IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE HP ERISA LITIGATION,

_____/

This Document Relates To: 12-6199
12-6410
13-0301

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Master File No. C-12-6199 CRB

ORDER GRANTING MOTION TO DISMISS

Defendant Hewlett-Packard ("HP"), various HP subsidiaries, and eight individual defendants who are current and former HP executives and general counsels, (collectively "Defendants") move the Court to dismiss this ERISA action. The suit stems from HP's acquisition of British software company Autonomy Corporation plc ("Autonomy") and the subsequent write-down of approximately $9 billion of HP's assets. Plaintiffs' claims include breach of duty of loyalty, breach of duty of prudence, and several derivative claims. The motions to dismiss argue, in brief, that: (1) Plaintiffs have sued the wrong fiduciaries; (2) the Moench presumption of prudence applies; (3) Defendants made no false or misleading fiduciary statements and had no duty to disclose nonpublic information; and (4) because the underlying claims fail, the derivative claims must be dismissed. Because the the Moench presumption of prudence applies, and because it was not improper for Defendants to take the time to investigate prior to making any disclosures, the Court GRANTS the motions to dismiss without prejudice.[1] The Court also GRANTS the unopposed Requests for Judicial Notice (dkts. 79, 83).

[1] At the February 28, 2014 hearing, Plaintiffs explained that new press reports and evidence have come to light since the filing of the Consolidated Am. Compl. (dkt. 50) ("Compl.") and that this new material will allow them to amend to address deficiencies. See Transcript (dkt. 115) at 20:12-23. Thus, the Court GRANTS leave to amend.

I. BACKGROUND

This Court is familiar with the details of HP's acquisition of Autonomy. There is no need to recite the details of that history again here. However, because this suit was filed under The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"), background on HP's retirement plan is relevant.

A. The Plan

HP sponsors a 401(k) retirement plan (the "Plan") for its employees.[2] The Plan is governed by the HP Company 401(k) Savings Plan, as amended and restated as of January 1, 2007, and as amended and restated as of January 1, 2012 (the "Plan Document"). Compl. ¶ 61. The Plan Document identifies and names two fiduciaries for the Plan: the Plan Committee for operation and administration of the Plan, and the Investment Review Committee ("IRC") for control and management of the assets of the Plan. Id. ¶¶ 42, 49. Each of the named individual defendants was a member of the IRC while employed by HP during the class period. Id. ¶¶ 42-48.

As the Plan sponsor, HP does not hold the Plan's assets, run the plan, or make investment choices for the Plan. Conway Decl., (dkt. 82) Ex. B at 1. Fidelity Management Trust Company holds the Plan's assets in trust. Plan participants have the option of making voluntary contributions to their accounts which HP matches dollar-for-dollar up to the first four percent of a participant's eligible compensation. Conway Decl., Ex. C at 4. Plan participants may invest their contributions, and HP's matching contributions, in a variety of offerings as determined by the IRC which the Plan Document divides into two categories: Investment Funds[3] and the dedicated HP Stock Fund. Conway Decl., Ex. A §§ 9(a), 9(b), 16(b). Under the Plan, participants decide how to allocate their retirement savings and may reallocate their savings freely. Conway Decl., Ex. C at 22, 25-27.

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[2] HP also authored and issued Summary Plan Descriptions to Plan participants. Id. ¶ 87. The Summary Plan Description dated January 1, 2012 ("SPD") specifically incorporates HP's previous and future SEC filings as fiduciary communications to Plan participants. Id. ¶ 88.

[3] In 2012, the IRC permitted investment in 27 funds in addition to the HP Stock Fund, including money market funds, bond funds, and mutual funds offered through Fidelity Investments. Conway Decl., Ex. C at 25-27.

This lawsuit focuses on the HP Stock Fund. The HP Stock Fund is an employee stock ownership plan (ESOP) which, under ERISA, is required to invest exclusively in HP stock.[4] As an ESOP, the HP Stock Fund, consistent with the intent of Congress in enacting ERISA, provides a simple way for HP employees to directly invest in the company they work for. See generally Quan v. Computer Sciences Corp., 623 F.3d 870, 879 n.7 (9th Cir. 2010) (noting that Congress intended for ESOPs "to reward and motivate employees by making them stakeholders in the success of the companies that employ them"). Though ERISA requires that this ESOP invest exclusively in HP stock, the Plan Document gives broad discretion to the Trustee regarding the "time, price, amount and manner of purchase of Stock for the Stock Fund." Conway Decl., Ex. A § 9(b). Determining the extent to which the various parties had the power (and fiduciary duty) to choose not to invest HP Stock Fund assets in HP stock is at the heart of this litigation.

B. The Parties

Plaintiffs are former HP employees and participants in HP's 401(k) Stock Fund. Plaintiffs purchased HP stock through the Plan during the Class Period. Plaintiffs allege that they suffered losses from purchasing and holding HP stock, rather than purchasing or diversifying into other investment options under the Plan.[5] Compl. ¶¶ 31-33.

Defendant Shoreline Investment Management Company ("Shoreline") is an investment management company that is a wholly owned subsidiary of HP and an SEC registered investment advisor. Compl. ¶¶ 50-51. During the Class Period, the IRC delegated authority and responsibilities to Shoreline. Id. ¶ 52. Plaintiffs allege that "[b]y this delegation, Shoreline became a co-fiduciary with authority and discretion over the HP

[4] The parties agree that to qualify as an ESOP the HP Stock Fund is required to invest exclusively in HP Stock. Compare Mot. to Dismiss (dkt. 81) at 2 with Opp'n to Mot. to Dismiss (dkt. 98) at 7. They dispute whether the Plan required that the HP Stock Fund be available as an investment option.

[5] Note that a Plan participant who invested in the HP Stock Fund immediately after the Autonomy deal was announced and held that investment until the present day would have made a profit of approximately 40 percent. See infra n. 6.

common stock fund" and that "HP also became a *de facto* fiduciary through its ownership and control of Shoreline. Id. ¶ 53.

State Street Bank and Trust Company ("State Street") is a trust company which provides services to mutual funds, pension funds, insurance companies, and other financial entities. During the Class Period, State Street served as the investment manager for the HP Common Stock Fund and was a co-fiduciary and independent investment manager. State Street is not a defendant. Id. ¶¶ 54-55. State Street "ha[d] no discretion as to whether to continue the availability of [the HP Stock] Fund as an investment option." Conway Decl., Ex. G at 1.

Defendant Catherine A. Lesjak was HP's Chief Financial Officer during the Class Period and the Chair of the IRC. Compl. ¶ 42. Defendant John N. McMullen, was HP's Treasurer during the Class Period. McMullen was also the President of Shoreline Investment Management Company. Id. ¶ 43. Defendant James T. Murrin was HP's Controller from the start of the Class Period until March 2012. Id. ¶ 44. Defendant Mark A. Levine was HP's Controller from March 2012 through the end of the Class Period. Id. ¶ 45. Defendant Michael J. Holston was HP's General Counsel from the start of the Class Period until December 2011. Id. ¶ 46. Defendant David W. Healy was HP's General Counsel from December 2011 until April 2012. Id. ¶ 47. Defendant John F. Schultz was HP's General Counsel from April 2012 through the end of the Class Period. Id. ¶ 48.

Defendants Lesjak, McMullen, Murrin, Levine, Holston, Healy, and Schultz were named fiduciaries under the Plan. Id. ¶¶ 42-48. Defendants McMullen, Murrin, Levine, Holston, Healy, and Schultz were also members of the Plan Committee. Id. at 49.

C. This Court's Ruling in the Related Securities Litigation

On December 10, 2013 this Court ruled on motions to dismiss in a related securities litigation case based on the same underlying facts. In re HP Securities Litigation, No. 12-5980 (dkt. 201) ("Order"). This Court issued an order granting in part and denying in part the motions to dismiss. Specifically, the Court rejected all claims involving statements made prior to May 23, 2012, and all claims regarding statements made by Lesjak. Id. There,

however, the Court assumed, without deciding, the falsity of the statements at issue because its "ruling hinge[d] primarily on the issue of scienter." Id. at 8. As Plaintiffs emphasized at the hearing on this motion, here, they need not plead scienter. See Transcript at 10:22-24.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). For purposes of evaluating a motion to dismiss, a Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

The claims for breach of fiduciary duty that Plaintiffs assert are governed by ERISA, which requires fiduciaries of retirement plans to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries" and to do so "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).

Claims for fraud must meet the pleading standard of Federal Rule of Civil Procedure 9(b), which requires a party "alleging fraud or mistake [to] state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) "requires an account of the time, place, and specific content of the false representations as well as the

identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted).

III. DISCUSSION

A. Plaintiffs Named the Appropriate Fiduciaries

The first issue before the Court is whether Plaintiffs named the appropriate fiduciaries as defendants. Under § 405(c)(2) of ERISA, when a "named fiduciary" delegates responsibilities to an independent fiduciary, "then [the] named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that the named fiduciary violated section 1104(a)(1)." 29 U.S.C. § 1105(c)(2). Defendants argue that HP's delegation of fiduciary authority to State Street Bank "to direct the investment and reinvestment of the assets credited to the [HP Stock] Fund" provided a safe harbor for Defendants and requires dismissal. Mot. to Dismiss at 14 quoting Conway Decl., Ex. F at 1. This argument fails because the alleged breaches of fiduciary duty relate to actions, statements, or omissions of the members of the IRC and the Plan Committee. To the extent Plaintiffs allege that the breach of fiduciary duty was caused by the continued offering of the HP Stock Fund as an investment option for HP employees during the class period, Compl. ¶¶ 2, 358, and or by false and misleading SEC filings or omissions, id. ¶¶ 173-74, 190, 210-15, Plaintiffs have named the appropriate defendants. HP's 2008 401(k) plan guidelines for the HP Stock Fund specifically prohibit State Street Bank from deciding whether to continue the availability of the Stock Fund as an investment option. Conway Decl., Ex. G at 1. Therefore, HP and HP's officers, rather than State Street Bank, are the appropriate defendants here.

B. The Moench Presumption of Prudence

The next issue before the Court is whether the Moench presumption of prudence applies. In Moench, the Third Circuit addressed the question, "[t]o what extent may fiduciaries of [ESOPs] be held liable under [ERISA] for investing solely in employer common stock, when both Congress and the terms of the ESOP provide that the primary

purpose of the plan is to invest in the employer's securities[?]"[6] Moench v. Robertson, 62 F.3d 553, 556 (3d Cir. 1995). The court concluded that only "in limited circumstances, ESOP fiduciaries can be liable under ERISA for continuing to invest in employer stock according to the plan's direction." Id. The Ninth Circuit "adopt[ed] the Moench presumption because it provides a substantial shield to fiduciaries when plan terms require or encourage the fiduciary to invest primarily in employer stock."[7] Quan, 623 F.3d at 881.[8] Thus, when an employee benefit plan requires or encourages investment in employer's stock, plan fiduciaries are entitled to a strong presumption that they satisfied ERISA's prudence mandate by permitting plan participants to invest in their employer's stock. Id. at 879-81.

Here, the Plan requires that the HP Stock Fund be an ESOP offered as an investment option for Plan participants. Conway Decl., Ex. A §§ 9(b), 10(a). Plaintiffs argue that the Moench presumption does not apply here "because the HP Plan did not require or strongly encourage investment in the stock fund." Opp'n to Mot. to Dismiss at 34. This argument

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[6] The question arose because of Congress' decision to incentivize employee ownership of their employer's stock. "Congress, believing employees' ownership of their employer's stock a worthy goal, has encouraged the creation of ESOPs both by giving tax breaks and by waiving the duty ordinarily imposed on trustees by modern trust law . . . to diversify the assets of a pension plan." Steinman v. Hicks, 352 F.3d 1101, 1103 (7th Cir. 2003). Recognizing that concentration of retirement assets in a single security is inherently risky, Congress expressly exempted fiduciaries of ESOPs and other eligible individual account plans from the statutory duty in ERISA to diversify retirement plan assets. ERISA § 404(a)(2), 29 U.S.C. § 1104(a)(2).

[7] The Ninth Circuit's rationale in adopting the Moench presumption squarely applies here: "Fiduciaries are not expected to predict the future of the company stock's performance; without the Moench presumption, a fiduciary could be sued for not selling if he adhered to the plan [and the company stock dropped], but also sued for deviating from the plan [and selling] if the stock rebounded. Moreover, the long-term horizon of retirement investing requires protecting fiduciaries from pressure to divest when the company's stock drops. The Moench presumption should also make it less likely that a plan fiduciary would be tempted to use insider information to divest the plan from company stock, since continued investment in the plan will be presumed prudent." Quan, 623 F.3d at 881-82 (internal quotations and citations omitted). See also supra n. 4.

[8] The Supreme Court recently heard argument on the question of "Whether the Sixth Circuit erred by holding that Respondents were not required to plausibly allege in their complaint that the fiduciaries of an employee stock ownership plan ("ESOP") abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable, as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101, et seq. ("ERISA"), and every other circuit to address the issue." Fifth Third Bancorp v. Dudenhoeffer, 692 f.3d 410 (6th Cir. 2012), cert. granted 134 S. Ct. 822 (Dec. 13, 2013) (No. 12-751). Oral argument was heard on April 2, 2014. In the event that the Supreme Court's decision in Fifth Third Bancorp substantially alters the Moench presumption, this Court will entertain a motion to reconsider.

hinges on Plaintiffs' reading of the Plan as providing the IRC "the power to terminate, hold purchases of, or transfer assets out of the stock fund." Id. at 35. Plaintiffs rely on § 9(f) of the Plan document which gives the IRC (or the Plan Committee) the power "to impose from time to time any restrictions or limitations on any or all Participants' ability to direct the investment of his, her or their Accounts into or out of a certain Fund or Funds as the Plan Committee or the IRC may deem appropriate in its sole and absolute discretion. Compl. ¶ 63; Conway Decl., Ex. A § 9(f); Opp'n to Mot. to Dismiss at 35 (emphasis added). Plaintiffs sum up the divergent readings of the Plan:

> Defendants argue that this provision only applies to Section 9(a) funds[9] by virtue of the definition of the capitalized term "Funds." [Mot. to Dismiss at 16-17.] But defendants ignore the second capitalized term, "Fund," which is not elsewhere defined. The only intelligible reading of this term "Fund" is as a reference to the one other "Fund" in the Plan Document that is defined–the Stock Fund.

Opp'n to Mot. to Dismiss at 35-36. Plaintiffs' reading of the Plan is unpersuasive.

Section 9 of the Plan distinguishes between the HP Stock Fund and all the other Funds available through the Plan. Conway Decl., Ex. A § 9. The Funds other than the HP Stock Fund are addressed in § 9(a) which gives the IRC broad discretion to add, remove, or modify the investment Funds available. Id. Section 9(b), which applies to just the HP Stock Fund, provides no such discretion to the IRC and instead mandates that the "Stock Fund shall be invested and reinvested primarily in [HP] Stock." Id. § 9(b). Read together, these two sections unequivocally provide the IRC with broad discretion as to all investment Funds offered under the Plan except for the HP Stock Fund. Plaintiffs' attempt to construe § 9(f) to the contrary falls short. Section 9(f) authorizes the Plan Committee or the IRC to restrict or limit Plan participants' ability to direct investments "into or out of a certain Fund or Funds." A plain reading of the language suggests that "Fund" is simply the singular of "Funds." Plaintiffs' argument that "Fund" must refer to the HP Stock Fund is inconsistent with the language in Sections 9(a) and (b), and the presumption that the same word or phrase is used consistently throughout the document: elsewhere the Plan refers to the HP Stock Fund as the "Stock Fund."

[9] The various investment funds available to Plan participants other than the HP Stock Fund.

Plaintiffs next argue that the Moench presumption does not apply here by relying on Harris v. Amgen, 738 F.3d 1026 (9th Cir. 2013). Opp'n to Mot. to Dismiss at 36-37. In Amgen, the Ninth Circuit held that the presumption of prudence did not apply because "[t]here is no language in the Plans requiring that a Company Stock Fund be established as an available investment for plan participants. Nor is there language in the Plans requiring that a Company Stock Fund, once established, be continued as an available investment." Id. at 1037-38. Not so here where § 9(b) of the Plan requires the establishment and maintenance of the HP Stock Fund. See also Conway Decl., Ex. A § 10 (establishing the HP Stock Fund). Thus, Amgen does not control here[10] and the Moench presumption of prudence applies.[11] "To overcome the presumption of prudent investment, plaintiffs must therefore make allegations that clearly implicate[ ] the company's viability as an ongoing concern or show a precipitous decline in the employer's stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement." Quan, 623 F.3d at 882 (internal quotations omitted) (alterations in original). Plaintiffs make no such allegations here. Therefore, the Court finds that the Moench presumption applies and GRANTS the Motion to Dismiss the prudence claim.

C. Disclosure Claims

The next issue before the Court is whether Plaintiffs have stated a claim that Defendants violated their ERISA duties of disclosure by omitting to disclose material information about the problems with Autonomy. See, e.g., Compl. ¶¶ 296, 299, 329, 382.

All of Defendants' statements and omissions at issue here were made either before Whistleblower No. 4 came forward, or while the investigation into Whistleblower No. 4's allegations was ongoing. As this Court noted in the securities case Order:

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[10] Amgen is also distinguishable because there plaintiffs in the parallel securities fraud case had survived a motion to dismiss, plausibly alleging that the defendants, all of whom were ERISA fiduciaries, had made false statements of material fact in SEC filings with scienter. 717 F.3d at 1050-51. Here, plaintiffs in the parallel securities-fraud case had most of their case dismissed. Order.

[11] Plaintiffs concede that if the Moench presumption applies, their prudence claims fail. Supp. Opp'n to Mot. to Dismiss (dkt. 106) at 3.

> Whistleblower No. 4's allegations required time to investigate–the PwC investigation took approximately six months. Compl. ¶ 141. "Taking the time necessary to get things right is both proper and lawful. Managers cannot tell lies but are entitled to investigate for a reasonable time, until they have a full story to reveal." Higginbotham[v. Baxter Int'l Inc.], 495 F.3d [753,] 761 [(7th Cir. 2007)]. Defendants have no obligation to prematurely report allegations, even if well-founded; nor would Defendants have been able to accurately determine the true amount of the required write-down absent a thorough investigation."

Order at 17. That reasoning controls here.[12]

Plaintiffs argue that the "fiduciary duty of loyalty not only requires that a fiduciary put the interests of those to whom she owes the duty above her own interests, but that she 'has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information.'" Opp'n to Mot. to Dismiss at 26 quoting Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995). Nevertheless, as in the securities case, a fiduciary cannot "convey complete and accurate information" until she has had adequate time to investigate. Even then, nothing "require[s] plan fiduciaries to disclose nonpublic information regarding the expected performance of a plan investment option." In re Citigroup ERISA Litig., 662 F.3d 128, 143 (2d Cir. 2011).

At the hearing, Plaintiffs argued that, at a minimum, Defendants should have told Plan participants about Lesjak's opposition to the Autonomy acquisition. See Transcript at 15:1-7. It is true that, unlike Whistleblower No. 4's allegations, Lesjak's opposition to the acquisition required no investigation. However, Plaintiffs' argument would effectively require that Plan participants become boardroom participants. No law requires a board to invite every shareholder or employee to observe proceedings or be privy to disagreements.

It is difficult to separate out the interests of the HP Stock Fund participants from the interests of any HP shareholder. If Defendants had been able to terminate or suspend the HP Stock Fund as a result of concerns over Autonomy, the impact of such a termination or suspension on the price of HP stock, including that already owned by the HP Stock Fund,

[12] CEO Meg Whitman, whose post-May 23 statements the Court found to be actionable in the securities case, is not a defendant here, nor was she a Plan fiduciary at any time. See Opp'n to Mot. to Dismiss at 33, n. 15.

likely would have been dire. Nor could HP have prevented employees from buying stock without disclosing as much to the market. "[F]iduciaries are under no obligation to violate securities laws in order to satisfy their ERISA fiduciary duties. . . . Moreover, plan participants are not entitled to profit from artificially inflated stock prices or to avoid financial loss by selling before public disclosure of a company's deteriorating health." Quan, 623 F.3d at 882, n. 8. In Amgen the Ninth Circuit noted that:

> compliance with ERISA would likely have resulted in compliance with the securities laws. If defendants had revealed material information in a timely fashion to the general public (including plan participants), thereby allowing informed plan participants to decide whether to invest in the Amgen Common Stock Fund, they would have simultaneously satisfied their duties under both the securities laws and ERISA.

738 F.3d at 1042-43. But here, the Court has already found that it was proper for Defendants to take the time to investigate the allegations of fraud at Autonomy before making any public disclosures. See Order at 17.

Finally, Plaintiffs argue that "[a]t a minimum, the Court should sustain plaintiffs' loyalty claims to the extent similar allegations were sustained under the higher pleading standard" in the related securities litigation. Supp. Opp'n to Mot. to Dismiss at 2. There were three statements that this Court found actionable in the securities litigation. The parties agree that the two statements made by Whitman are not at issue here because Whitman is not a defendant and was never a plan fiduciary. Transcript at 21:8-12. The third statement this Court found to be actionable in the securities case, a materially misleading declaration of the value of Autonomy in HP's third quarter 2012 SEC form 10-Q, is at issue here. The SPD was issued in January 2012, months before Whistleblower No. 4 came forward in May and longer still before the third quarter 10-Q was filed in September. Plaintiffs argue that the fact that the SPD predates the filing of the SEC form with the actionable statement is irrelevant because the SPD incorporated by reference future SEC filings. See Transcript at 21-22.

The issue, then, is whether incorporating by reference a future SEC filing can be the basis for liability. This Court is unaware of any Ninth Circuit case that addresses this precise question, and the parties were unable to provide one. Plaintiffs point to Amgen but in that case the Ninth Circuit did not actually consider the issue of incorporating by reference future

filings: the holding there was "that defendants' preparation and distribution of the SPDs, including their incorporation of Amgen's SEC filings by reference, were acts performed in their fiduciary capacities." Amgen, Inc., 738 F.3d at 1044. But here the question is narrower and is limited to an SEC document filed well after several of the defendants had ceased to play a fiduciary role. Defendants point to a Second Circuit decision in which that court considered an SPD which incorporated by reference future SEC filings which were at issue. Rinehart v. Akers, 722 F.2d 137, 152-53 (2013). The Second Circuit held that even where the SPD explicitly incorporates by reference future filings, "Plaintiffs must still articulate a viable claim that," when the SPD was issued but before the SEC filings existed, "Defendants knew of false statements . . . yet to be contained in . . . the SEC filings . . . yet to be incorporated in[] the SPDs." Rinehart v. Akers, 722 F.3d 137, 153 (2d Cir. 2013). While the Court acknowledges that there is no clear rule in the Ninth Circuit, the Second Circuit's reasoning is persuasive. As Plaintiffs pointed out at the hearing, plan participants should be able to rely on the SPD's incorporating by reference of future filings. Transcript 22:4-10. But the fact that the SPD incorporates by reference future filings does not absolve Plaintiffs of their obligation to "articulate a viable claim that . . . Defendants knew" of the falsity at the time the SPD was distributed. Here, the SPD was dated January 2012 and Whistleblower No. 4 did not make his allegations until May 2012. Therefore, the Court GRANTS the motion as to the disclosure claims.

D. Derivative ERISA Claims

In Counts II, IV, and V, Plaintiffs allege that Defendants failed to monitor their co-fiduciaries, failed to avoid conflicts of interest, and knowingly participated in co-fiduciaries' breaches of duty. Compl. ¶¶ 363-70, 380-87. These claims are derivative of the prudence and disclosure claims. Because the Court GRANTS the motion as to the prudence and disclosure claims, the Court further GRANTS the motion as to these derivative claims.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the unopposed requests for judicial notice and GRANTS the Motion to Dismiss without prejudice.

IT IS SO ORDERED.

Dated: April 2, 2014

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE