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

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

Dated: February 29, 2016

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PRELIMINARY STATEMENT

This case fits squarely into the new analytical framework for ESOP fiduciary-breach cases established in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), recently reaffirmed in *Amgen, Inc. v. Harris*, 136 S. Ct. 758 (2016), and applied by numerous district courts in factually analogous circumstances to dismiss these same claims in their entirety. And even though *Dudenhoeffer* is a relatively new precedent, there is nothing new about the allegations in plaintiffs' Complaint[1] or the arguments in plaintiffs' opposition. They all have been raised and rejected before, many by no less an authority than the Supreme Court and many on multiple occasions. The same result should obtain here.

I. ARGUMENT

A. The Prudence Claims Fail.

1. *Dudenhoeffer* Eviscerates Plaintiffs' Public-Information Claim.

The Complaint does not distinguish among defendants as to their possession of non-public information in addition to public information, perhaps on the view that it makes no difference. *See, e.g.*, ¶¶ 3, 92, 103, 180, 213, 216.[2] *See also* Opp. at xiii ("Defendants . . . fail[ed] to act upon non-public information."), 1 (discussing "[d]efendants' concealment" of "material, non-disclosed information"), 12 ("[T]he fiduciaries should have understood the overvaluation because of nonpublic information of which they were aware."). But of course it does make a difference, a critical one for any contention that a defendant should have directed a sale of shares from the ESOP based on public information alone. As noted in defendants' opening brief, Br. at 15 n.11, any defendant who had both public and non-public information was

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

[2] Unless otherwise indicated, all paragraph references are to the Complaint.

legally disabled from causing a sale "based on public information alone." There is no such thing as splitting one's mind in half for purposes of the insider trading prohibition. Plaintiffs' opposition has nothing to say on this inarguable point. The upshot is that, since not a single defendant is identified as having exclusively public information, any claim predicated on a failure to force a sale of shares out of the ESOP is dead on arrival, even without the necessity of applying the full *Dudenhoeffer* analysis to such a claim, which defendants nevertheless have undertaken and reaffirm here.

Plaintiffs do not contest (and thus concede) that *Dudenhoeffer* would doom their public-information claim in the absence of "special circumstances" (not present here). Instead, they make two arguments that attempt to dodge *Dudenhoeffer* altogether. First, purporting to have discerned a limitation on *Dudenhoeffer* found nowhere in the opinion itself, they argue *Dudenhoeffer doesn't even apply*. Second, they say that even if it does, they have pled special circumstances that allow them to skirt dismissal.

a. *Dudenhoeffer* Applies Here.

In arguing *Dudenhoeffer* doesn't even apply, plaintiffs latch onto the word "inflated"—a term that occurs only once in the opinion, and even then in the *non*-public information section—to argue that *Dudenhoeffer* applies to public information claims only when those claims explicitly allege that a stock's price was "artificially inflated." Opp. at 17. Their claim, plaintiffs contend, has nothing to do with artificial inflation or the "valu[e]" of Cliffs stock, but rather is "a classic ERISA . . . imprudence action" claiming that Cliffs' "risk profile exceeded the reasonable bounds for" a retirement investment. *Id.* Specifically, plaintiffs argue, Cliffs' stock was too risky (and therefore imprudent) because the "depressed price of iron ore and coal over

the last several years" made it "patently clear" that Cliffs' business was "irreparably compromised." *Id.* at 8.

Multiple district courts have recently considered and rejected this very argument. *See Coburn v. Evercore Trust Co., N.A.*, __ F. Supp. 3d __, 2016 WL 632180, at *3 (D.D.C. Feb. 17, 2016) (dismissing complaint and rejecting plaintiff's argument that *Dudenhoeffer* was inapplicable because the complaint did not allege artificial inflation); *In re 2014 RadioShack ERISA Litig.*, No. 4:14-CV-959, slip op. at 8 (N.D. Tex. Jan. 25, 2016) (rejecting plaintiffs' argument that "*Dudenhoeffer* only applies to claims involving inflated stock prices" and that plaintiffs' complaint "allege[d] the stock was an imprudent investment because of the known circumstances, not inflated market prices"). And for good reason. "[N]othing in *Dudenhoeffer* . . . supports the . . . contention that the Supreme Court's reasoning is only relevant in cases where the stock price is alleged to have been artificially inflated." *Coburn*, 2016 WL 632180, at *4 (quotation omitted). The *Dudenhoeffer* decision was not, as plaintiffs assert, restricted to "artificial inflation" claims divorced from substantive allegations of risk or imprudence.

Quite to the contrary, just as plaintiffs purport to base their "classic" public-information claim on an alleged "sea-change in Cliffs' basic risk profile" wrought by "the drastic decline of iron ore prices" and a "structural shift in" the coal and iron ore industries, Opp. at 17, 20, 8, the plaintiff in *Dudenhoeffer* based his public information claim on "early warning signs that subprime lending, which formed a large part of [defendant's] business, would soon leave creditors high and dry as the housing market collapsed and subprime borrowers became unable to pay off their mortgages." *Dudenhoeffer*, 134 S. Ct. at 2464. *Dudenhoeffer* thus dealt with—

and rejected—the same argument plaintiffs say they are advancing here: that the underlying fundamentals of the company's business made its stock an imprudent investment.[3]

Eager to distract from the all-fours applicability of *Dudenhoeffer*, plaintiffs point to five lower-court, post-*Dudenhoeffer* decisions they claim support their position.[4] But three of the five *aren't even ESOP cases*. And of the remaining two, one consists of a single, citation-free paragraph in an unreasoned order, and the other has been rejected by every court that has considered it.

Of the five, plaintiffs rely most heavily on *Gedek v. Perez*, 66 F. Supp. 3d 368 (W.D.N.Y. 2015) and *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2887 (2015). In *Gedek*—one of the two cases that actually involved an ESOP[5]—analysts predicted that the company, Kodak, would run out of cash in a matter of *months*. *Gedek*, 66 F. Supp. 3d at 378. And, important to the court's analysis, the plan at issue in *Gedek* did *not* require the trustee "to invest the Kodak Stock Fund entirely in Kodak stock." *Id.* at 379. Perhaps most important, though, *all five* courts to have substantively addressed *Gedek* have declined to follow it, suggesting *Gedek* is contrary to *Dudenhoeffer*. *Coburn*, 2016 WL 632180, at *4 (rejecting application of *Gedek*); *RadioShack*, slip op. at 15-17 (distinguishing *Gedek* and stating that, even if *Gedek* did apply, "the Court declines to follow [its] reasoning" as contrary to

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[3] Plaintiffs' argument regarding *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015) badly errs. First and foremost, *Tibble* was not a pleading case and therefore didn't even apply the *Dudenhoeffer* pleading standard. *Cf. Coburn*, 2016 WL 632180, at *7 ("'*Tibble* did not involve claims based on a drop in an employer's stock price, and thus did not discuss *Dudenhoeffer*'s holding.'" (quoting *In re Citigroup ERISA Litig.*, 112 F. Supp. 3d 156, 159 (S.D.N.Y. 2015))). Additionally, the only question there was how to calculate the relevant statute of limitations. *Tibble*, 135 S. Ct. at 1827.

[4] The four pre-*Dudenhoeffer* cases on which plaintiff attempts to rely do not merit discussion. The analytical framework undergirding them has been abrogated. Following them would be legal error.

[5] The other ESOP case is *Borboa v. Chandler*, No. 13-CV-844, slip op. at 1 (E.D. Va. Dec. 31, 2014). In an unreasoned order, unavailable even in unpublished form on Westlaw or Lexis, the court denied dismissal with a four-sentence paragraph that lacked a citation to *Dudenhoeffer* or any other case.

Dudenhoeffer); *In re BP plc Sec. Litig.*, No. 10-MD-2185, 2015 WL 1781727, at *10 n.11 (S.D. Tex. Mar. 4, 2015) (expressing skepticism whether *Gedek* "[e]ven . . . can be reconciled with *Dudenhoeffer*"); *In re Lehman Bros. Sec. & ERISA Litig.*, 113 F. Supp. 3d 745, 756 (S.D.N.Y. 2015) (distinguishing *Gedek* "whatever [its] merits . . . on its own facts"); *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 616 (S.D.N.Y. 2015) (same).

No more helpful to plaintiffs is *Tatum v. RJR Pension Inv. Comm.*, 761 F. 3d 346 (4th Cir. 2014), a challenge to a fiduciary's decision to *sell* the stock in a *non-ESOP* fund[6] in *contravention of plan terms*. *Id.* at 351-52. And the differences hardly stop there. *Tatum* was an appeal from a final verdict in a bench trial, and the main issue on appeal was the standard of *proof*—not pleading—for the loss-causation element of an ERISA fiduciary-breach claim. Thus, the *Dudenhoeffer* pleading standard did not apply and was not relevant. *See id.* at 366 n.14 (*Dudenhoeffer* did not apply because issue in *Tatum* was "standard applie[d] to determine loss causation *after* a fiduciary breach has been established"). *Tatum* has no bearing on this case.[7]

The cases proffered by plaintiffs thus by no means alter the inevitable conclusion: *Dudenhoeffer* applies to plaintiffs' public information claims, and those claims must be dismissed.

[6] The fund held shares of a company that, after a corporate restructuring, was no longer related to the company that employed the plaintiffs. *Id.* at 351-52.

[7] The other two post-*Dudenhoeffer* cases plaintiffs cite are *Int'l Bhd. of Teamsters Union Local No. 710 Pension Fund v. Bank of New York Mellon Corp.*, No. 13-CV-1844, 2015 WL 1234091 (N.D. Ill. Mar. 16, 2015) ("*Teamsters*") and *United Food & Commercial Workers Int'l Union-Indus. Pension Fund v. Bank of New York Mellon*, No. 13-CV-4484, 2014 WL 4627904, at *6 (N.D. Ill. Sept. 16, 2014) ("*UFCW*"). Neither involved an ESOP. Rather, both centered on use of a complex securities lending arrangement to purchase debt issued by a *third party* company. *UFCW* at *1-2; *Teamsters* at *1. Moreover, in both cases, that "risky" third party company was Lehman Brothers. There is, of course, no need to speculate what a court applying *Dudenhoeffer* might do in an *actual* Lehman Brothers ESOP case. *See* Br. at 10-11 (discussing complete dismissal of plaintiffs' claims in *In re Lehman Brothers Securities & ERISA Litigation*, 113 F. Supp. 3d 745 (S.D.N.Y. 2015)).

b. Plaintiffs Have Not Pled Special Circumstances.

Plaintiffs take one further crack at rescuing the public information claim, this time with the assertion that, even conceding *Dudenhoffer*'s application, the Complaint should survive because (contrary to the detailed discussion in defendants' opening brief, Br. at 8-11) it does in fact plead "special circumstances affecting 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 (quotation omitted). The only way they are able to advance this argument is by applying a counter-textual varnish to both *Dudenhoeffer* and the Sixth Circuit's decision in *Pfeil*.

First, regarding *Dudenhoeffer*, plaintiffs complain that "[d]efendants' definition of 'special circumstances' as meaning only 'market inefficiency' is much too narrow." Opp. at 21. But this definition is *Dudenhoeffer*'s, not defendants'. "[S]pecial circumstances," *Dudenhoeffer* teaches, are those "affecting 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). A market inefficiency is, of course, by definition a failure of the market to reliably "assess[a] security's value in light of all public information." *Id.* And it is the Supreme Court's unanimous opinion—rather than, as plaintiffs would have it, a hypothetical posed from the bench by a single Justice and nowhere reflected in the opinion—that controls the definition of "special circumstances." *Cf.* Opp. at 21-22. Plaintiffs plead no market inefficiency, and argue none in their brief. Br. at 8-10.

Second, even if the Court were to go along with plaintiffs and disregard *Dudenhoeffer*'s definition of "special circumstances," their argument still fails. They say that a "complete failure" to investigate a publicly traded investment constitutes a special circumstance. They cite *Pfeil v. State St. Bank & Trust Co.*, 806 F.3d 377 (6th Cir. 2015), as their sole support for this proposition, asserting the Sixth Circuit there concluded that "a fiduciary's complete failure to

investigate a publicly traded investment might constitute circumstances sufficiently special for a claim of imprudence to survive a motion to dismiss." Opp. at 2. What the Sixth Circuit *actually* said was "[*w*]*e do not now decide whether* a fiduciary's complete failure to investigate a publicly traded investment might constitute a circumstance sufficiently special for a claim of imprudence to survive a motion to dismiss." *Pfeil*, 806 F.3d at 386 (emphasis added).

And, moreover, it would make no sense to read a "failure-to-investigate" exception into *Dudenhoeffer*. Given *Dudenhoeffer*'s express holding that fiduciaries may prudently rely on the market price of a stock traded in an efficient market, it would be nonsense to say that there somehow could be liability for not undertaking an "investigation" into the price. If, as *Dudenhoeffer* teaches, failing "to outsmart a presumptively efficient market . . . is . . . not a sound basis for imposing liability," 134 S. Ct. at 2471-72, how could an asserted failure to conduct an investigation of public information thorough enough to outsmart that same market ever give rise to liability? Such an exception would also be at odds with *Dudenhoeffer*'s description of "special circumstances" as those "affecting the reliability of the market price as an unbiased assessment of the security's value in light of all public information." *Id.* at 2472 (quotation omitted). The nature of a fiduciary's "investigation" simply has no bearing on whether the market for the company's stock is or is not efficient.

2. ***Dudenhoeffer* and *Amgen* Eviscerate Plaintiffs' Non-Public-Information Claim As Well.**

Plaintiffs' non-public information claim fails for multiple reasons. As a threshold matter, the claim fails because the Complaint never alleges what the supposedly crucial non-public information was. Defendants pointed out this fatal flaw in their opening brief, and plaintiffs, in their opposition, tacitly acknowledge the deficiency by failing to point to *any* allegations in the Complaint identifying *any* non-public information. Incredibly, they assert that they need not

plead non-public information to make out a non-public information claim. Opp. at 12. This is patently incorrect. For the reasons stated in defendants' opening brief and part I.B, below, plaintiffs are wrong to say that Rule 9(b) does not apply to their non-public information claims. But even Rule 8's relatively liberal pleading standard would require dismissal. Plaintiffs allege *no* facts regarding non-public information, let alone "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To the contrary, it is implausible for plaintiffs to say that non-public information should have led defendants to dump Cliffs stock (contrary to Plan terms) without telling us *what* information should have led defendants to that extraordinary conclusion. The *Citigroup* court dealt with this very issue, and plaintiffs provide no counter to *Citigroup*'s all-fours dismissal of the non-public information claim there for "failure to allege any material nonpublic information." 104 F. Supp. 3d at 611, n.13.

Also as shown in defendants' opening brief, the Complaint falls short of meeting the *Dudenhoeffer* requirements of "plausibly alleging" (1) "an alternative action that the defendant[s] could have taken that would have been consistent with the securities laws," 134 S. Ct. at 2472, *and* (2) "that a prudent fiduciary in the defendant's position could not have concluded that" the alternative action "would do more harm than good," *id.* at 2473. The Supreme Court's recent decision in *Amgen v. Harris*, 136 S. Ct. 758 (2016), only serves to underscore the Complaint's deficiency in this regard.

Amgen, an ERISA case in which the Ninth Circuit initially reversed the district court's decision granting the defendants' motion to dismiss, was remanded to the Ninth Circuit by the Supreme Court for reconsideration in light of *Dudenhoeffer*. On reconsideration, the Ninth Circuit again reversed the district court's dismissal. The *Amgen* complaint alleged several

"alternative action[s]" that the defendant fiduciaries could have taken with regard to the Amgen stock funds at issue. *Dudenhoeffer*, 134 S. Ct. at 2472. These included "making appropriate disclosures . . . ; divesting the Plan of [Amgen] Stock; precluding additional investment in [Amgen] Stock; consulting independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the Participants [in] the Plan; or resigning as fiduciaries." *Harris v. Amgen*, No. 07-CV-5442 (C.D. Cal. Mar. 23, 2010), Am. Compl. ¶ 344, ECF No. 168. *See also id.* ¶¶ 288, 290, 306.

The Ninth Circuit agreed with plaintiffs that the complaint alleged plausible alternative actions and that (as plaintiffs would propose to have the Court find here) a prudent fiduciary could not have concluded that these actions would do more harm than good. Among other things, it bought into the arguments that "[i]t [was] quite plausible . . . that defendants could remove the [Amgen Stock] Fund from the list of investment options without causing undue harm to plan participants" and that defendants should have removed the fund early on because removal "w[ould] prevent the greater harm to plan participants that would result if . . . plan participants are allowed to make continued investments in the Fund." *Harris v. Amgen, Inc.*, 788 F.3d 916, 938 (9th Cir. 2015). The Ninth Circuit also rejected the defendants' argument that "they could not have removed the Amgen Stock Fund based on undisclosed alleged adverse material information—a potentially *illegal* course of action." *Id.* at 939. The Ninth Circuit concluded that the plaintiffs' complaint satisfied *Dudenhoeffer*.

A unanimous Supreme Court reversed the Ninth Circuit without even hearing oral argument. *Amgen*, 136 S. Ct. at 760. Contrary to the *Saumer* plaintiffs' incredible claim that the Supreme Court's *Amgen* opinion "does not undermine the Ninth Circuit's legal analysis," Opp. at 15, the Supreme Court rejected the Ninth Circuit opinion outright, examined the complaint for

itself, and held that it did "not [contain] sufficient facts and allegations to state a claim for breach of the duty of prudence." *Amgen*, 136 S. Ct. at 760. Concluding dismissal was appropriate, the Court bypassed the Ninth Circuit and remanded *to the district court* to determine whether dismissal should be with or without prejudice. *Id.*

Plaintiffs' "alternative action[]" allegations here, *see* ¶¶ 93-94, 97-101, mimic the Ninth Circuit's *Amgen* decision and the allegations in the *Amgen* complaint, presumably because, at the time plaintiffs filed their Complaint, the Ninth Circuit's *Amgen* decision was plaintiffs' best hope of evading dismissal. But *all* of plaintiffs' alternative-action allegations have since been rejected via the Supreme Court's *Amgen* decision[8]:

ALTERNATIVE ACTIONS PLED BY PLAINTIFF	**ALTERNATIVE ACTIONS <u>REJECTED</u> BY SUPREME COURT IN *AMGEN***
Defendants should have "inform[ed] the . . . public at large of the Company's misstatements so as to remedy any artificial inflation of Cliffs Stock." ¶ 93.	Defendants should have "ma[de] . . . disclosures," including about "the true financial health of the Company." *Amgen* Complaint ¶¶ 344, 342. Defendants' failure to disclose caused "artificial inflation of Amgen stock." *Id.* ¶ 354.
"Disclosure might not have prevented the Plan from taking a loss on Company Stock it already held; but it would have prevented the Plan from acquiring . . . additional shares of overpriced Company Stock[.] [F]ull disclosure would have cut short the period in which the Plan bought at inflated prices." ¶ 94.	"Removal of the Fund . . . might cause a drop in the share price," but would "prevent the greater harm to plan participants that would result if no disclosure is made . . . and if plan participants are allowed to make continued investments in the Fund at increasingly inflated prices." *Amgen*, 788 F.3d at 938.
"Defendants could have . . . directed that all . . . contributions to the Company Stock fund be held in cash rather than be used to purchase Cliffs Stock." ¶ 97.	Defendants could have "divest[ed] the Plan of Company Stock [or] preclud[ed] additional investment in Company Stock." *Amgen* Complaint ¶ 344.

[8] Plaintiffs' attempt, in their *brief*, Opp. at 16 n.31, to plead allegations on "information and belief" regarding appointment of an independent fiduciary is as improper as it is inaccurate. *See Moss v. Mercy St. Anne Hosp.*, No. 12-CV-1840, 2014 WL 172530, at *1 (N.D. Ohio Jan. 13, 2014) (A "[p]laintiff is not permitted to amend her complaint via briefs in opposition to a motion to dismiss.").

"Defendants also should have closed the [fund] to further contributions and directed that contributions be diverted from Company Stock into other (prudent) investment options." ¶ 98.	
"Given the relatively small number of Cliffs shares that might not have been purchased by the . . . fund in comparison to the enormous volume of actively traded shares, it is extremely unlikely that this decrease in the number of shares . . . purchased . . . would have had an appreciable impact on the Cliffs share price." ¶ 100.	"[G]iven the relatively small number of Amgen shares that would not be purchased by the Fund in comparison to the enormous number of actively traded shares, it is unlikely that the decrease in the number of shares . . . purchased . . . would have an appreciable negative impact on the share price." *Amgen*, 788 F.3d at 937-38.
"Defendants also could have sought guidance from the DOL or SEC; resigned as plan fiduciaries to the extent they could not act loyally and prudently; and/or retained . . . advisors or . . . independent fiduciaries . . . for the Plan." ¶ 101.	Defendants could have "resign[ed] as fiduciaries . . . to the extent they could not . . . loyally serve" or "consult[ed] independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan." *Amgen* Complaint ¶ 344.

Plaintiffs pinned their hopes to the Ninth Circuit's ruling in *Amgen*. The Supreme Court has utterly repudiated that ruling. The Supreme Court's *Amgen* decision is a definitive bar to plaintiffs' non-public information claims.[9]

There are even more problems with plaintiffs' non-public information claim. Plaintiffs represent that "[d]efendants ask this Court to be the first to hold . . . that freezing a stock fund's purchases of stock is impermissible without public disclosure." Opp. at 13. Not true. *See, e.g.*, *In re JPMorgan Chase & Co. ERISA Litigation*, No. 12-CV-4027, 2016 WL 110521, at *3 (S.D.N.Y. Jan. 8, 2016) ("Defendants could not have prevented Plan participants from making

[9] Further in the vein of arguments rejected by the Supreme Court, plaintiffs argue that this Court's decision to deny the motion to dismiss in *New Jersey v. Cliffs Natural Resources, Inc.*, No. 14-CV-1031 (N.D. Ohio Nov. 6, 2015), ECF No. 84, means that the motion to dismiss should be denied here as well. Opp. at 12-13. But the two cases involve quite different standards applied to quite different factual allegations The Ninth Circuit took what turned out to be a primrose path when it relied on this same reasoning in its now-discredited *Amgen* opinion. *Harris v. Amgen*, 788 F.3d at 936 (noting denial of motion to dismiss in related securities action).

new Stock Fund purchases without public disclosures."); *In re BP plc Sec. Litig.*, No. 10-MD-2185, 2015 WL 1781727, at *14 (S.D. Tex. Mar. 4, 2015) ("[I]t would have been consistent with the securities laws to remove the BP Stock Fund as an investment option, so long as Plan participants (and, by extension, the public) were so informed."); *In re HP ERISA Litig.*, No. 3:12-CV-06199-CRB, 2015 WL 3749565, at *7 (N.D. Cal. June 15, 2015) (operating under the principle that restricting new investment in company stock would require public disclosure).[10]

JPMorgan is particularly instructive. Plaintiffs there proposed two alternative actions for the ESOP: First, they argued "that Plan fiduciaries could have stopped new purchases of the Stock Fund by Plan participants." 2016 WL 110521 at *3 (alterations omitted). "Second, [they] argue[d] that Defendants could have disclosed [information] to Plan participants." *Id.* In rejecting the first alternative, the court reasoned:

> If the Plan fiduciaries had sought to halt new Stock Fund purchases, ERISA would have required the plan administrator to notify Plan participants in advance. Federal securities laws, in turn, would have required JPMorgan to disclose that information to the public. Defendants would expose themselves to liability under Section 10(b) [of the Securities Exchange Act] and Rule 10b-5 if they failed to make such disclosures.

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[10] Once again, the cases on which plaintiffs rely are of no value. *See* Opp. at 13 n.24. The Ninth Circuit's *Amgen* decision has been reversed; *Gedek* is both inapposite and discredited, *see supra* at 4; and *In re SunTrust Banks, Inc. ERISA Litig*. is, like *Borboa*, *see supra* n.5, unavailable, even in unpublished form, on Lexis or Westlaw and treats this issue in a single, citation-free paragraph.

The two pre-*Dudenhoeffer* cases plaintiffs cite, *see* Opp. at 13 n.23, are likewise of no moment. *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 861 n.3 (N.D. Ohio 2006), relies on only a single authority—*In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003)—which itself happens to be the only other case plaintiffs cite. *Enron* does indeed contain a quote from a Labor Department brief in that case asserting that the securities laws only require disclosure when buying or selling, but it is the *SEC*, not Labor, that is charged with interpreting the securities laws, and thus Labor's opining on this issue, particularly in light of the case law discussed above, is little better than irrelevant. *Cf. DeMasters v. Carilion Clinic*, 796 F.3d 409, 422 n.7 (4th Cir. 2015) (Even where a case involves an agency's own statute, the agency's "amicus brief . . . does not have the force of law [and] its interpretation . . . is not entitled to *Chevron* deference." (citation omitted)). The question *Dudenhoeffer* and *Amgen* require the Court to ask is, "Could a reasonable fiduciary have concluded that it was unwise to risk criminal prosecution by relying on *Labor*'s unofficial interpretation of the SEC's statute?" *See infra* at 13-14. Moreover, 29 U.S.C. § 1021(i) , the statute requiring ERISA plan administrators to notify plan participants of the "reasons for [any] blackout period" (and thus also requiring plan administrators to choose between disclosing to the public or violating the securities laws) did not even apply in *Enron*. In fact, it was in response to that very case that Congress enacted 29 U.S.C. § 1021(i), part of the Sarbanes-Oxley Act, P.L. 107-204, 116 Stat. 745 (2002).

Id. Regarding both proposals, the court went on to discuss the "more harm than good" inquiry *Dudenhoeffer* requires. The complaint acknowledged that disclosure would "cause[] [the] company's stock price to drop" but alleged that the longer defendants waited to disclose "the more painful the correction w[ould] be."[11] *Id.* at *4. The court rejected that argument: "These assertions are not particular to the facts of this case and could be made by plaintiffs in any case asserting a breach of ERISA's duty of prudence. They amount to no more than factors [d]efendants might have considered when deciding whether to make public disclosures." *Id.* The complaint was dismissed.

Lastly, even assuming, counterfactually, that plaintiffs were correct about all the above—that their fraud-based claims need not comply with Rule 9(b), that at any rate they need not identify any of the non-public information that supposedly should have caused defendants to dump Cliffs stock, that the Ninth Circuit's *Amgen* decision was still good law, and that defendants could halt investment in the Cliffs stock fund without concerning themselves with any notification[12] or securities-law issues—they *still* would not prevail because they misconstrue the *Dudenhoeffer* test for determining whether an alleged "alternative action" is sufficiently compelling to make out a plausible claim of imprudence. Plaintiffs contend the question is whether a prudent "fiduciary could conclude [that a proposed alternative action] would not have

[11] *Cf.* ¶ 94 ("Disclosure might not have prevented the Plan from taking a loss on Company Stock it already held; but it would have prevented the Plan from acquiring . . . additional shares of overpriced Company Stock: the longer the concealment continued, the more of the plan's good money went into a bad investment; and full disclosure would have cut short the period in which the Plan bought at inflated prices.").

[12] Plaintiffs cite a Department of Labor statement providing that permanent restrictions on investments are not blackouts. Opp. at 14. Setting aside the prudence (or not) of ESOP fiduciaries in *permanently* preventing employees from investing in Cliffs stock (and whether that would be in accord with Congress' intent to promote ESOPs), *and* the fact that the Complaint does not allege that closure of the Cliffs Stock Fund needed to be *permanent*, ¶ 90 (merely stating "[d]efendants should have closed the [Fund] to further contributions"), the Labor language plaintiffs cite is not, as plaintiffs' citation suggests, an actual rule. Rather, it is mere "supplementary information" providing commentary on the rule itself. *See* 68 Fed. Reg. 3716-01 (2003).

[] done more harm than good," Opp. at 13, *i.e.*, whether it would be *possible* for a prudent fiduciary to disagree with defendants' decision. They have it backwards. The Supreme Court stated in *Dudenhoeffer*, and made even clearer in *Amgen*, that the proper inquiry is instead "whether the complaint . . . 'has plausibly alleged' that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Amgen*, 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2463). Every one of plaintiffs' allegations, then, must pass through this filter: *Could* a prudent fiduciary have concluded, in real-time, that the alternatives plaintiffs propose would have done more harm than good? That is, would it be *impossible* for a prudent fiduciary to have made the decision defendants made? The answer, of course, is a resounding no.

B. Plaintiffs Have Failed to Plead a Loyalty Claim.

Plaintiffs have not pled an actionable loyalty claim, and their opposition brief only underscores that fact. They effectively concede the Complaint does not allege *any* self-dealing between *any* defendant and the Plan, nor any false or misleading statement *ever* directed to *any* Plan participant. *See* Br. at 19-20. And they do not dispute that merely owning stock does not give rise to a loyalty claim. *See id.* at 19. Rather, the best they can do is say defendants "took certain actions that indicate they did not have the Plan participants' best interests in mind"—a generalized, fact-free assertion that could be copy-pasted into any ERISA complaint. Opp. at 24.

Noticeably absent from plaintiffs' defense of their loyalty claim is *any* citation to the Complaint: They cannot point to a single *factual* allegation that amounts to a breach of loyalty. They argue that defendants "seek to compel Plaintiffs to prove every disloyal act they claim [d]efendants took." *Id.* at 25. Nonsense. Defendants merely assert—and the case law

demands—that plaintiffs must *plead facts* supporting their disloyalty claim. Far from "prov[ing] every disloyal act," plaintiffs have failed even to *allege* any.

Plaintiffs' opposition also confirms, as defendants asserted, Br. at 18-19, that their loyalty claim is nothing more than their prudence claim renamed in an attempt to squeak past dismissal. "[O]ffering a knowingly *imprudent* plan investment option is," they say, "a breach of [the] fiduciary duty [of *loyalty*]." Opp. at 24 (emphasis altered). Because *Dudenhoeffer* forecloses the prudence claim, the copy-cat loyalty claim must go, too. *In re Chesapeake Energy Corp. 2012 ERISA Class Litig.*, No. Civ-12-688, 2013 WL 5596908, at *11 (W.D. Okla. Oct. 11, 2013) (dismissing "derivative" loyalty claim "based upon the dismissal of the prudence claim").

C. Rule 9(b) Applies to All of Plaintiffs' Claims and Independently Requires Dismissal.

Plaintiffs also do not contest (and therefore concede) that they have not pled their claims with particularity under Fed. R. Civ. P. 9(b). Instead, they argue Rule 9(b) does not apply to *any* aspect of the Complaint. But Rule 9(b) does apply. The Complaint must be dismissed for this independent reason as well.

Plaintiffs would have the Court believe that ERISA cases are a pleading monolith—that, regardless of the substance of their allegations, either *all* aspects of *all* ERISA complaints are subject to Rule 9(b), or none is. But the case law shows neither extreme to be true. And defendants have never argued that Rule 9(b) applies in *every* ERISA case, only that it applies in cases, like this one, flush with allegations sounding in fraud. Discarding plaintiffs' false all-or-nothing construct, it becomes clear that plaintiffs' cases provide little—or, in the case of virtually all the intra-Circuit decisions on which plaintiffs seek to rely, no—support for the argument that Rule 9(b) does not apply to the *factual allegations here*.

Plaintiffs try to create a Rule 9(b)-never-applies impression by lining up several ERISA cases from the Circuit in which Rule 9(b) was not applied. But many of these cases are misused and inapposite. In *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1015 (S.D. Ohio 2006), for example, the complaint alleged only *negligence*, not fraud. *In re Cardinal Health, Inc. ERISA Litig.*, No. 04-CV-643 (S.D. Ohio Apr. 29, 2005), Am. Compl. ¶¶ 94, 97, ECF No. 69. And far from arguing Rule 9(b) should apply, the defendants openly stated in their motion to dismiss that fraud was not alleged. *Id.*, Mot. to Dismiss at 30, ECF No. 80. And in *In re The Goodyear Tire & Rubber Co. ERISA Litig.*, 438 F. Supp. 2d 783 (N.D. Ohio 2006), Rule 9(b) was never mentioned or at issue. The question, rather, was the now-wholly-irrelevant one of whether the pre-*Dudenhoeffer* "presumption of prudence," not Rule 9(b), created some sort of heightened pleading standard. *Id.* at 793-94. *See also In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 817 (S.D. Ohio 2004) (Rule 9(b) did not apply to allegations defendants "*negligently* ma[de] misrepresentations and *negligently* fail[ed] to disclose material information" (emphasis added)); *In re Ferro Corp. ERISA Litig.*, 422 F. Supp. 2d 850, 861 n.3 (N.D. Ohio 2006) (plaintiffs alleged only that "Defendants knew *or should have known* about the accounting irregularities" (emphasis added)).

To the contrary, the Sixth Circuit cases cited in defendants' opening brief make it clear that Rule 9(b) does in fact apply to fraud-based ERISA complaints. Br. at 23. And courts have made the common-sense distinction between ERISA allegations that are and are not subject to Rule 9(b) clear: "Although Rule 8's pleading requirements apply generally to ERISA claims for breach of fiduciary duty, . . . to the extent that any claims sound in fraud, they are subjected to the heightened pleading requirements of Rule 9(b)." *Johnson v. Radian Grp., Inc.*, No. 08-CV-2007, 2009 WL 2137241, at *12 (E.D. Pa. July 16, 2009). *See also Crocker v. KV Pharm. Co.*,

782 F. Supp. 2d 760, 784 (E.D. Mo. 2010) (same); *Pugh v. Tribune Co.*, 521 F.3d 686, 700 (7th Cir. 2008) (noting that if ERISA plaintiffs had alleged defendants "actually knew about" inflation of newspaper circulation numbers, "this would have been tantamount to a claim of fraud . . . , subjecting the complaint to the stricter pleading standards of Rule 9(b)").

The facts of *Crocker v. KV Pharmaceuticals* are particularly relevant here. In *Crocker*—also an ESOP case—the plaintiff alleged breach of the ERISA duty of prudence. 782 F. Supp. 2d at 784. Specifically, the plaintiff alleged that the defendant company's stock price was "artificially inflated" as a "result of [individual] Defendants' scheme to misrepresent the state of" the company's manufacturing problems and its "financial and accounting activities," and that the company "concealed its violations of FDA regulations." *Id.*

The court concluded that "[a]lthough these [allegations] do not employ the word 'fraud,' . . . they can be read only as averments that [the defendants] committed fraud." *Id.* at 785. "As such, plaintiffs' allegations [were] subject to analysis under Rule 9(b)." *Id.* Applying 9(b), the court observed that plaintiffs had "fail[ed] to explain the specific activities and/or conduct that amounted to" the fraud and also "fail[ed] to allege the specific statements . . . that were false and misleading." *Id.* "As such, the [c]ourt [concluded] that plaintiffs ha[d] failed to plead with sufficient particularity" and "dismiss[ed] plaintiffs' prudence claim." *Id.*

Similarly, our plaintiffs plead that "Cliffs Stock was artificially inflated" because defendants "falsely claimed [the dividend increase] was sustainable," ¶ 7, and that certain defendants "participated in [a] deception" wherein they "knew Bloom Lake was operating in severe distress" but "conceal[ed] the truth," ¶¶ 92, 95. Indeed, plaintiffs say it was a "deception from the start," ¶ 116, and their pleading trumpets in bold type that "Defendants Continued to Hype Cliffs Stock," Compl. p. 27. Plaintiffs' whole case is inextricably intertwined with the

assertions of deceit and deception—to wit, fraud—liberally strewn across their pleading. *See* Br. at 21. Rule 9(b) therefore applies; plaintiffs have failed to comply with it; and the Complaint must be dismissed.

D. Plaintiffs' Monitoring Claim Fails.

As shown in defendants' opening brief, case law and the ERISA statute unquestionably require a separate, underlying primary breach by another fiduciary before a fiduciary may be subjected to secondary liability under the duty to monitor. Br. at 23-24. Consistent with this blackletter rule, every case plaintiffs cite in the duty-to-monitor section of their opposition brief also included a breach-of-prudence or breach-of-loyalty claim that survived dismissal. They do not offer any case in which a duty-to-monitor claim made it past a motion to dismiss by itself. The prudence and loyalty claims must be dismissed here, and thus so must the monitoring claim.

E. Plaintiffs Have Not Pled the Fiduciary Capacity of the Investment Committee, the Officer Defendants, or Cliffs.

Plaintiffs' fiduciary-capacity response does nothing to move the needle in their favor and, if anything, bolsters defendants' position. For starters, defendants pointed out in their opening brief that "plaintiffs do not plead any facts supporting the conclusion that the Investment Committee did indeed have authority over the Cliffs Stock Fund." Br. at 26. Plaintiffs have not contested that point or identified any such well-pleaded facts in their opposition. In the absence of factual allegations of authority over the Cliffs Stock Fund, the Investment Committee must be dismissed as a defendant.

Plaintiffs assert in "gotcha" style that the Investment Committee is a named fiduciary of the Plan. Opp. at 27. Of course it is. The Plan and defendants' opening brief say as much. But, as defendants have shown, federal regulations make clear that "[i]f 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 . . . responsibilities . . . allocated to them," 29 C.F.R. § 2509.75-8, FR-13, and plaintiffs' opposition says not a word about the supporting cases on which defendants relied in their opening brief, *see* Br. at 27.[13] Unable to refute the regulation and case law, all plaintiffs do is weakly claim the Plan is "ambiguous." Opp. at 29.

That argument rings hollow. As explained previously, only one substantive provision in the entire Plan even mentions the Investment Committee, and it charges that entity with a single task: selecting the investment options the Plan will offer *in addition to* the Cliffs Stock Fund. Br. at 26. But wait, plaintiffs say, "[d]efendants acknowledge [that] the Plan is silent as to who monitors the [Cliffs] Stock Fund." Opp. at 28. To the contrary, defendants note that the fund "was mandatory under the Plan," Br. at 25, and then go on to point out explicitly that "[a]ll responsibility under the Plan—other than the responsibility of picking funds to supplement the Cliffs Stock Fund— . . . *is allocated to the Benefits Department*" as Plan Administrator, *id.* at 26 (emphasis added). Even *plaintiffs themselves* admit elsewhere in their opposition that "the *Plan Administrator Defendants* had the discretionary authority to halt the Plan's investments in Company Stock." Opp. at 5 (emphasis added). It is clear, then—from the Plan, as well as from

[13] Plaintiffs do cite a handful of cases for the general proposition that fiduciary status is a fact-intensive inquiry. These are of no help to them in the particular circumstances of this case. *E.g.*, *In re Regions Morgan Keegan ERISA Litig.*, 692 F. Supp. 2d 944, 964 (W.D. Tenn. 2010) (no analysis); *Banks v. Healthways, Inc.*, No. 3:08-734, 2009 WL 211137, at *4 (M.D. Tenn. Jan. 28, 2009) (plaintiffs *did* allege specific actions by defendants; issue was whether those actions were done in a fiduciary capacity or while performing a different corporate function); *In re Diebold ERISA Litig.*, No. 06-CV-170, 2008 WL 2225712, at *4 (N.D. Ohio May 28, 2008) (same). More importantly, the Sixth Circuit has held that where, as here, the parties do not dispute the relevant underlying facts, "a party's status as an ERISA fiduciary is purely a question of law." *McLemore v. Regions Bank*, 682 F.3d 414, 422 (6th Cir. 2012) (citation omitted) (affirming dismissal). *See also, e.g.*, *Cataldo v. U.S. Steel Corp.*, No. 09-CV-1253, 2010 WL 1254862, at *3 (N.D. Ohio Mar. 25, 2010), *aff'd*, 676 F.3d 542 (6th Cir. 2012) (Polster, J.) (granting motion to dismiss on ground that defendant union was not an ERISA fiduciary).

defendants' *and plaintiffs'* briefs—that the Benefits Department, not the Investment Committee, had authority over the Cliffs Stock Fund.[14]

Because the Investment Committee had no responsibility with regard to the Cliffs Stock Fund, it should be dismissed from the case, as should the Officer Defendants, whose only alleged link to the Plan, plaintiffs concede, was the duty to appoint the Investment Committee. Br. at 28; Opp. at 30 ("responsib[ility] for appointing members of the Investment Committee" given as only reason to keep Officer Defendants in the case).

Cliffs should likewise be dismissed. The Complaint's only allegation against Cliffs is that the Officer Defendants' actions should be "imputed" to it. Br. at 28-29. Thus, if the Court concludes (as defendants submit it should) that the Officer Defendants are not fiduciaries, then Cliffs also must be dismissed as a defendant. But even if the Court concludes, contrary to the Plan terms, that the Officer Defendants are fiduciaries, Cliffs should still be dismissed, as plaintiffs have failed to refute[15] the facts that the Sixth Circuit has never recognized respondeat superior in the ERISA context and that the most persuasive authorities reject the doctrine's application to ERISA cases. *Id.* at 29-30.

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[14] Contrary to plaintiffs' assertion, Opp. at 29, the cabining of responsibilities in the Plan stands in stark *contrast* to *Daniels v. Nat'l Employee Benefit Servs., Inc.*, 858 F. Supp. 684, 691 (N.D. Ohio 1994), where one named fiduciary was "assigned the sole responsibility of managing trust assets," another was "responsible in its discretion to 'instruct' the [first fiduciary] as to the investment of trust assets," and the court determined, unsurprisingly, that both fiduciaries therefore had responsibility regarding the investment of trust assets.

[15] All they do is cite a single case, "[c]uriously . . . omit[ted]" by defendants considering that it is "from this very district." Opp. at 30. *Cardinal Health* was decided in the Southern District of Ohio. *In re Cardinal Health, Inc. ERISA Litg*., 424 F. Supp. 2d 1002 (S.D. Ohio 2006). While a single judge in a different district may have applied *respondeat superior* in an ERISA case, the far more important fact is that the Sixth Circuit has *never* recognized it. *Hamilton v. Carell*, 243 F.3d 992, 1001 (6th Cir. 2001); Br. at 29.

II. CONCLUSION

For all these reasons, as well as those stated in defendants' opening brief, the Complaint should be dismissed with prejudice.

Dated: February 29, 2016

Respectfully submitted,

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LOCAL RULE 7.1(f) CERTIFICATION

Pursuant to Local Civil Rule 7.1(f), I hereby certify that the foregoing Reply in Support of Defendants' Motion to Dismiss the Second Amended Complaint adheres to the page limitation for complex cases and is a total of 21 pages in length.

/s/ *John M. Newman, Jr.*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 29, 2016, defendants' Reply in Support of Defendants' Motion to Dismiss the Second Amended Complaint was filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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