on the security's market price as an unbiased assessment of the security's value in light of all public information." *Id.* (citation and internal quotation marks omitted). "ERISA fiduciaries . . . may, as a general matter, likewise prudently rely on the market price." *Id.* "In other words, a fiduciary usually is not imprudent to assume that a major stock market provides the best estimate of the value of [a] stock" and, accordingly, that it is prudent to buy, hold, or sell the stock at that price. *Id.* (internal quotation marks omitted).

The Court thus recognized the fundamental unfairness of requiring ESOP fiduciaries to try to outguess the market. And of sticking them between the proverbial rock and a hard place: if a fiduciary continues to hold the employer's stock and the stock's value decreases, he'll be sued for shirking the duty of prudence by failing to minimize losses; if he sells the stock and its value increases, he'll be sued for disobeying the plan documents. *See Dudenhoeffer*, 134 S. Ct. at 2470. The *Dudenhoeffer* rule that it is prudent to rely on the market price because that price incorporates all public information prevents the outsmart-the-market-or-get-sued approach the Court was concerned to avoid.

The rule is characterized as *general* for only one reason. It applies in all situations unless "special circumstances" are present. *Id.* at 2471. *Dudenhoeffer* defines "special circumstances" narrowly. To show "special circumstances," a plaintiff must show that the market for the employer's stock did not function efficiently, *i.e.*, it failed to render "an unbiased assessment of the security's value in light of all public information." *Dudenhoeffer*, 134 S. Ct. at 2741.

Here, plaintiffs do not and cannot show that the market for Cliffs' stock was broken such that it did not factor the "massive amounts of publicly-available information" about the company into the stock price. ¶ 3. More than that, plaintiffs *do not even allege* a market inefficiency, or any facts that would plausibly suggest that the market price for Cliffs stock was not a reliable indicator of its value in light of all public information.

And they hardly could. Cliffs stock was publicly traded on the New York Stock Exchange throughout the class period. *See* Ex. L (2012 10-K at 58; 2013 10-K at 58; 2014 10-K at 48).[7] "[T]he NYSE is a paradigmatic efficient market." *In re Moody's Corp. Sec. Litig.*, 274

[7] "[I]f public records refute a plaintiff's claim, a defendant may attach those documents to its motion to dismiss, and a court can then consider them in resolving the Rule 12(b)(6) motion without converting the motion to dismiss into a Rule 56 motion for summary judgment." *In re Omnicare, Inc. Sec.*

F.R.D. 480, 489 n.3 (S.D.N.Y. 2011); *see also, e.g.*, *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 442 (S.D. Ohio 2009) (NYSE "a recognized efficient market"). Cliffs also was part of the S&P 500—an index of the most heavily reported on and closely scrutinized companies—for the bulk of the class period. *See* Ex. L (10-K 2012 at 4; 10-K 2013 at 4). Because plaintiffs have alleged no facts to suggest that Cliffs did not trade in an efficient market, their prudence claim based on public information fails.

Faced with the rigorous requirements of *Dudenhoeffer* and the absence of facts suggesting market inefficiency, there is not much plaintiffs can do. In their 61-page Complaint, they make only a single token reference to *Dudenhoeffer*'s special circumstances requirement, baldly asserting that "Cliffs' deteriorating condition, evidenced by an exceptional amount of negative publicly available information" was "the kind of 'special circumstances'" required in *Dudenhoeffer*. ¶ 11. The Supreme Court made clear, however, that when it comes to a public-information-based claim, the "special circumstances" must be ones that "affect[] the reliability of the market price as an unbiased assessment of the security's value in light of all public information." *Dudenhoeffer*, 134 S. Ct. at 2472 (citation omitted). Plaintiffs here plead only that there was "an exceptional amount of negative publicly available information" on Cliffs, but they do not allege (or even suggest) that the market was incapable of digesting that public information.

In the same vein as this "exceptional amount of negative publicly available information" theory, plaintiffs also assert that Cliffs stock was simply "too risky an investment" to be in the

(continued…)

Litig., 769 F.3d 455, 466 (6th Cir. 2014); *see, e.g.*, *North Port Firefighters' Pension—Local Option Plan v. Temple-Inland, Inc.*, 936 F. Supp. 2d 722, 744 (N.D. Tex. 2013) (taking judicial notice of 10-K at motion-to-dismiss stage).

Plan—the "risk profile" theory. ¶¶ 9, 137. This allegation of riskiness likewise fails to suggest any market inefficiency and thus does not constitute a "special circumstance" under *Dudenhoeffer*. Under *Dudenhoeffer*, only "special circumstances . . . ***affecting the reliability of the market price***" can get a claim past a motion to dismiss. 134 S. Ct. at 2472. A fundamental premise of the efficient market theory on which *Dudenhoeffer* relies is that information about risk, along with all other public information about a stock, is incorporated into the stock price. *See, e.g.*, *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 5 n.7 (1st Cir. 2009) ("The efficient market theory hypothesizes that the best indicator of a stock's potential, *as well as its risks and liabilities*, is the price at which it is traded in the open market." (emphasis added)).

And the "risk" information to which plaintiffs point—from commodity prices to Z-scores to analyst opinions—was all public, as plaintiffs must acknowledge. ¶ 11 ("exceptional amount of negative publicly-available information" evidenced "serious deteriorating condition"). "[R]isk" based on public information "is accounted for in the market price." *In re Citigroup ERISA Litig.*, __ F. Supp. 3d __, 2015 WL 2226291, at *14 (S.D.N.Y. May 13, 2015). It is no wonder, then, that courts applying *Dudenhoeffer* have repeatedly rejected attempts to avoid a motion to dismiss by pleading riskiness. *See, e.g.*, *id.* at *7 (dismissing complaint and rejecting argument that "Citigroup stock was excessively risky and an imprudent investment option for the Plans" (internal quotation marks omitted)).

In re Lehman Brothers Securities & ERISA Litigation, __ F. Supp. 3d __, 2015 WL 4139978 (S.D.N.Y. July 10, 2015), is particularly instructive. Lehman did not merely experience serious financial difficulty—the company completely collapsed. *Id.* at *8. Plaintiffs, participants in Lehman's ESOP, sued asserting breach of the duty of prudence. Specifically, they alleged that "in light of public information available at the time, the sophisticated Defendant

fiduciaries should have concluded by no later than [several months before the collapse] that Lehman stock was far too risky for retirement savings and that they should have stopped purchasing additional shares and divested the Plan of its current Lehman stock holdings." *Id.* at *3 (internal quotation marks omitted). The complaint, like the one at bar, included descriptions of "ominous news articles," "rising costs," "downgrades from various ratings agencies," and "criticism from investment analysts." *Id.* at *5.

But the court, applying *Dudenhoeffer*, rejected plaintiffs' argument in its entirety, including the argument that public information showed Lehman Brothers stock to be too "risky" to be a prudent ESOP investment. *Dudenhoeffer*, the court said, "foreclose[s] breach of prudence claims based on public information, irrespective of whether such claims are characterized as based on alleged overvaluation or alleged riskiness of a stock." *Id.* at *6. The complaint was dismissed. *Id.* at *17.[8]

There was the same result—complete dismissal—in another recent, post-*Dudenhoeffer* case. In *In re Citigroup ERISA Litigation*, __ F. Supp. 3d __, 2015 WL 2226291 (S.D.N.Y. May 13, 2015), the plaintiffs brought ERISA claims after Citigroup's stock price dropped "precipitously," from $27.23 per share at the start of the class period to $0.97 at the period's close, a decrease of 96%. *Id.* at *1-2. The plaintiffs alleged that Citigroup had "set itself up for collapse through a heavy volume of risky bets on the subprime mortgage market," including by acquiring risky new business units. *Id.* at *5. The company was left "with significant losses and insufficient capital and liquidity to absorb those losses." *Id.* Information on the severity of the

[8] The court dismissed the *Lehman Brothers* complaint even though the plaintiffs came closer than plaintiffs do here to actually pleading "special circumstances." In *Lehman Brothers*, the plaintiffs pointed out that, in the lead-up to Lehman's collapse, the SEC had placed severe restrictions on short sales of its stock. *Id.* at *8. The plaintiffs argued, to no avail, that these restrictions "affect[ed] the reliability of the market price [of Lehman stock]." *Id.* at *3. There were no such restrictions during the class period on trading in Cliffs' stock.

subprime mortgage crisis "flooded the national news." *Id.* at *6. Citigroup announced "write-offs and losses of billions of dollars" and a large number of analyst firms "advised clients to sell Citigroup stock." *Id.* In light of all this, the plaintiffs argued, the defendant fiduciaries should have known that Citigroup was an "excessively risky and an imprudent investment option"—just as plaintiffs allege here. *Id.* at *7 (internal quotation marks omitted). The defendant fiduciaries, the plaintiffs said, should have "halt[ed] the purchase of additional Citigroup stock or divest[ed] the Plans of Citigroup stock." *Id.*

The court applied *Dudenhoeffer* and rejected every one of the plaintiffs' arguments. The court found that the plaintiffs had failed to identify "any 'special circumstance' that would render reliance on the market price imprudent." *Id.* at *14. Alleging that the stock was "excessively risky" didn't cut it. *Id.* As the court pointed out, "the plaintiffs in *Dudenhoeffer* claimed that the defendants should have known their company stock was 'excessively risky,' and the Supreme Court held that such an allegation was not sufficient to state a claim for a breach of the duty of prudence." *Id.* (citing *Dudenhoeffer*, 134 S. Ct. at 2464, 2473).[9] Risk, even "excessive" risk, is accounted for in the market price. *Id.* *See also Pfeil v. State St. Bank and Trust Co.*, 806 F.3d 377, 386 (6th Cir. 2015) (relying on this section of the *Citigroup* decision). Defendants, the court said, had been between *Dudenhoeffer*'s "rock and a hard place;" the "general rule

[9] In *Dudenhoeffer*, the Sixth Circuit had sustained the plaintiffs' complaint based on allegations that Fifth Third had made "risk[y] . . . investments" in the subprime market, "and that such risks made Fifth Third stock an imprudent investment." *Id.* at 2472 (quoting *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410, 419-20 (6th Cir. 2012)). In unanimously vacating the Sixth Circuit judgment, the Supreme Court wrote that "[t]he [Sixth Circuit] decision to deny dismissal . . . appears to have been based on an erroneous understanding of the prudence of relying on market prices," *id.*—thus rejecting the precise "risk" argument plaintiffs advance here.

rendering suits implausible when they allege that the fiduciaries should have been able to beat the market" applied. *Id.*[10]

Cliffs stock was publicly traded in a quintessentially efficient market. At any given moment, the Plan fiduciaries were entitled to rely on the market price of Cliffs stock as a prudent price at which to buy, hold, or sell, and as a matter of law were not required to try to forecast what the next day, week, month, or year would bring by way of a new price. Plaintiff is completely unable—indeed, has barely even tried—to plead special circumstances suggesting the market for Cliffs stock was inefficient. Under *Dudenhoeffer*, plaintiffs' prudence claims based on public information must fail.

2. <u>There is no plausible prudence claim based on non-public information.</u>

Plaintiffs also argue in Count I that maintaining the Cliffs Stock Fund was imprudent based on *non*-public information available to defendants. Under *Dudenhoeffer*, this argument—monikered by these plaintiffs as the "artificial inflation" theory—fails as well.

The claim suffers from a threshold fatal flaw: *Plaintiffs never say what the supposedly crucial non-public information was* that would have turned an otherwise acceptable investment into an imprudent one. They never allege precisely what fact(s) it was that the market didn't know and that defendants supposedly did know and should have acted upon. The only specific

[10] Similar to *Lehman Brothers* and *Citigroup*, in *Smith v. Delta Air Lines, Inc.*, 619 F. App'x 874 (11th Cir. 2015), the Eleventh Circuit reaffirmed dismissal of an ESOP suit remanded to it in light of *Dudenhoeffer*. Plaintiff alleged "that the fiduciaries imprudently invested in Delta securities in the face of disappointing financial performance, loss in competitive advantage, and *concerns about Delta's ability to survive in the industry*." *Id.* at 875 (emphasis added). Relying on *Dudenhoeffer*'s statements that "allegations based on over- or undervaluing the stock are implausible as a general rule" and that "a fiduciary usually is not imprudent to assume that a major stock market provides the best estimate of the value of the stocks traded on it," the court held that the plaintiff's claim "f[e]ll[] squarely within the class of claims the Supreme Court deems 'implausible as a general rule.'" *Id.* at 876 (citations and some internal quotation marks omitted). The court rejected the notion "that the Delta fiduciaries should have foreseen that Delta stock would continue to decline." *Id.*

data the Complaint identifies were indisputably public: the market price of iron ore, the content of Cliffs' earnings calls and SEC filings, Bloom Lake's production costs per ton, Altman Z-scores, etc. *See, e.g.*, ¶¶ 8, 86, 105, 109, 147, 152. Plaintiffs go to considerable lengths to emphasize the "massive amounts of publicly-available information" on every negative aspect of Cliffs' business the Complaint identifies. ¶ 3. *See Citigroup*, 2015 WL 2226291, at *14 (rejecting allegations that "the nonpublic information pertained to Citigroup's financial condition, subprime exposure, and insufficient liquidity levels" because "plaintiffs also allege[d] that information regarding all of these subjects was 'widely publicized'"). The failure to identify any specific item of non-public factual information that the defendants allegedly knew and that made an otherwise prudent investment imprudent prevents this claim from clearing the plausibility hurdle, just as it did in *Citigroup*. *See id.* at *14 n.13 (dismissing non-public information claim in light of fact plaintiffs "fail[ed] to allege any material nonpublic information").

Moreover, even if the Complaint <u>had</u> identified some specific non-public fact that the defendants knew and should have acted upon, the prudence claim based on non-public information still would fail under *Dudenhoeffer*. To state a prudence claim based on non-public information, a plaintiff must clear two high hurdles. <u>First</u>, "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws." *Dudenhoeffer*, 134 S. Ct. at 2472. In this regard, "courts should consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Id.* at 2473. <u>Second</u>, a plaintiff must also

"plausibly allege[] that a prudent fiduciary in the defendant's position ***could not have concluded*** that" the alternative action "would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.* (emphasis added). That is, the plaintiff must adequately allege that ***no prudent fiduciary*** could conceivably have reached the conclusion to continue holding the company stock.

Plaintiffs offer a course of action that they claim satisfies their legal-alternative obligation under *Dudenhoeffer*. They allege defendants should have barred Plan participants from making further investments in Cliffs stock (contrary to the express terms of the Plan) and should have either held those contributions in cash or invested them in other alternatives in the Plan (contrary to the participants' investment directions). ¶ 97 ("Defendants . . . should have[] directed that all . . . contributions to the Company Stock fund be held in cash rather than be used to purchase Cliffs Stock."); ¶ 98 ("Defendants . . . should have . . . directed that contributions be diverted from Company Stock into other (prudent) investment options."). That allegation doesn't work.[11]

Plaintiffs are flat wrong to suggest that defendants were free to (1) unilaterally freeze new investment in Cliffs stock without notice and disclosure to participants and the market and (2)

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[11] Plaintiffs don't appear to allege that defendants should have sold Cliffs stock based on supposed material, non-public information. Nor could they. That course of action would have been illegal. *Dudenhoeffer*, 134 S. Ct. at 2472 ("Federal securities laws are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information." (citation and quotation marks omitted)). The Supreme Court expressly held in *Dudenhoeffer* that ERISA does not require plan fiduciaries to violate the securities laws: "ERISA's duty of prudence cannot require an ESOP fiduciary to perform an action—*such as divesting the fund's holding of the employer's stock on the basis of inside information*—that would violate the securities laws." *Id.* (emphasis added).

And to the extent plaintiffs suggest that the same defendants who supposedly had non-public information should have put the non-public information out of their minds and sold based on public information alone (¶ 216), their suggested course of action still would have involved a violation of the securities laws. The SEC has made clear through Rule 10b5-1 that an insider unlawfully trades "on the basis of" material nonpublic information whenever he or she makes trades while "aware" of such information. 17 C.F.R. 240.10b5-1(a)-(b). In other words, once an insider becomes "aware" of material non-public information about a security, he may not lawfully sell (or direct the sale of) that security, regardless whether he or she has other reasons to sell.

either hold contributions in cash or invest them in other funds. To effectuate a freeze on further investments in Cliffs stock, ERISA would have required the plan administrator first "to notify the plan participants" "[i]n advance of the commencement of [the] blackout period." 29 U.S.C. § 1021(i)(1). The notice would have had to include "(i) *the reasons for the blackout period*, (ii) an identification of the investments and other rights affected, (iii) the expected beginning date and length of the blackout period, [and] (iv) . . . a statement that the participant or beneficiary should evaluate the appropriateness of their current investment decisions in light of their inability to direct or diversify assets credited to their accounts during the blackout period." 29 U.S.C. § 1021(i)(2)(A) (emphasis added).

Plan fiduciaries, therefore, could not, as plaintiffs allege, simply have "held [the contributions earmarked for Cliffs stock] in cash." ¶ 97. Rather, if Plan fiduciaries had decided to ignore the Plan's terms and forbid further investments in Cliffs stock, ERISA would have required them to provide *advance* notice to participants that such investments would be frozen, along with the *reasons for the freeze*—*i.e.*, the non-public facts that supposedly turned Cliffs into an imprudent investment.

At that point, SEC Regulation FD would have required the defendants simultaneously to disclose *to the public* the non-public information made known to Plan participants as part of the decision to freeze the Cliffs Stock Fund.[12] Absent simultaneous disclosure, the Plan's fiduciaries would have been in plain violation of Regulation FD and also would have been exposed to

[12] Regulation FD provides that "[w]henever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person . . . , the issuer shall make public disclosure of that information . . . (1) [s]imultaneously, in the case of an intentional disclosure." 17 C.F.R. § 243.100(a).

liability[13] under other federal securities laws, including Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, for selectively disclosing material, non-public information to Plan participants to the detriment of the larger investing public. *See, e.g.*, *SEC v. Obus*, 693 F.3d 276, 285 (2d Cir. 2012) ("Section 10(b) and Rule 10b-5 also reach situations where the insider or misappropriator tips another who trades on the information.").

As noted, plaintiffs never identify exactly *what* material, non-public facts supposedly pushed Cliffs stock over the edge into imprudence, but we do know that plaintiffs allege it would have amounted to an assertion that "Bloom Lake was an unmitigated disaster and money pit." ¶ 7. Accepting plaintiffs' hypothesis for this branch of its argument—namely, that the supposedly "massive amounts of publicly-available information" showing Cliffs' "seriously deteriorating condition" was an insufficient picture—a prudent fiduciary certainly could have concluded that declaring Bloom Lake to be "an unmitigated disaster and money pit" would cause Cliffs' stock price to fall and do more harm than good to the Cliffs Stock Fund. In such a circumstance, a disclosure of that kind would have done tremendous damage to the value of shares already held in the Cliffs Stock Fund, and a reasonable fiduciary readily could have concluded that such actions "would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Dudenhoeffer*, 134 S. Ct. at 2473.[14]

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[13] That is, both civil *and criminal* liability. *See United States v. Laurienti*, 611 F.3d 530, 537 (9th Cir. 2010) ("Violations of section 10(b) and Rule 10b-5 can give rise to both civil liability and criminal liability.").

[14] Of course, if a "money pit" declaration were <u>not</u> to have caused damage to the Plan in the form of a price decline, that could only be because it added nothing material to what had already been in the public domain and impounded into the stock price, which then takes us back to the <u>public</u> information prong of their Complaint, treated and disposed of earlier.

Plaintiffs' non-public information claim fails to satisfy either of the requirements that *Dudenhoeffer* put in place to "weed[] out meritless claims" at the motion-to-dismiss stage. *Id.* at 2471. The alternative course of action they suggest would have been illegal without simultaneous public disclosure of the (unspecified) non-public facts driving the decision. And Plan fiduciaries readily could have concluded that forbidding further investment in Cliffs stock—and publicly disclosing the (unspecified) dire non-public facts requiring such extreme action—would cause a severe decline in the value of the Cliffs shares already in the Plan. Accordingly, under *Dudenhoeffer*, any duty-of-prudence claim based on non-public information must be dismissed. [15]

B. <u>The Complaint Fails To State A Breach-Of-Loyalty Claim.</u>

Just as the prudence claim in Count I fails, so too does Count II for breach of the fiduciary duty of loyalty under ERISA.

First, the loyalty claim largely duplicates the ill-pled prudence claim. Thus, plaintiffs allege it was *disloyal* to offer an *imprudent* investment, melding the two claims into one. *See* ¶ 6 ("The thrust of plaintiffs' allegations under Counts I (breach of the duty of prudence) ***and*** II

[15] In addition to the alternative course of action addressed above, plaintiffs mention three other alternatives in passing, via bullet points in paragraph 101 of the Complaint. Defendants, plaintiffs say, could have (1) "sought guidance from the DOL or SEC as to what they should have done"; (2) "resigned as Plan fiduciaries"; or (3) "retained outside experts to serve either as advisors or as independent fiduciaries specifically for the Plan." Option (1) is merely a clever way of stating that plaintiffs don't have any viable alternative to what the Plan fiduciaries actually did—and therefore defendants should go ask someone else for ideas. There is no suggestion of what the Department of Labor or SEC would (or could) have done that would have made any difference. Regarding option (2), resigning as Plan fiduciaries would not have solved the problem, either, as ERISA requires the position of Plan fiduciary always to be filled by *someone*, and (as is also the case with (3), the "outside experts" option) plaintiffs allege no facts showing that a mere shuffling of personnel would have avoided the losses over which they sue. Indeed, the Complaint alleges *no* facts showing that a successor fiduciary or independent fiduciary could not have relied on the market price of Cliffs stock under *Dudenhoeffer*. Further, the securities laws would have barred defendants from tipping off any new fiduciaries to material inside information so that they might trade on it. *See, e.g.*, *Obus*, 693 F.3d at 285.

(*breach of the duty of loyalty*) is that Defendants allowed . . . investment . . . in Cliffs Stock . . . despite the fact that they knew or should have known that that *investment was imprudent*." (emphasis added)); ¶ 185 (alleging "fiduciary breaches [*of loyalty*] against [defendants] for continuing to allow the investment of the Plan's assets in Cliffs Stock . . . despite the fact that they knew or should have known that such *investment was imprudent*." (emphasis added).). Because the Complaint does not adequately allege imprudence, the loyalty claim based on an allegedly imprudent investment likewise fails.

Second, plaintiffs never adequately plead a loyalty claim separate from their inadequately-pled prudence claim. The Complaint does not allege, for instance, any self-dealing between any defendant and the Plan. There are no allegations of any transaction between any defendant and the Plan that caused either a detriment to the Plan or a benefit to a defendant. The closest plaintiffs come is alleging that certain defendants owned Cliffs stock and that "[b]ecause of [their] ownership in Cliffs Stock these Defendants had a conflict of interest which put them in the position of having to choose between their own interests . . . and the interest of the Plan Participants." ¶ 195. But the law is clear that it is no breach of loyalty for a Plan fiduciary also to hold company stock. *E.g.*, *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 866 (N.D. Ohio 2006) ("[A] conflict of interest does not exist simply because a fiduciary holds company stock."); *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 987-88 (C.D. Cal. 2004) (rejecting stock-owner-loyalty-breach theory: "Under this theory, corporate defendants would always have a conflict of interest."). To the contrary, "[a]s opposed to creating a conflict, compensation in the form of company stock aligns the interests of plan fiduciaries with those of plan participants." *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842, 849 n.6 (S.D. Ohio 2009).

The Complaint also fails to state a loyalty claim arising out of disclosures to Plan participants. Plaintiffs state the obvious—that "lying is inconsistent with the duty of loyalty"—and allege, on information and belief, that defendants had "communications with the Plan's participants in which they omitted or misrepresented information" about the Cliffs Stock Fund. ¶¶ 188, 190. But that's the extent of it. Plaintiffs *never* identify any specific communication directed to *any* Plan participant that was false or misleading. Nor do they state what fact or facts were misstated or misrepresented, let alone the details surrounding any alleged misstatement (*e.g.*, the specific communication at issue, the date it was made, the specific statement alleged to be incomplete or false, or why it was incomplete or false). *See Kococinski v. Collins*, 935 F. Supp. 2d 909, 920 (D. Minn. 2013) (for a loyalty claim to survive a motion to dismiss, plaintiff "must plead facts that would at least support a reasonable inference that the directors knew that the statements were false and misleading when issued"); *Noble v. AAR Corp.*, No. 12-CV-7973, 2013 WL 1324915, at *5 (N.D. Ill. Apr. 3, 2013) ("To establish a breach of the duty of disclosure[,] Plaintiff must allege that facts are missing from the statement, identify those facts, state why they meet the materiality standard and how the omission caused injury."). Compounding the problem for plaintiffs, the Complaint also never alleges that plaintiffs (or any other Plan participants) ever saw—let alone relied upon—any specific misstatement. *See Del Rio v. Toledo Edison Co.*, 130 F. App'x 746, 751 (6th Cir. 2005) ("[T]o establish a claim for a breach of a fiduciary duty under ERISA based on a material misrepresentation, a plaintiff must show: (1) that the defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that these constituted material misrepresentations; and (3) *that the plaintiff relied on those misrepresentations to his or her detriment*." (internal quotation marks omitted)).

C. The Complaint Violates Fed. R. Civ. P. 9(b).

The entire Complaint also should be dismissed for the independent reason that it fails to meet the pleading standard in Fed. R. Civ. P. 9(b): "In alleging fraud . . . , a party must state *with particularity* the circumstances constituting fraud." (Emphasis added). Given the Rule's stringent pleading requirements for fraud-based claims, it is no wonder that plaintiffs meticulously avoid use of the word "fraud" anywhere in the Complaint. But simply avoiding the magic word provides no relief from Rule 9(b)'s requirements. Rather, Rule 9(b) applies to any and all claims that sound, or are grounded, in fraud. *E.g.*, *Smith v. Bank of Am. Corp.*, 485 F. App'x 749, 752 (6th Cir. 2012); *Developers Diversified Realty Corp. v. Vidalakis*, No. 06-CV-234, 2008 WL 5705708, at *14 (N.D. Ohio Feb. 14, 2008) ("Defendants' claim clearly sounds in fraud. Accordingly, Rule 9(b) applies.").

Here, the entire Complaint sounds in fraud. Throughout, it repeatedly alleges that defendants knowingly made false statements to, or otherwise misled, investors, including Plan participants. *See, e.g.*, ¶ 7 ("Defendants falsely claimed [Cliffs' dividend increase] was sustainable."); ¶ 90 ("[T]he Company, through its officers[,] falsely represented that the dividend was extremely sustainable."); ¶ 92 (alleging "deception"); ¶ 95 (alleging "concealment of the truth"); p. 27 ("Defendants Continued to Hype Cliffs Stock Instead of Protecting the Plan"); ¶ 103 (alleging "false assur[ances]"); ¶ 105 ("continued to mislead the public"); ¶ 111 ("concealing . . . knowledge from the public"); ¶ 116 ("deception from the start").

Though awash with allegations sounding in fraud, the Complaint doesn't come close to meeting Rule 9(b)'s particularity requirement. "In order to satisfy Rule 9(b) when pleading a fraud claim, a plaintiff's complaint must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Wilson v. HSBC Bank, N.A.*, 594 F. App'x

852, 856 (6th Cir. 2014) (internal quotations and citation omitted). *See also U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 643 (6th Cir. 2003) ("In complying with Rule 9(b), a plaintiff, at a minimum, must allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." (internal quotation marks omitted)). But not once does the Complaint link a specific statement to specific information known to a given defendant. Not once does it explain how any such specific information contradicted a public statement by any defendant.

Additionally, the Complaint lumps all the defendants together in plain contradiction of Rule 9(b). In fact, of the 15 individual defendants whom plaintiffs are suing, a full 13 are *never mentioned once* by name in the Complaint's substantive allegations.[16] Not only that, but examination of the introductory paragraphs identifying them shows a dizzying variety of starting and ending dates for their tenures. ¶¶ 32-43, 48, 53. This mélange shows that plaintiffs have not just chosen to omit particularized factual allegations showing that any particular statement was known by a defendant to have been false at the time it was uttered; they have also taken the still-more-audacious step of *declining even to identify the individual defendants* they accuse of

[16] The two exceptions are Mr. Paradie and Ms. Brlas. Mr. Paradie is mentioned substantively in paragraphs 105 and 112, but neither paragraph alleges that his statements were false. Ms. Brlas is mentioned substantively in paragraphs 86, 89, 103, and 118. As with Mr. Paradie, two of these paragraphs merely purport to quote Ms. Brlas without alleging any sort of falsehood. And the other two still don't get plaintiffs anywhere. Plaintiffs merely allege—regarding Ms. Brlas's statement in paragraph 89 that the increased dividend was extremely sustainable—that "[i]n reality, [she] . . . knew this was not the case." No particularized facts—indeed no facts at all—are alleged to support that cursory conclusion. The other reference, in paragraph 118, is likewise bereft of particularity: "[T]he Company, through its officers, including Defendant Brlas, made misleading and inaccurate statements regarding the potential of Bloom Lake to provide much needed cash for the Company."

"false[hood]" and "conceal[ment]."[17] ¶¶ 7, 111; *e.g.*, *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551 (6th Cir. 2012) (affirming dismissal of "plaintiffs' claims for breach of ERISA fiduciary duty" in part because complaint "fail[ed] to allege the speaker of the alleged statements, instead referring vaguely only to 'defendants,' of which there are many in this case," in violation of Rule 9(b)); *In re Gen. Motors ERISA Litig.*, No. 05-71085, 2007 WL 2463233, at *4 (E.D. Mich. Aug. 28, 2007) ("Although Plaintiffs refer to Defendants collectively throughout this portion of the Complaint, it is insufficient for Rule 9(b) purposes to do so. Rather, Plaintiffs must identify the specific defendant, or defendants, who are alleged to have made each misstatement, as a blanket allegation against all defendants will not suffice.").

D. Because The Primary Liability Claims Fail, The Co-Fiduciary Monitoring Claims Fail As Well

Count III, plaintiffs' claim for co-fiduciary liability for failure to monitor, necessarily fails, as that claim depends upon an adequately-pled claim for primary fiduciary liability, which the Complaint lacks. The ERISA section governing plaintiffs' duty-to-monitor claim provides:

> In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a ***breach of fiduciary responsibility of another fiduciary*** with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, ***an act or omission of such other fiduciary***, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such ***other fiduciary to commit a breach***; or

[17] As the Court may recall, when it directed plaintiffs to file this Complaint, it told them to make the pleading clear as to the basis for liability of each person named as a defendant. Plaintiffs' continued approach of lumping all the "Defendants" together with virtually no distinction flouts that request.

> (3) if he has knowledge of ***a breach by such other fiduciary***, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a) (emphasis added). The statute itself thus requires an underlying primary breach by another fiduciary to subject a fiduciary to secondary liability. As shown above, plaintiffs' primary breach claims—for breach of the duties of prudence and loyalty—must be dismissed. Thus, the failure-to-monitor claims must be dismissed as well. *E.g.*, *Lehman Brothers*, 2015 WL 4139978, at *13 ("The duty to monitor claim . . . fails because the [complaint] fails to allege plausibly any primary breach of fiduciary duty."); *Citigroup*, 2015 WL 2226291, at *15 ("Claims for breach of the duty to monitor and for co-fiduciary liability require antecedent breaches in order to be viable."); *Schmalz v. Sovereign Bancorp, Inc.*, 868 F. Supp. 2d 438, 460 (E.D. Pa. 2012) (viability of failure-to-monitor and co-fiduciary claims is "dependent upon a breach of fiduciary duty. Because I find that the complaint fails to adequately plead such a breach, the derivative claims will be dismissed as well.").

Besides, there are no facts pled to support a conclusion that anyone failed in a monitoring duty. There are no allegations that committees failed to meet, that reports were not prepared or received, or the like. Merely reciting the legal standard and asserting that the "Officer Defendants" violated it is not enough to push a claim over the line from conceivable to plausible. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [to meet Rule 8's pleading requirements]." (citing *Twombly*, 550 U.S. at 555)).[18]

[18] To the extent plaintiffs seek to construct a monitoring claim on an alleged violation of a "duty to inform" other fiduciaries of material non-public information (more accurately described as a "duty to tip"), that attempt goes nowhere. *E.g.*, ¶¶ 205-06. Tipping another fiduciary to material inside information so that that fiduciary could trade on it would squarely violate the securities laws. *See, e.g.*, *Obus*, 693 F.3d at 285 ("Section 10(b) and Rule 10b-5 [*i.e.*, the securities laws barring inside trading] also

E. <u>**Northshore Mining Company And The Employee Benefits Administration Department Of The Northshore Mining Company Are The Only Defendants Whose Fiduciary Capacity Is Adequately Pled.**</u>

In addition to the arguments above that require dismissal of the whole case, there are separate, individualized grounds to dismiss many of the defendants from the case, too. Plaintiffs fail adequately to plead a relevant fiduciary capacity as to virtually all defendants. For this reason, all the defendants except Northshore and the Employee Benefits Administration Department of Northshore ("Benefits Department") must be dismissed from the suit.

1. <u>**Investment Committee**</u>

The Complaint names as defendants the Cliffs Natural Resources Inc. Investment Committee ("Investment Committee") and certain members of the Investment Committee—defendants Balazs, Bittner, Cheverine, Flanagan, Forrester, Gallagher, Harapick, Holland, Michaud, Paradie, Petish, and Raguz. ¶¶ 26-44. But the Complaint fails to allege any facts to support the conclusion that the Investment Committee had any fiduciary responsibility with regard to the Cliffs Stock Fund.

To the contrary, the Plan makes clear that the Investment Committee's sole responsibility was to pick which investment funds *in addition to the Cliffs Stock Fund* would be offered as investment options to Plan participants. Ex. B § 6.1(a). The Cliffs Stock Fund was mandatory under the Plan; the Investment Committee lacked any authority with regard to it. And even if the

(continued…)

reach situations where the insider or misappropriator tips another who trades on the information."). That is why the "duty to inform" theory has been directly rejected in post-*Dudenhoeffer* decisions. *See In re BP plc Sec. Litig.*, No. 4:10-CV-4214, 2015 WL 6674576, at *9 (S.D. Tex. Oct. 30, 2015) ("ERISA does not impose a duty on monitoring fiduciaries to keep their appointees apprised of material, non-public information."); *Lehman Bros.*, 2015 WL 4139978, at *14 ("ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information. The Court therefore dismisses [plaintiffs'] duty to inform claim because it is impermissible as a matter of law.").

Fund were not mandated under the Plan, the Investment Committee would have no responsibility for it, since it was outside the strictly limited responsibilities the Plan apportioned to the Committee. This is only substantive reference to the Investment Committee in the entire Plan:

> The following investment categories will be offered:
>
> (a) Any . . . investment . . . made available to the Plan which the Investment Committee selects under the terms of the plan; and
>
> (b) Cliffs Stock Fund.

Ex. B § 6.1.[19] Plaintiffs do not plead any facts supporting the conclusion that the Investment Committee did indeed have authority over the Cliffs Stock Fund. *Cf.* ¶ 28 (unsupported legal conclusion that "[t]he Investment Committee . . . w[as] required to prudently select and monitor the Plan's investment options, including Cliffs Stock").

In contrast to the Investment Committee's narrow mandate, the Plan allocates to the Benefits Department, as Plan Administrator, "all the powers and authority as may be necessary to carry out the provisions of the Plan, including the discretionary power and authority to interpret and construe the Plan." Ex. B. § 9.3(a). All responsibility under the Plan—other than the responsibility of picking funds to supplement the Cliffs Stock Fund—thus is allocated to the Benefits Department, *not* to the Investment Committee. Together, the Investment Committee, the Benefits Department, and Northshore are the Plan's "named fiduciaries." Ex. B. § 8.2.

"If named fiduciaries of a plan allocate responsibilities in accordance with a procedure . . . set forth in the plan, a named fiduciary will not be liable for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities which have been allocated to them, except [in certain situations not applicable here]." 29 C.F.R. § 2509.75-8, FR-13. Here, the Plan

[19] The other references to the Investment Committee merely define the term (§ 2.19), limit the Committee's liability (§ 6.6), and list the Committee as a named fiduciary (§ 8.2).

unambiguously allocates separate responsibilities to the Investment Committee and the Benefits Department; the Plan document withholds all authority regarding the Cliffs Stock Fund from the Investment Committee; and the Complaint pleads no facts supporting a conclusion that the "named fiduciaries" did not "allocate responsibilities in accordance with [the] procedure . . . set forth in the plan."

Thus, under § 2509.75-8, FR-13, the Investment Committee can "not be liable for acts and omissions of" the Benefits Department since the Benefits Department, not the Investment Committee, had broad authority over the whole Plan, including its provisions relating to the Cliffs Stock Fund. *See, e.g.*, *Walker v. Nat'l City Bank of Minneapolis*, 18 F.3d 630, 633 (8th Cir. 1994) ("The Department of Labor, charged with implementing and regulating ERISA, has clearly stated [in § 2509.75-8] that where, as here, the Plan allocates specific duties to specific fiduciaries, each fiduciary is responsible only for the responsibilities allocated to it."); *Hunter v. Metro. Life Ins. Co.*, 251 F. Supp. 2d 107, 113 (D.D.C. 2003), *aff'd*, 2003 WL 22240321 (D.C. Cir. Sept. 24, 2003) (employer who was plan administrator could not be held liable for insurer's decision to deny benefits because plan explicitly gave insurer discretionary authority to determine benefit claims and there was "no indication . . . [the employer] had any discretion or played any role in the determination of plaintiff's claim"); *Hartford Fire Ins. Co. v. E.A. Sween Co.*, 920 F. Supp. 1021, 1027 (D. Minn. 1996) ("Even if [defendant] was a fiduciary with respect to claims handling, it was not a fiduciary with respect to the function at issue in this case. . . . [Defendant] could not have breached a duty it never owed to the Plan.").

The Investment Committee cannot be held liable for decisions about the Cliffs Stock Fund. It, and the individual defendants who served on the Investment Committee, should be dismissed on this independent ground.[20]

2. Officer Defendants

The "Officer Defendants"—Brlas, Graham, Harapick, Michaud, Paradie, and Tompkins—should also be dismissed from the suit. None is a named fiduciary of the Plan. More importantly, the Complaint alleges they had only one fiduciary responsibility: to "appoint[] and oversee[] members of the Investment Committee." ¶ 45. Since the Investment Committee and its members must be dismissed, *a fortiori* the Officer Defendants, whose only alleged link to the Plan was appointing the Investment Committee, must be dismissed as well.

3. Cliffs

Lastly, Cliffs should be dismissed from the suit as well. Cliffs is not a named fiduciary of the Plan, Ex. B § 8.2, and the Complaint contains no allegations that Cliffs was a functional fiduciary. Rather, the only attempt to ascribe a duty to Cliffs occurs in paragraph 23, where plaintiffs allege that "the actions of the Officer Defendants are imputed to Cliffs under the doctrine of *respondeat superior*, and Cliffs is liable for these actions." But since the Officer

[20] Plaintiffs also allege that Timothy Flanagan and Kurt Holland are separately liable as "Plan Administrator Defendants" because Mr. Flanagan signed three forms filed with the SEC and Mr. Holland signed two forms filed with the Departments of Labor and the Treasury. ¶¶ 58-60. Neither Flanagan nor Holland is individually allocated any responsibility under the Plan. And simply signing a form on behalf of an *entity* that is a Plan Administrator (*i.e.*, the Benefits Department) does not somehow turn an *individual* into a fiduciary of any kind, let alone into a Plan Administrator responsible for determining the fate of the Cliffs Stock Fund. *See, e.g.*, *Walker v. Massachusetts Fin. Servs. Co.*, No. CIV. JFM-04-1758, 2006 WL 734796, at *2 (D. Md. Feb. 27, 2006) (either an officer defendant's "position of authority" nor "the fact that he signed SEC documents on behalf of the company" rendered him an ERISA fiduciary); *Malone v. Nuber*, No. C07-204RSL, 2010 WL 3430418, at *3 (W.D. Wash. Aug. 30, 2010) (individual who signed tax return on behalf of corporate defendant "signed the return not as a[] . . . fiduciary" but rather "as an 'officer' and 'corporate secretary' of" the corporation).

Defendants have no fiduciary duty relating to the Cliffs Stock Fund, there is no duty to be "imputed" to Cliffs.

Further, the Sixth Circuit has never recognized the doctrine of *respondeat superior* in an ERISA action. *Hamilton v. Carell*, 243 F.3d 992, 1001 (6th Cir. 2001) (noting the court has yet to "recognize the doctrine in [the ERISA fiduciary-duty] context"). And there is good reason to conclude, as numerous courts have, that the doctrine does not apply in ERISA fiduciary-duty cases. *See, e.g.*, *Kenseth v. Dean Health Plan*, *Inc.*, 610 F.3d 452, 465 (7th Cir. 2010) (rejecting *respondeat superior* liability under ERISA because permitting it "would vitiate our requirement than an ERISA claim for breach of fiduciary duty must be asserted against plan fiduciaries" (citation and internal quotation marks omitted)); *Goodman v. Crittenden Hosp. Ass'n, Inc.*, __ F. Supp. 3d. __, 2015 WL 7016992, at *3 (E.D. Ark. Nov. 12, 2015) ("[E]xpanding ERISA liability through *respondeat superior* would not fill a statutory gap. It would discombobulate the statutory balance."); *Monper v. Boeing Co.*, __ F. Supp. 3d __, 2015 WL 2250419, at *8 (W.D. Wash. May 13, 2015) ("[T]he Ninth Circuit has plainly signaled that common law theories, such as *respondeat superior*, are not to be imported into ERISA actions so as to expand the bases for liability that the statute provides."); *Harris v. Finch, Pruyn & Co.*, No. 1:05-CV-951, 2008 WL 2064972, at *7 (N.D.N.Y. May 13, 2008) ("*Respondeat superior* liability does not exist under ERISA's fiduciary liability scheme.").[21]

"ERISA imposes liability only on named fiduciaries and *de facto* fiduciaries who exercise actual or discretionary control or authority over the management or disposition of plan assets.

[21] Some courts, such as the Fifth Circuit, have concluded that *respondeat superior* liability may exist under ERISA in certain, narrow circumstances, *see American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc.*, 841 F.2d 658, 665 (5th Cir. 1988), but the Sixth Circuit has explicitly rejected the Fifth Circuit's formulation as overly expansive. *See Hamilton*, 243 F.3d at 1002.

Nothing in the statute . . . permits a non-fiduciary to be held liabile for breaches of fiduciary duties by others." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02-CIV-8853, 2005 WL 563166, at *4 n.5 (S.D.N.Y. Mar. 10, 2005) (citations omitted). Given the detailed liability regime in ERISA and the Supreme Court's "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly," *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993) (internal quotation marks omitted), many courts are, rightfully, loath to decree a new mechanism of ERISA liability in the form of *respondeat superior*. If this Court reaches this question, defendants respectfully submit that it should join the ranks of those courts.

III. CONCLUSION

The Complaint, already a third go-round, should be dismissed with prejudice.

Dated: December 16, 2015

Respectfully submitted,

/s/ *John M. Newman, Jr.*

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LOCAL RULE 7.1(f) CERTIFICATION

Pursuant to Local Civil Rule 7.1(f), I hereby certify that the foregoing Memorandum of Law in Support of Defendants' Motion to Dismiss the Second Amended Complaint adheres to the page limitation for complex cases and is a total of 30 pages in length.

/s/ *John M. Newman, Jr.*
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One of the Attorneys for Defendants