**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

BARTON GERNANDT, JR., et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-15-834-D
	)	
SANDRIDGE ENERGY INC., et al.,	)	
	)	
Defendants.	)	

CHRISTINA A. CUMMINGS, et al.,	)	
	)	
Plaintiff,	)	
	)	*Consolidated with*
v.	)	Case No. CIV-15-892-D
	)	
SANDRIDGE ENERGY, INC., et al.,	)	
	)	
Defendants.	)	

RICHARD A. McWILLIAMS, et al.,	)	
	)	
Plaintiff,	)	
	)	*Consolidated with*
v.	)	Case No. CIV-15-1001-D
	)	
SANDRIDGE ENERGY, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

INTRODUCTION

This consolidated class action involves claims for alleged violations of the Employee Retirement Income Security Act of 1974, codified at 29 U.S.C. § 1001, *et seq*. ("ERISA"), with respect to the SandRidge Energy, Inc., 401(k) Plan (the "Plan"). Plaintiffs, participants and beneficiaries of the Plan, claim the defendants were responsible for the Plan's investments and breached their fiduciary duties by, *inter alia*, retaining SandRidge common stock as an investment option in the Plan despite its decline and when a reasonable fiduciary would have done otherwise. *See* Consol. Class Action Compl., ¶ 2 (hereinafter "Compl."). Specifically, Plaintiffs allege Defendants permitted the Plan to continue to offer SandRidge Stock as an investment option to Participants even after the Defendants knew or should have known that: (1) SandRidge Stock was, for a substantial portion of the Class Period (August 2, 2012 to the present), artificially inflated; (2) SandRidge was in extremely poor financial condition; and (3) SandRidge faced extremely poor long term prospects, making it an imprudent retirement investment option for the Plan. *See id*. ¶ 3. Plaintiffs' Complaint is largely based on public information about SandRidge's gradual decline into bankruptcy, beginning in 2012 and culminating in 2016.

Before the Court is Defendant Reliance Trust Company's (Reliance) Motion to Dismiss Consolidated Class Action Complaint and Motion to Strike Jury Demand [Doc. No. 118]. Reliance was the Plan's trustee and held the Plan's assets in trust.

Compl. ¶ 73. As stated more fully below, Plaintiffs contend that, given the amount of public information available regarding SandRidge's financial condition, Reliance had a duty to disregard any instruction to invest Plan assets in SandRidge stock. *Id*. ¶ 75. Plaintiffs have responded to the Motion [Doc. No. 125] and Reliance has replied [Doc. No. 130]. The matter is fully briefed and at issue.[1]

BACKGROUND

The following facts are taken from the Consolidated Complaint and, in addition to all reasonable inferences, viewed in the light most favorable to Plaintiffs. *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016). Legal conclusions, however, are not or accepted as true. *See id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The SandRidge Energy, Inc., 401(k) Plan was formed to provide participants with the opportunity to save for retirement. A trust was established as a funding medium for the Plan, which designated Reliance as trustee. Reliance was not a party to the Plan and had no duties or responsibilities with respect to it other than those expressly included in the applicable trust agreements. Under the agreements,

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[1] As noted above, on May 16, 2016, SandRidge and certain of its subsidiaries and affiliates initiated Chapter 11 bankruptcy proceedings in the Southern District of Texas [Doc. No. 144]. Accordingly, this action was stayed pending the conclusion of the bankruptcy litigation [Doc. Nos. 152-153]. Upon its completion, this action was reopened so Plaintiffs could proceed against the non-debtor defendants and SandRidge in a nominal capacity [Doc. No. 155].

Reliance had a duty to invest and reinvest trust assets pursuant to instructions from certain fiduciaries. A significant portion of the Plan assets consisted of SandRidge stock -- approximately 34% and 36% of the Plan's net assets in 2012 and 2013. A Form 11-K that SandRidge filed with the Securities and Exchange Commission (SEC) noted that as a result of this concentration, "any significant fluctuation in the market value of Company common stock could impact the net assets of the Plan as well as individual participant account balances." From 2011 to 2014, the Plan offered numerous investment options, including SandRidge stock. During this period, certain investment options were placed on a "watch list" and removed due to, among other things, underperformance. During the relevant time period, SandRidge stock was never placed on the watch list.

SandRidge explored, developed and produced natural gas with a focus on the Mid-Continent region of North America, also known as the "Mississippian formation" or "Mississippian play." SandRidge stated it was investing in the Mississippian play due to the large amounts of oil relative to natural gas. However, SandRidge overstated the amount of oil relative to natural gas in the area (which dipped in price), resulting in the overstatement of the economic value of SandRidge's Mississippian play and thereby overvaluing the price of SandRidge stock. From 2011 to 2012, the Complaint alleges SandRidge made statements that falsely touted the economic value of its wells in the Mississippian play by, *inter alia*, omitting the true amount of natural gas relative to oil in SandRidge's wells.

On August 2, 2012, SandRidge announced its financial results for the second quarter 2012 and first six months of 2012 in a press release that was filed with the SEC. The announcement stated that the Mississippian play's daily production grew 31% quarter over quarter and 199% from the comparable period in 2011. However, SandRidge's massive spending on drilling new wells in the Mississippian play enabled SandRidge to report increasing production numbers, although its older wells were experiencing steep declines. The heightened drilling activity masked the rapid decline and depletion in SandRidge's Mississippian wells.

Plaintiffs allege that by this point in time, SandRidge's Board of Directors and Benefits Committee knew or should have known of the company's misstatements, given the investigative resources available. After the close of trading on November 8, 2012, SandRidge issued a press release reporting a "net loss applicable to common stockholders of $184 million." SandRidge's Chief Executive Officer (CEO), Tom Ward, acknowledged that its increase in natural gas production had been offset by a lower amount of oil being produced. In response to this news, an analysist downgraded SandRidge's rating from "Buy" to "Neutral." SandRidge shares subsequently dropped to $5.51 per share on November 9, a 34% decline from January 3, 2012.

SandRidge's Benefits Committee met with a consultant on March 7, 2012 to review investment options for the Plan. The Committee agreed to continue to monitor one Plan investment, but at no time did the board discuss SandRidge stock as an investment. By the beginning of May 2012, SandRidge stock dropped 4.7% to $6.91 per share. On May 7, 2012, SandRidge reported its financial results for the first quarter of 2012, where it reported a net loss of $216 million. The company also reported a loss to its cash and cash equivalents, which dropped 38.5% from $207.7 million to $127.8 million. The Benefits Committee met again on May 9, 2012 to review investment options. The committee agreed to continue monitoring two Plan investment options due to lagging performance. However, the committee did not discuss SandRidge stock. During this time, SandRidge's Z-Score was 0.12,[2] and its debt-to-equity ratio was 1.93 (meaning it had 1.93 times more debt than equity). Plaintiffs state that, by August 2, 2012, it was or should have been clear that SandRidge stock was not a prudent investment. On August 6, 2012, the Benefits

[2] The "Altman Z-Score" is a commonly-accepted methodology used to gauge a company's likelihood of going bankrupt. *See, e.g., DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756, 769 (E.D. Va. 2006); *see also American Pegasus SPC v. Clear Skies Holding Co., LLC*, No. 13-CV-3035, 2015 WL 10891937, at *14 (N.D. Ga. Sept. 22, 2015) (observing that "courts have noted the acceptance of Z-score as a reliable model to predict distress.") (citing *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1316 (S.D. Fla. 2007); *Litman v. United States*, 78 Fed. Cl. 90, 126 (2007)). "The higher the Z-Score, the more healthy the company; companies with the lowest Z-Scores are 'deeply distressed financially' and run a substantial risk of default." *Litman*, 78 Fed. Cl. at 126.

Committee met only to discuss SandRidge's health plans. At its next meeting, held August 27, 2012, the committee concluded that offering SandRidge stock as an investment option was required by the Plan and even if it was not required, it was appropriate to keep SandRidge stock as an investment. The committee met again on September 21, 2012 to discuss company health plans.

Citing SandRidge's "disastrous performance," a major investor called for the resignation of SandRidge's CEO. By mid-December 2012, SandRidge stock was downgraded to "Sell" by one investment bank. On December 9, 2012, SandRidge sold its properties in the Permian Basin, which caused its stock to fall 4.8%, and SandRidge shares were down over 20% by year's end. At the end of December, SandRidge's Z-Score was 0.20 and its debt-to-equity ratio was 1.8. On December 11, 2012, the Benefits Committee met and reviewed SandRidge stock, where it, again, concluded that the Plan required offering SandRidge stock as an investment and offering the stock was appropriate even absent such a requirement.

In 2013, SandRidge was downgraded to "Underweight" and "Underperform" by two investment firms. The Benefits Committee met again on March 25, 2013 and reviewed the Plan's investment options. Approximately thirteen Plan investment funds were recognized as "underperforming." Regarding SandRidge stock, however, the Committee noted that stock price fluctuations were an insufficient basis to require removing it as an investment option, but if the committee had knowledge of an impending collapse, such information would need to be considered. As before, the committee concluded that offering SandRidge stock was required by the Plan and remained an appropriate option even if it was not required. On May 8, 2013, for the first quarter, SandRidge reported a net loss of $531.3 million, $315 million more than in 2012. The Benefits Committee met on May 20, 2013 and reviewed the Plan's investments. Approximately twelve investments were viewed as "underperforming." The Committee concluded that offering SandRidge stock was required by the Plan and remained appropriate as an option even absent a requirement. By the end of the second quarter of 2013, SandRidge reported $506.6 million in losses for the first six months ending June 30, 2013. As of June 30, 2013, SandRidge's Z-Score was 0.26.

The Benefits Committee met again on August 15, 2013. Ten investments were recognized as "underperforming." The committee agreed to keep SandRidge stock as an investment option. On November 6, 2013, SandRidge reported its financial results for the third quarter of 2013, ending September 30, 2013, where it reported $39 million less in total revenues. It also reported a net loss of income in the amount of $54.6 million, and losses totaling $556.3 million for the nine-month period ending September 30, 2013. The Benefits Committee met three more times in 2013. There was no discussion of placing SandRidge stock on a watch list or removing it as an investment option.

On May 8, 2014, SandRidge reported its financial results for the first quarter of 2014 for the period ending March 31, 2014. It reported a loss in total revenue of $68.6 million and a reported net loss of $134 million for the quarter. As of March 31, 2014, SandRidge's Z-Score was 0.11 and its debt-to-equity ratio had risen to 1.9. By the end of the second quarter of 2014, SandRidge reported its total revenues had decreased by 27% to $374.7 million and that it incurred a net loss of $8.8 million for the quarter. Collectively, for the first six months of 2014, SandRidge reported a net loss of $142.8 million. The Benefits Committee met on April 23, 2014, and one investment was flagged for monitoring. For the reasons cited above, the committee elected to keep SandRidge stock as an investment option. The committee subsequently met on June 30, 2014, September 10, 2014, and November 19, 2014. SandRidge stock was not discussed at either the June or September meetings, but at the November meeting the committee elected to keep SandRidge stock as an investment option. On December 31, 2014, SandRidge's Z-Score was negative 0.04.

On November 4, 2014, SandRidge announced that its financial accounting for the prior two years was being reviewed by the SEC. The review stemmed from a thirty-year treating agreement SandRidge had with Occidental whereby SandRidge supplied Occidental with carbon dioxide. Under the agreement, SandRidge was required to pay a penalty if it failed to deliver its contracted volumes. Due to the unprofitability of natural gas wells, SandRidge had to pay the penalty each year.

SandRidge had been accruing the penalty in its books annually, but the SEC stated it had to accrue the penalty quarterly. As a result, SandRidge announced it was reconsidering its accounting treatment with respect to the penalty, which could "materially affect" the net income reported for previous periods. SandRidge stated that its financial statements for 2013 and the first half of 2014, accordingly, should no longer be relied upon. After the announcement, SandRidge shares dropped to a 52-week low of $3.56 by close of business November 4, 2014. Plaintiffs allege SandRidge's Audit Committee knew or should have known of the accounting practices, but took no steps to protect the Plan or its participants. As a result of the SEC review, SandRidge's financial statements for 2013-14 were impacted by more than $40 million.

On January 8, 2015, SandRidge restated its financial condition because of the SEC's audit. The company also reported its financial earnings for the third quarter ending September 30, 2014. It reported a 20% drop in total revenues and its cash and cash equivalents dropped nearly $20 million. In February 2015, SandRidge reported it was also slashing its rig count in Kansas and Oklahoma by 75% and that it intended to lay off 265 employees of a subsidiary in Odessa, Texas. SandRidge reported its 2014 annual financial statements on February 27, 2015, and it reported a decrease in cash and cash equivalents totaling $181.3 million for 2014 compared to $814.7 million in 2013, a reduction of 78%. It also reported total revenues decreased by

21% in 2014, and oil and natural gas revenues had decreased by 22% since the end of the prior year.

The Benefits Committee met on March 27, 2015 and it elected to keep SandRidge stock as an investment option. On March 31, 2015, SandRidge had a Z-Score of negative 0.9142 and its debt-to-equity ratio was 3.8 – meaning it had nearly four times more debt than equity. In April 2015, SandRidge announced it would lay off 132 employees. During the first three months of 2015, SandRidge lost more than $1.2 billion of its total assets as of year's end 2014. Its oil, natural gas, and natural liquids revenues declined from $405,316,000 in 2014 to $195,732,000 in 2015. Its total revenue was down more than $227 million. In all, SandRidge had a net loss of $1,151,874,000 for the first quarter of 2015. Its long-term debt increased by $175 million during the first three months of 2015.

In June 2015, SandRidge laid off 40 employees in its Alva, Oklahoma office. On June 12, 2015, SandRidge's stock price fell due to news of lower oil prices. The Benefits Committee met on June 18, 2015 and flagged four Plan investment funds for further monitoring. It reviewed SandRidge stock and elected to keep it as an investment. One week later, on June 26, 2015, SandRidge stock fell to $0.95 per share, and it was in danger of being delisted from the New York Stock Exchange. At the time of Plaintiffs' initial complaint, SandRidge stock was considered a "penny stock" – a security that trades at less than $5.00 per share.[3] On August 5, 2015, SandRidge reported that during the second quarter of 2015 ending June 30, 2015, its debt increased by approximately $53 million. Accordingly, at the end of the second quarter of 2015, SandRidge's net debt was $3.4 billion. On September 23, 2015, SandRidge stock hit a 52-week low of $0.31 cents per share. On November 4, 2015, SandRidge reported a $640.4 million loss for its third fiscal quarter of 2015 ending September 30, 2015. The company also reported an adjusted net loss of $45 million for the third quarter of 2014 and an adjusted operating cash flow down to $45 million. At the time of Plaintiff's initial complaint, SandRidge stock was trading at $0.31 cents per share.

Plaintiffs contend that, given the amount of public information regarding SandRidge's financial condition, Reliance had a duty to disregard any instruction from the Benefits Committee to invest Plan assets in SandRidge stock. Compl. ¶ 75. Specifically, Count Four of the Complaint alleges:

> 301. Reliance breached its duties to prudently and loyally manage the Plan's assets. During the Class Period, Reliance knew or should have known that, as described herein, Company Stock was not a

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[3] *See, e.g., S.E.C. v. Bronson*, 14 F. Supp. 3d 402, 404 n. 1 (S.D.N.Y. 2014). The *Bronson* court noted that "[p]enny stocks may be difficult to accurately price and are particularly susceptible to market manipulation due to the lack of liquidity in the market, minimal standard requirements for over-the-counter trading, paucity of publicly available information on the companies issuing these stocks, and the fact that many of these companies are either newly formed or approaching bankruptcy." *Id*. (citation omitted). "Accordingly, penny stocks are considered to be particularly high risk and not suitable to all investors." *Id*. (citation omitted).

> suitable and appropriate investment for the Plan. Yet, during the Class Period, despite its knowledge of the imprudence of the investment, Reliance failed to take any meaningful steps to protect Participants from the inevitable losses that it knew would ensue as the already-weakened SandRidge faced quarter after quarter of loss as its business model became increasingly difficult and its ultimate demise became significantly more likely.
>
> 302. Reliance further breached its duties of loyalty and prudence by failing to divest the Plan of Company Stock when it knew or should have known that it was not a suitable and appropriate investment for the Plan.
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> 303. Reliance also breached its co-fiduciary obligations by, among their other failures, knowingly participating in each other's failure to protect the Plan from inevitable losses. Reliance had or should have had knowledge of such breaches by other fiduciaries of the Plan, yet made no effort to remedy them.
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> 304. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly the Participants, lost a significant portion of their retirement investment. Had Reliance taken appropriate steps to comply with its fiduciary obligations, participants could have liquidated some or all of their holdings in Company Stock and thereby eliminated, or at least reduced, losses to the Plan.

Compl. ¶¶ 301-304.

Reliance contends Plaintiffs' claims against it must be dismissed because as a "directed trustee," it had no authority or discretion over the Plan's assets and exercised no fiduciary duties with respect to the wrongs alleged in Plaintiffs' Complaint. According to Reliance, it simply did what it was directed to do and Plaintiffs have failed to plausibly allege any cause of action against it. Moreover, Reliance alleges Plaintiffs do not state a plausible claim under the applicable standards as to fiduciaries having discretionary authority with respect to investment decisions, which were clarified by the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) ("*Fifth Third*"). Reliance also contends Plaintiffs have failed to plausibly plead an action for co-fiduciary liability, and moves to strike Plaintiffs' jury trial demand.

STANDARD OF DECISION

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility 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 "plausibility" standard announced in *Twombly* and *Iqbal* is not considered a "heightened" standard of pleading, but rather a "refined standard," which the Tenth Circuit has defined as "refer[ring] to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th

Cir. 2012) (citing *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)).

The Tenth Circuit has further noted that "[t]he nature and specificity of the allegations required to state a plausible claim will vary based on context." *Khalik*, 671 F.3d at 1191 (quoting *Kansas Penn Gaming*, 656 F.3d at 1215). "Thus … the *Twombly/Iqbal* standard is 'a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do.' " *Id*. (quoting *Robbins*, 519 F.3d at 1247). In deciding *Twombly* and *Iqbal*, there remains no indication the Supreme Court "intended a return to the more stringent pre-Rule 8 pleading requirements." *Id.* at 1191 (citing *Iqbal*, 556 U.S. at 678).

Thus, it remains true that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555); *Smith v. United States*, 561 F.3d 1090, 1104 (10th Cir. 2009) ("Technical fact pleading is not required, but the complaint must still provide enough factual allegations for a court to infer potential victory.") (quoting *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008)). "While the 12(b)(6) standard does not require that Plaintiff establish a prima facie case in [its] complaint, the elements of each alleged cause of action help to determine whether Plaintiff has set forth a plausible claim." *Khalik*, 671 F.3d at 1191 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002)). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Sanchez v. Hartley*, 810 F.3d 750, 756 (10th Cir. 2016) (citing *Twombly*, 550 U.S. at 556).

Fifth Third Bancorp v. Dudenhoeffer

Relevant to the instant motion, the Supreme Court in *Fifth Third* held that *Twombly* and *Iqbal* limited claims involving employee stock ownership plans in two respects. First, the Court held 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, at least in the absence of special circumstances." 134 S.Ct. at 2471. Thus, a claim based on "publicly available information, such as newspaper articles," is generally insufficient to state a claim. *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 the stocks traded on it that is available to him.'" *Id*. (quoting *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 408 (7th Cir. 2006)).

Second, as for claims based on material inside information, the Court sharply constrained such claims by directing lower courts "to bear in mind that the duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law." *Id*. at 2472. The Court, nonetheless, suggested it might be possible to allege a claim for breach of fiduciary duty based on nonpublic information without implicating the insider trading laws. To sustain such a claim, assuming a fiduciary possessed inside information bearing adversely on a plan's continued investment in the stock of its sponsor, "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id*. Such actions might include disclosure or declining to invest further in the securities of the plan sponsor, although 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." 134 S.Ct. at 2473.[4]

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[4] In *Amgen Inc. v. Harris*, __ U.S. __, 136 S.Ct. 758, 193 L.Ed.2d 696 (2016), the Supreme Court clarified that the complaint itself must plausibly allege "that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Id*. at 760 (quoting *Fifth Third*, 134 S.Ct. at 2463). The Court clarified that a court cannot simply presume that the plaintiff's proposed alternatives would satisfy the *Fifth Third* standards; rather, "the facts and allegations supporting that proposition should appear in the stockholders' complaint." *Id*.

"Although *Fifth Third* did not provide examples as to what a special circumstance would entail, various courts have found special circumstances to be akin to accounting irregularities, misappropriations of insider information, or another action which affects the market's reliability of a stock's market price." *In re 2014 Radioshack ERISA Litig*., 165 F. Supp. 3d 492, 502 (N.D. Tex. 2016) (citations omitted).

DISCUSSION

ERISA subjects pension and benefit plan fiduciaries to a duty of prudence. *See* 29 U.S.C. § 1104. An ERISA plan participant may bring a civil action to enforce this duty. *See id*. § 1132(a)(2); *Cooper v. Occidental Petroleum Corp*., No. 16-CV-687-TCK–TLW, 2017 WL 1652576, at *3 (N.D. Okla. May 1, 2017). The elements of a breach of fiduciary duty claim under ERISA are: (1) the defendant was a fiduciary, (2) the defendant was acting within its capacity as a fiduciary at the time of the alleged breach, and (3) the defendant breached its fiduciary duty. *Womack v. Orchids Paper Products Co. 401(K) Sav. Plan*, 769 F. Supp. 2d 1322, 1328 (N.D. Okla. 2011). With respect to management and administration decisions, the standard of proof required to hold a fiduciary accountable is high. "It is not enough to show that a fiduciary's investment decisions turned out badly; to prevail, a plaintiff must show that those decisions were objectively imprudent at the time they were made." *Gedek v. Perez*, 66 F. Supp. 3d 368, 674 (W.D.N.Y. 2014).

Under ERISA, a person is a "fiduciary" to the extent he or she (1) exercises any discretionary authority or discretionary control respecting management of the plan, (2) renders investment advice for a fee or other compensation with respect to any moneys or other property of the plan, or (3) has any authority or responsibility to do so or has any discretionary authority or discretionary responsibility in the administration of the plan. *See* 29 U.S.C. § 1002(21)(A); *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). The phrase "to the extent" indicates a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control. *In re Luna*, 406 F.3d 1192, 1202-03 (10th Cir. 2005). ERISA, hence, generally defines the term "fiduciary" in "functional terms of control and authority over the plan." *See id*. (quoting *Mertens v. Hewitt Assocs*., 508 U.S. 248, 262 (1993)); *In re Williams Cos. ERISA Litig*., 271 F. Supp. 2d 1328, 1341 (N.D. Okla. 2003).[5] This definition is "broad but not all-encompassing." *Luna*, 406 F.3d at 1208. Fiduciaries under ERISA are those so named in the plan, or those who exercise fiduciary functions. *Luna*, 406 F.3d at 1201 ("Once deemed a fiduciary, either by express designation in the plan documents or the assumption of fiduciary obligations

[5] *See also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 587 (S.D. Tex. 2003) ("*Inter alia*, fiduciary status … is broadly construed in accordance with ERISA's policies and objectives.") (citing *John Hancock Mutual Life Ins. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993)).

(the functional or de facto method), the fiduciary becomes subject to ERISA's statutory duties.").

A fiduciary who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by ERISA shall be personally liable to their plans for any losses to the plan resulting from such breach. *See* 29 U.S.C. § 1109(a). "Therefore, as the Supreme Court has noted, the 'threshold question' in an action for breach of fiduciary duty is whether the alleged fiduciary 'was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.'" *Luna*, 406 F.3d at 1206 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)).

I

As noted *supra*, Reliance contends Plaintiffs' claims against it should be dismissed on the grounds that it was a directed trustee that did not possess discretion regarding the extent to which the Plan invested in SandRidge stock, and thus, it cannot be held liable for the Plan's ongoing investment in the stock. Plaintiffs do not dispute that Reliance was a directed trustee. *See* Pl. Resp. at 3. Accordingly, the issue is whether Reliance's status as a directed trustee is sufficient to absolve it of liability for following directions given by SandRidge's Benefits Committee.

ERISA states that:

> [A]ll assets of an employee benefit plan shall be held in trust by one or more trustees. … [U]pon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that (1)

> the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or (2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers[.]

See 28 U.S.C. § 1103(a)(1). Under this "directed trustee provision," "a directed trustee will escape liability only if it relies upon directives that are proper,[6] consistent with plan terms, and not contrary to ERISA." *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1235 (D. Kan. 2004) (citing *Maniace v. Commerce Bank*, 40 F.3d 264, 267-68 (8th Cir. 1994)).[7] "[T]he directed trustee provision *modifies the extent of, but does not eliminate, a directed trustee's fiduciary duties*. A directed trustee may not comply with directives that the trustee knows or ought to know violate the fiduciary's duties to the beneficiaries, and the trustee must still conform to the prudent person standard of care." *See id*. (citing *FirsTier Bank v. Zeller*, 16 F.3d 907, 911 (8th Cir. 1994) (emphasis added)); *Enron*, 284 F. Supp. 2d at 587 ("ERISA's expansive definition of fiduciary, its enhancement of the fiduciary's duty

[6] Courts have noted that by requiring directives to be "proper," Congress meant to exclude any communications from the named fiduciary that did not meet certain formal requirements, including that a direction be clear, unequivocal and in writing and that it issue from a person or entity with authority to do so. *DiFelice v. U.S. Airways, Inc.*, 397 F. Supp. 2d 735, 747-48 (E.D. Va. 2005).

[7] *See also Gedek v. Perez*, 66 F. Supp. 3d 368, 382 (W.D.N.Y. 2014); *Chesemore v. Alliance Holdings, Inc.*, 770 F. Supp. 2d 950, 969 (W.D. Wis. 2011); *Afridi v. Nat'l City Bank*, 509 F. Supp. 2d 655, 664 (N.D. Ohio 2007); *DiFelice v. U.S. Airways, Inc.*, 397 F. Supp. 2d 735, 746 (E.D. Va. 2005).

incorporated from trust law, and the statute's purpose and policy of heightened protection of plan assets and plan participants and beneficiaries, together, support the Court's conclusion that [§ 1103(a)(1)] should be read to maintain some, rather than virtually eliminate, fiduciary obligations of a directed trustee to question and investigate where he has some reason to know the directions he has been given may conflict with the plan and/or the statute."); *see also In re Worldcom, Inc.*, 263 F. Supp. 2d 745, 762 (S.D.N.Y. 2003) ("To the extent, therefore, that Merrill Lynch is alleged to have followed instructions to invest employee funds in WorldCom stock when a prudent trustee would know that WorldCom's decision to continue to offer its own stock to its employees as an investment option was imprudent, or otherwise in violation of WorldCom's obligations under ERISA, then Merrill Lynch may be liable as an ERISA fiduciary.").

The Department of Labor, in a Field Assistance Bulletin ("FAB"), addressed the fiduciary responsibilities of a directed trustee. *See* Department of Labor, Field Assistance Bulletin No. 2004-03 (December 17, 2004). The FAB addressed two scenarios: (1) where a directed trustee possesses material, non-public information about the sponsor, and (2) where its only information is public. Where a directed trustee possesses "material non-public information that is necessary for a prudent decision," it has a duty to inquire whether the named fiduciary knows of and has considered such information. *See id*. at 4. The FAB proceeded to state that, although directed trustees rarely have an obligation under ERISA to act on public information, "in limited, extraordinary circumstances, where there are clear and compelling public indicators, as evidenced by an 8-K filing with the Securities Exchange Commission (SEC), a bankruptcy filing or similar public indicator, that call into serious question a company's viability as a going concern, the directed trustee may have a duty not to follow the named fiduciary's instruction without further inquiry." *Id*. at 6.

In sum, the fiduciary duties of a directed trustee are "extremely narrow" and are "significantly narrower than the duties generally ascribed to a discretionary trustee under common law trust principles." *Harley v. Bank of New York Mellon*, No. 1:15-cv-8898-GHW, 2017 WL 78901, at *20 (S.D.N.Y. Jan. 9, 2017) (citations omitted).

II

A review of the foregoing legal principles and authorities leads the Court to conclude as follows. As a threshold matter, the Complaint's allegations support a finding that, at all times relevant, Reliance was acting as a fiduciary in its management and handling of the Plan's assets. The Complaint states the governing trust documents provided Reliance was "obligated to discharge its duties with respect to the Plan solely in the interest of the Participants and Beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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." Compl., ¶ 74. Indeed, the primary purpose of ERISA is to protect the interests of plan beneficiaries. *David P. Coldesina, D.D.S. v. Estate of Simper*, 407 F.3d 1126, 1136 (10th Cir. 2005).[8] The fact that Reliance, as a directed trustee, may not have exercised discretionary authority or control over the administration and management of the Plan does not relieve it of a fiduciary obligation to Plaintiffs. As one court has noted, "[t]he proposition that a directed trustee does not have an independent duty to investigate, on the one hand, is quite distinct from the proposition that a directed trustee has a fiduciary duty to act with prudence based on what it knows or should know, on the other." *Sprint*, 388 F. Supp. 2d at 1237.

The Court also finds that the standard announced in *Fifth Third* applies to Plaintiffs' claims. Plaintiffs contend *Fifth Third* is inapplicable because their claims against Reliance do not concern whether the market was over- or undervaluing SandRidge stock, but that "the basic risk profile and future business prospects of SandRidge had so dramatically changed, that continued deterioration of the price of SandRidge Stock was inevitable, making SandRidge an imprudent Plan investment

[8] Should any conflict arise between ERISA and the trust documents, ERISA controls. *See, e.g., LaBarbera v. J.D. Collyer Equip. Corp.*, 337 F.3d 132, 136 (2d Cir. 2003) ("ERISA of course trumps the … Trust agreements in the case of a conflict.").

option." Pl. Resp. at 24-25. However, as other courts have noted in evaluating similar ERISA claims:

> [T]he purported distinction between claims involving "excessive risk" and claims involving "market value" is illusory. *Fifth Third* "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." Although the language of *Fifth Third* refers primarily to "over- or undervaluing" stock, the *Fifth Third* Court applied this rule to the plaintiffs' risk-based claims in that case. Moreover, viewing this rule as applicable to all allegations of imprudence based upon public information—regardless of whether the allegations are framed in terms of market value or excessive risk—is consistent with the efficient market hypothesis that risk is accounted for in the market price of a security.

Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56, 66 (2d Cir. 2016) (citations omitted); *see also Saumer v. Cliffs Natural Resources Inc.*, 853 F.3d 855, 862 (6th Cir. 2017); *Coburn v. Evercore Trust Co., N.A.*, 844 F.3d 965, 971 (D.C. Cir. 2016). Accordingly, the Court concludes that Plaintiffs must plead facts sufficient to meet *Fifth Third's* special circumstances requirement.

The Tenth Circuit has not addressed the question of what "special circumstances" a plaintiff could allege that would render reliance on the market price imprudent. Nonetheless, the Court finds that Plaintiffs have not plausibly alleged the existence of such special circumstances. In reaching this conclusion, the Court believes a close question exists as to whether, at this stage of the pleadings, the subject events constitute "special circumstances" as contemplated by the Supreme Court in *Fifth Third*. But, as a sister court also considered, the question raised by

Reliance's Motion is "did the Supreme Court intend to set the standard so high as to preclude the kinds of 'careening to bankruptcy' cases courts had found overcame the presumption [of prudence standard]?" *Lynn v. Peabody Energy Corp.*, No. 4:15CV00916, 2017 WL 1196473, at *6 (E.D. Mo. Mar. 30, 2017). As that court determined, the weight of authority compels the Court to, reluctantly, conclude the answer is "yes."

Courts considering the issue have held circumstances similar to those cited by Plaintiffs do not constitute special circumstances. *See Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 65 (2d Cir. 2016) (holding that ominous news articles, volatility in corporation's stock price, increased trading volumes, rising costs of corporation's credit default swaps and other investment instruments, downgrades from various ratings agencies, and criticism from investment analysts were not special circumstances so as to alert committee members that corporation was an imprudent investment); *Pfeil v. State St. Bank & Trust Co.*, 806 F.3d 377, 380 (6th Cir. 2015) (holding that a company's "severe business problems that resulted, ultimately, in its bankruptcy" did not constitute a special circumstance), *cert. denied*, 136 S. Ct. 2511 (2016); *In re 2014 RadioShack ERISA Litig.*, 165 F. Supp. 3d 492, 504-05 (N.D. Tex. 2016) (holding that a company's "slide into bankruptcy" rendering its stock excessively risky was not a "special circumstance" under *Fifth Third*); *In re Citigroup ERISA Liti*g., 104 F. Supp. 3d 599, 615 (S.D.N.Y 2015).

The Court is mindful that, at this early stage of the proceedings, and without the benefit of discovery, the result announced here may appear harsh. However, in the absence of further guidance from the Supreme Court or controlling Tenth Circuit authority, the Court is compelled to follow the majority of cases which have held the type of instances discussed here would not be deemed a special circumstance under *Fifth Third*. Accordingly, the Court grants Reliance's Motion on this issue.

III

Reliance next contends Plaintiffs have failed to state a claim for co-fiduciary liability. ERISA § 405(a) provides the statutory basis for co-fiduciary liability. It states:

> (a) 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
>
> (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). As stated above, Plaintiffs contend Reliance breached its co-fiduciary duties under subsections (a)(1) and (a)(3) by "knowingly participating in each other's failure to protect the Plan from inevitable losses" and not making any effort to remedy its co-fiduciary's breaches, despite having had, or being chargeable with, knowledge of such breaches. Compl. ¶ 303.

Subsections (a)(1) and (3) "require a showing of actual knowledge of the other fiduciary's breach; there is no vicarious liability under these provisions." *In re Enron Corp. Securities, Derivative & ERISA Litig*., 284 F. Supp. 2d 511, 580-81 (S.D. Tex. 2003) (citations omitted). Under subsection (a)(1), a co-fiduciary is liable for the other fiduciary's breach of fiduciary duty when: (1) the co-fiduciary had actual knowledge of the other fiduciary's breach; (2) the co-fiduciary knowingly participated in the breach or undertook to conceal it; and (3) damages resulted therefrom. *Id*. at 581. Under subsection (a)(3), a co-fiduciary is liable for the other fiduciary's breach of fiduciary duty when: (1) the co-fiduciary has actual knowledge of the other fiduciary's breach; (2) the co-fiduciary failed to make reasonable efforts to remedy the other fiduciary's breach; and (3) damages resulted therefrom. *Id*.

Viewing the allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have failed to plead sufficient factual content that would allow the Court to draw the reasonable inference that Reliance had actual knowledge of its co-defendant's alleged misconduct. Although Plaintiffs adequately set forth the statutory elements of co-fiduciary liability, the Complaint is devoid of any supporting facts that bolster their contention Reliance had "actual knowledge" of the other fiduciary's alleged breaches. Accordingly, Reliance's Motion on this issue is granted.

IV

Lastly, Reliance moves to strike Plaintiffs' jury trial demand. The Seventh Amendment preserves the right to a jury trial for "suits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. AMEND. VII. This requires a jury trial with respect to all suits where legal rights are involved. *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir. 1995). There is no right to a jury trial, however, for actions which involve only equitable rights or which traditionally arose in equity. *Id*.

Pursuant to Rule 12(f), Federal Rules of Civil Procedure, a court may strike immaterial matter from a pleading. Further, pursuant to Rule 39(a), a court may disallow a jury demand where "there is no federal right to a jury trial." The Tenth Circuit has repeatedly noted there is no right to a jury trial in ERISA cases because the statute's benefits are inherently equitable, not legal in nature. *See, e.g.*, *Graham v. Hartford Life & Acc. Ins. Co.*, 589 F.3d 1345, 1355 (10th Cir. 2009). Plaintiffs, however, argue their remedy is legal in light of the Supreme Court's decision in

Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan, __ U.S. __, 136 S.Ct. 651, 193 L.Ed.2d 556 (2016).

Montanile arose from a string of cases interpreting the phrase "appropriate equitable relief" in ERISA § 502(a)(3). In each of these cases, the Court explained that whether a remedy is available under § 502(a)(3) depends on (1) the basis for the plaintiff's claim and (2) the nature of the underlying remedies sought; both must be equitable to proceed under § 502(a)(3). *Montanile*, 136 S.Ct. at 657. A remedy was properly regarded as equitable only if the plaintiff sought the return of "specifically identified funds that remain in the defendant's possession or ... traceable items that the defendant purchased with the funds (e.g., identifiable property like a car)." *Id*. at 658. In *Montanile*, the Court found that a § 502(a)(3) suit was not available because the plaintiffs had not pointed to specifically identifiable funds in the defendant's possession to which an equitable lien could attach. Plaintiffs, accordingly, assert their claim for relief falls under this line of reasoning because they "seek to recover a sum of money generally from Defendants' general assets, not some specific thing or identifiable funds in Defendants' possession[.]" Pl. Resp. at 34.

The Court finds Plaintiffs' argument unpersuasive. First, *Montanile* involved the application of ERISA § 502(a)(3), which is not at issue in the present case. Second, *Montanile* did not address whether there is a right to a jury trial under

ERISA.[9] Lastly, although the Court is mindful of *Montanile's* general holding, it is not clear that the Court's holding was meant to overturn the well-established precedent regarding the right to a jury trial under the claims asserted here. Instead, following well-established Tenth Circuit precedent, the Court concludes that Plaintiffs are not entitled to a jury trial under the facts and allegations of this case. Accordingly, the Court strikes Plaintiffs' jury demand.

CONCLUSION

Defendant's Motion to Dismiss is **GRANTED** as set forth herein. With respect to the claims that have been dismissed, the Court is not convinced Plaintiffs are unable to state a claim for which relief can be granted. Accordingly, Plaintiffs are granted leave to file an amended complaint within **twenty-one (21) days** of this Order or seek an extension of time to do so.

IT IS SO ORDERED this **<u>28th</u>** day of July 2017.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

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[9] Indeed, the plaintiffs in *Montanile* did not request a jury trial. *See* Complaint [Doc. No. 1] and Civil Cover Sheet [Doc. No. 1-2], *Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan v. Montanile*, No. 9:12-cv-80746-DLB (S.D. Fla., filed July 11, 2012).