UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**Cassandra Wilson v. Edison International, Inc., et al.**	Date	July 6, 2016
Title	**LA CV15-09139 JAK (PJWx)**		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANTS' MOTION DISMISS COMPLAINT (DKT. 29)**

I. Introduction

Cassandra Wilson ("Plaintiff") brought this putative class action on behalf of similarly situated employees of Edison International, Inc. ("Edison"). The putative class consists of those Edison employees who, through their participation in the Edison 401(k) Savings Plan (the "Plan"), invested in the Edison International Stock Fund from March 27, 2014 through June 24, 2015 (the "Class Period"). Complaint, Dkt. 1. Plaintiff claims that Theodore Craver ("Defendant Craver") and Robert Boada ("Defendant Boada") (collectively, "Defendants") who had certain alleged responsibilities with respect to the administration of the Plan, breached their respective duties of prudence imposed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104(a)(1)(B).[1]

Defendants filed a Motion to Dismiss the Complaint ("Motion"). Dkt. 29. Plaintiff filed an opposition to the Motion (Dkt. 35), and Defendants filed a reply. Dkt. 39. A hearing on the Motion was held on June 20, 2016, and the matter was taken under submission. Dkt. 47. For the reasons stated in this Order, the Motion is **GRANTED**, without prejudice to the filing of an amended complaint.

II. Factual Background

A. The Edison 401(k) Plan and the Edison International Stock Fund

Edison is the parent company of Southern California Edison Company ("SCE"), which supplies and delivers electricity in Southern California. Dkt. 1 ¶ 48. SCE is regulated by the California Public Utilities Commission ("CPUC") and by the Federal Energy Regulatory Commission ("FERC"). Dkt. 1 ¶ 2.

Eligible employees of Edison, SCE and certain other subsidiaries may elect to participate in the Plan. *Id.*

[1] Plaintiff voluntarily dismissed Edison as a Defendant. Dkt. 38.

¶ 39. The Plan is sponsored by SCE and is administered by the Benefits Committee of SCE. RJN, Dkt. 31-2 (Ex. 16 at 163). Plan participants may direct a percentage of their earnings for investment in one or more funds offered by the Plan. *Id.* at 130. In general, income taxes are deferred on the amounts that are invested by a participating employee. The investment options that are provided to participants in the Plan are selected by Edison's Trust Investment Committee. *Id.* at 168. Defendant Craver, who is the Chief Executive Officer ("CEO") of Edison, appoints the members of the Trust Investment Committee. *Id.* at 128; Dkt. 1 ¶¶ 19-20. Defendant Boada, who is the Vice President and Treasurer of Edison, is a member of the Trust Investment Committee. *Id.*

During the Class Period, one of the investment options available to Plan participants was the Edison International Stock Fund (the "Stock Fund"). Dkt. 1 ¶ 16. The Stock Fund is an Employee Stock Ownership Plan ("ESOP") whose primary holding is Edison common stock. RJN, Dkt. 31-2 (Ex. 16 at 5168); Dkt. 31-3 (Ex. 17 at 11, 35).

B. The CPUC Proceedings and the November 2014 Settlement

In 2013, SCE retired the San Onofre Nuclear Generating Station ("SONGS"). Dkt. 1 ¶ 51. As part of this process, SCE participated in several ratesetting proceedings before the CPUC to determine how costs associated with the closing of the SONGS should be allocated between SCE and California ratepayers. *Id.* ¶ 53. As a result of these proceedings, in October 2012, the CPUC issued an Order Instituting Investigation ("OII") proceeding. Several advocacy groups, including the Office of Ratepayer Advocates ("ORA"), the Utility Reform Network ("TURN") and the Alliance for Nuclear Responsibility ("ANR") participated in the OII. *Id.* ¶¶ 54-55. The OII proceeding continued for approximately two years. Certain matters that arose during the process led to proceedings before two Administrative Law Judges -- Melanie Darling ("ALJ Darling") and Kevin Dudney ("ALJ Dudney"). *Id.* ¶¶ 54-59.

In November 2014, the CPUC approved a settlement reached by SCE and the advocacy groups (the "SONGS Settlement"), finding that it was "in the public interest" *Id.* ¶¶ 58-59; RJN, Dkt. 32 (Ex. 1 at 12) ("In sum, the Commission is satisfied that the amended and restated settlement will result in just and reasonable rates, is consistent with the law, reasonable in light of the whole record, and in the public interest.").

CPUC proceedings are governed by the Public Utility Code (the "Code") and by the CPUC Rules of Practice and Procedure (the "Rules"). Dkt. 1 ¶ 65. The Code and the Rules provide specific limitations as to certain ex parte communications between certain parties and CPUC personnel. *Id.* Rule 8.1 of the Rules defines an ex parte communication as follows:

> (c) "Ex parte communication" means a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:
> (1) concerns any substantive issue in a formal proceeding,
> (2) takes place between an interested person and a decisionmaker, and
> (3) does not occur in a public hearing, workshop, or other public forum noticed by ruling or

> order in the proceeding, or on the record of the proceeding.
> Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications.

RJN, Dkt. 31-1 (Ex. 7 at 305).

Rule 8.4 provides that an interested person in a ratesetting proceeding must report any ex parte communication within three working days of its occurrence. *Id.* at 309 ("Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. Notice of ex parte communications shall be filed within three working days of the communication."). The rules do not expressly define the term "substantive issue," but do provide that "[c]ommunications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications." *Id.* at 305.

C. Disclosure of Certain Communications

1. Email to Edison Personnel

In September 2014, approximately two months before CPUC approved the SONGS Settlement, the Chief Ethics and Compliance Officer of Edison sent an email to Edison personnel. It stated: "While we are well aware of the CPUC's ex parte communications rules, this situation makes clear that awareness of the rules in not enough." Dkt. 1 ¶ 67.

2. The Warsaw Meeting

In February 2015, approximately three months after the CPUC approved the SONGS Settlement, SCE provided written notice to the CPUC about a previously unreported ex parte communication between Stephen Pickett ("Pickett"), the former Executive Vice President of SCE, and Michael Peevey ("Peevey"), the former President of CPUC. *Id.* ¶¶ 8, 64. The communication occurred at an industry conference in Warsaw, Poland in March 2013 (the "Warsaw Meeting"). At that time, the CPUC proceedings were ongoing, although the settlement negotiations had not begun. *Id.* ¶¶ 64, 68.

Before the February 2015 notice of the ex parte communication, all of the following had occurred: (i) Peevey had resigned from the CPUC, effective December 2014; (ii) the California Attorney General had seized handwritten notes from the Warsaw Meeting during a January 2015 search of Peevey's residence; and (iii) Edison implemented its first policy regarding ex parte communication in or about February 2015. *Id.* ¶ 69.

Approximately two weeks after the February 2015 disclosure, Edison filed its Form 10-K with the Securities and Exchange Commission ("SEC"). The 10-K included financial results for the fourth quarter of 2014 and fiscal year 2014. The Form 10-K disclosed the following:

> On February 9, 2015, SCE filed in the OII proceeding a Late-Filed Notice of Ex Parte Communication regarding a meeting in March 2013 between an SCE senior executive and the president of the CPUC, both of whom have since retired from their respective positions. In response, the Alliance for Nuclear Responsibility, one of the intervenors in the OII, filed an application requesting that the CPUC institute an investigation into whether sanctions should be imposed on SCE in connection with the ex parte communication. The application requests that the CPUC order SCE to produce all ex parte communications between SCE and the CPUC or its staff since January 31, 2012 and all internal SCE unprivileged communications that discuss such ex parte communications.

Id. ¶ 72.

3. Other Meetings

In April 2015, ALJ Darling and ALJ Dudney ordered SCE to provide additional information related to its disclosure of the ex parte communication that had occurred at the Warsaw Meeting. *Id.* ¶ 75. The ruling stated that "[t]he Late-Filed Ex Parte Notice [filed by Edison in February 2015] offered little information about the content of the meeting between Commission President Peevey and SCE's Executive Vice President." *Id.* It then directed SCE to provide the following additional information to the CPUC no later than April 29, 2015: (a) documents related to any oral or written communications between any SCE employee and CPUC decision makers between March 1, 2013 and November 31, 2014, that concerned the potential settlement of the SONGS OII; and (b) all internal written communications that reported, discussed, referred to, or otherwise contained a description of any oral or written communications about the settlement with CPUC decision makers. *Id.* The ruling also directed SCE to file notices of any previously undisclosed communications that had already been discovered or any other oral or written ex parte communications relating to the substantive issues described in the OII proceedings. *Id.*

On April 29, 2015, SCE responded to the ruling. It allegedly produced documents that constituted "hundreds of pages of previously undisclosed ex parte communications (the 'April 29, 2015 Filing') implicating nearly all of Edison's most senior officers." *Id.* ¶ 79. According to the Complaint, the documents that were produced were located in stored emails of approximately 13 officers of Edison. *Id.* The emails were located through the use of search terms. *Id.* The April 29, 2015 Filing also included a declaration by Pickett. *Id.* ¶ 80. The Complaint alleges that in this declaration, Edison revealed that, as early as April 2013, Pickett had briefed senior Edison executives, including Defendant Craver, about the ex parte communications that occurred at the Warsaw Meeting. *Id.* Those senior executives included Defendant Craver. *Id.*

After the April 2013 briefing, Pickett sent an email to the senior executives that included a document titled "Elements of a SONGS Deal." This document summarized the ex parte communication that had occurred at the Warsaw Meeting. *Id.* ¶ 81. In his declaration, Pickett also stated that this document was "intended to be an internal outline that could serve as a basis for discussing a potential settlement in a deal with consumer and other groups should SCE's efforts to restart SONGS prove unsuccessful." *Id.*

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The April 29, 2015 Filing also disclosed that, in June 2013, Defendant Craver sent an email. According to the Complaint, this email referred to "two improper substantive ex parte contacts with Peevey to Edison directors Jagjeet Bindra, Richard Schlosberg, Peter Taylor, and Brett White." *Id.* ¶ 82.

The April 29, 2015 Filing also disclosed certain communications between Edison and CPUC regarding the Greenhouse Gas Initiative. That was a project that was to be undertaken at the University of California, Los Angeles ("UCLA") where Peevey held an advisory post. *Id.* ¶¶ 83-84. According to the declaration of Ron Litzinger ("Litzinger"), a former SCE President, Litzinger attended a meeting with Peevey and former CPUC Commissioner Michael Florio ("Commissioner Florio") in May 2014. In the declaration, Litzinger stated the following:

> Peevey stated he was pleased with the SONGS settlement. President Peevey stated that I probably knew he had talked to Mr. Pickett in Poland. President Peevey waved a set of handwritten notes, but did not give me the notes to read . . . President Peevey told me that the settlement was missing a provision to address the greenhouse gas impacts of the SONGS retirement, and he asked SCE to make a voluntary contribution to the University of California ("UC"), specifically UCLA, for greenhouse gas research. President Peevey stated the contribution should total $25 million over five years, with $4 million a year coming from SCE and $1 million a year coming from SDG&E.

Id. ¶ 83.

Litzinger's declaration also disclosed several other communications between Edison and the CPUC related to the Greenhouse Gas Initiative that took place during the SONGS OII negotiations. *Id.* ¶ 84. They included a June 2014 meeting between Peevey and Defendant Craver. *Id.*

D. The CPUC's Response to the Disclosures

In June 2016, TURN filed an application with the CPUC. It charged SCE with "fraud by concealment" and urged the CPUC to set aside the SONGS Settlement. *Id.* ¶ 88. Subsequently, ALJ Darling issued an email ruling directing SCE to produce additional information related to certain of the disclosed communications that had occurred between January 2013 and June 2014. *Id.* ¶ 89. Edison responded by producing an additional 43 documents. *Id.*

In August 2015, ALJ Darling issued a ruling on the TURN application (the "ALJ Ruling"). It found that SCE had failed to file the required notices of any of the following 10 communications, each of which was found to constitute an ex parte communication: (i) March 26, 2013: the communication between Pickett and Peevey at the Warsaw Meeting; (ii) March 27, 2013: continued communications between Pickett and Peevey; (iii) May 28, 2013: email sent by Les Starck, Edison's Senior Vice President of Regulatory Policy and Affairs to CPUC Commissioners; (iv) May 29, 2013: conversation between Michael Hoover ("Hoover"), Edison's Senior Director of State Energy Regulation, and Carol Brown, Chief of Staff to Peevy; (v) June 26, 2013: conversation between Litzinger and Commissioner Florio; (vi) September 6, 2013: lunch meeting with Peevey, Litzinger and others; (vii) November 15, 2013: dinner meeting between

Craver and Peevey; (viii) May 28, 2014: meeting between Hoover and Peevey; (ix) June 11, 2014: telephone call between Hoover and Peevey; and (x) June 17, 2014: meeting between Peevey and Craver. *Id.* ¶¶ 91-92.

In December 2015, the CPUC issued a decision modifying in part and affirming in part the ALJ Ruling (the "CPUC Ruling"). RJN, Dkt. 31-1 (Ex. 6). It found that SCE had failed to file required notices as to eight of the aforementioned ten ex parte communications. *Id.* at 232. The two communications that the CPUC excluded were the meetings held on May 29, 2013 and on June 17, 2014. *Id.* at 289. The CPUC stated that SCE's approach to reporting "should have been more robust and favored reporting over non-reporting when it engaged in what it saw as ambiguous communications and matters of first impression." *Id.* at 272-73. The CPUC imposed a $16.7 million penalty on SCE; $16.5 million of this amount was due to SCE's failure to report the communication that occurred during the Warsaw Meeting in violation of Rule. 8.4 of the Rules. *Id.* at 290.

The ALJ Ruling and the CPUC Ruling both acknowledged that the CPUC rules about ex parte communications can be difficult to apply. ALJ Darling wrote that "[w]hether reporting is required is often a fact-specific inquiry" and noted that the CPUC "has acknowledged there may be instances where it might be difficult for parties to discern between a [non-reportable] procedural 'inquiry' that merely seeks information and a [reportable] procedural request . . . that is substantive in nature." RJN, Dkt. 32 (Ex. 4 at 193, 204). The CPUC Ruling also stated that "one-way communications" are not reportable because they are not "between" an interested person and a decisionmaker, although whether a communication is "one-way" depends upon the nature of a party's response and whether it crosses into a "substantive" communication. *Id.* (Ex. 6 at 241). The CPUC Ruling concluded that "SCE's argument that it could hardly be expected to know whether [certain] communications fit the definition of ex parte communications prior to the [ALJ Ruling] is not entirely without weight." *Id.* at 280.

E. Effect on Edison's Stock Prices

In March 2014, which is the beginning of the Class Period, Edison stock was trading at approximately $49 per share. Dkt. 1 ¶ 97. The Complaint alleges that as a result of SCE's "materially false and misleading statements and omissions," Edison's stock price rose to more than $66 per share, and was trading at "artificially inflated prices during the Class Period." *Id.* This rise in price was allegedly due to the "announcement of the SONGS Settlement and expectations that Edison was putting the costs and expenses of this liability behind them." *Id.*

The Complaint also alleges that other disclosures about the aforementioned conduct had an adverse effect on the price of Edison's stock:

> On February 9, 2015, after Edison's first disclosure of its ex parte communications, its stock price fell to $62.78 per share from over $66.33 per share, then continued to correct as the truth emerged over the next few months.
> On April 29, 2015, on news of Edison's additional ex parte communications, shares of Edison fell from $61.13 per share to $60.08.

> On May 4, 2015, on news of the additional ex parte communications, shares of Edison declined $2.87 per share over two days of trading, or roughly 3.75%, to close at $59.60 on May 6, 2015. On June 24, 2015, on news of TURN's application charging SCO with "fraud by concealment," shares of Edison declined $1.56 per share or over 2.70%, to close at $56.07 on June 24, 2015.

Id. ¶ 99.

F. Advocacy Group Petitions and Shareholder Litigation

In April 2015, ANR petitioned the CPUC to modify its approval of the SONGS Settlement. ANR claimed that SCE's failure to file a timely notice of the ex parte communications that occurred during the Warsaw Meeting undermined the basis for the CPUC's decision. Dkt. 1 ¶ 77. Other consumer groups made similar requests. *Id.* ¶¶ 88, 94. The CPUC Ruling deferred a decision on this issue; it remains pending. RJN, Dkt. 31-1 (Ex. 6 at 271).

In July 2015, a putative securities class action was filed against Edison and certain of its senior officers in the Southern District of California (the "Securities Action"). *Eng v. Edison Int'l,* No. 3-15-CV-1478-BEN-KSC (S.D. Cal.) (Benetiz, J.). The Complaint in *Eng* alleges that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(a) *et seq.*, by making statements that failed to disclose that unreported ex parte communications had occurred. *Id.* (Dkt. 1).The Defendants filed a motion to dismiss the complaint in January 2016. *Id.* (Dkt. 23). A hearing on the motion was held in March 2016. *Id.* (Dkt. 30). The matter remains under submission.

III. <u>Analysis</u>

A. Legal Standard: Motion to Dismiss

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may move to dismiss for failure to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

B. Judicial Notice

Each of the parties has requested judicial notice of certain documents. Fed. R. Evid. 201(b) permits judicial notice of any fact "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be questioned." Defendants request judicial notice of 22 exhibits. Dkt. 32, 40. Plaintiffs have not opposed this request. These materials include CPUC public records, analyst reports, news articles, stock price data, documents filed in certain judicial proceedings, Plan documents, SEC filings, and certain of the e-mails referenced in the Complaint. The request for judicial notice of these materials is **GRANTED**;[2] provided, however, the emails as well as the news articles are received for the limited purpose of showing that they were exchanged or published, and not for the truth of the matters asserted.

Plaintiffs request judicial notice of three exhibits. Dkt. 37. Each is a document that was filed in a judicial proceeding. Defendants have not opposed this request. Judicial notice of these exhibits is appropriate. *See, e.g.*, *Almont Ambulatory Surgery Ctr., LLC*, 99 F. Supp. 3d at 1125 (C.D. Cal. 2015) ("Courts may take judicial notice of public records, including court records from another case."). This request for judicial

[2] *See, e.g.*, *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) ("a court may take judicial notice of records and reports of administrative bodies") (internal quotation omitted); *No Cost Conf., Inc. v. Windstream Commc'ns, Inc.*, 940 F. Supp. 2d 1285, 1296 (S.D. Cal. 2013) (judicial notice taken of application for relief filed with CPUC because "this document is a matter of public record that was filed with a public administrative agency"); *Paralyzed Veterans of Am. V. McPherson*, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 9, 2008) (government documents available at official agency websites "have often been treated as proper subjects for judicial notice"); *In re Century Aluminum Co. Sec. Litig.*, 2011 WL 830174, at *9 (N.D. Cal. Mar. 3, 2011) ("courts routinely take judicial notice of analyst reports"); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (judicial notice taken of news articles to "indicate what was in the public realm at the time"); *Tarantino v. Gawker Media, LLC,* 2014 WL 2434647, at *1 n.1 (C.D. Cal. Apr. 22, 2014) ("Courts have found website and newspaper articles to be proper subject for judicial notice when those materials are relied on by a plaintiff or concern facts at issue in the complaint."); *Metzler Inv. GMBH v. Corinthian Colls., Inc.,* 540 F.3d 1049, 1064 n.7 (9th Cir. 2008) (judicial notice of company's "reported stock price history"); *In re First Am. Corp. ERISA Litig.*, 2008 WL 5666637, at *1 (C.D. Cal. July 14, 2008) ("The stock prices are not subject to reasonable dispute and therefore are appropriate for judicial notice.") (internal quotation omitted); *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110, 1125 (C.D. Cal. 2015) ("Courts may take judicial notice of public records, including court records from another case."); *Care First Surgical Ctr. v. ILWU-PMA Welfare Plan*, 2014 WL 6603761, at *4 (C.D. Cal. July 28, 2014) ("The court may consider the plan documents under the incorporation by reference doctrine because [plaintiff's] ERISA claims . . . rely on the terms of the plan."); *Metzler Inv. GMBH*, 540 F.3d at 1064 n.7 (9th Cir. 2008) (SEC filings subject to judicial notice); *Knievel v. ESPN*, 393 F.3d 1068, 1077 (court may "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading") (internal quotation omitted); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1039 n.2 (9th Cir. 2007) (judicial notice of transcript of oral argument).

notice is **GRANTED**.

C. Application

1. The Statutory Standards for Claims Brought Under ERISA

Section 404(a)(1)(A) of ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and [] for the exclusive purpose of: providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Section 404(a)(1)(B) of ERISA requires that these duties be discharged "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

2. Interpretation of the Statutory Standards When Maintaining Investment in Stock of Employer

The Supreme Court has addressed the pleading standards that govern ERISA claims brought against an ESOP fiduciary. The Court did so in two cases in which plaintiffs, who were employees, alleged that fiduciaries, who were employed by the same employer as the plaintiffs, breached their obligations under ERISA by imprudently managing investments in the stock of that employer. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016). The cases involved allegations that the fiduciaries knew or should have known of certain actions by the employer that had not been disclosed publicly, and whose public disclosure would have an adverse effect on the price of the stock in which an ESOP had invested.

Fifth Third set forth the following standard:

> To state a claim for breach of the duty of prudence on the basis of inside information, 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.

134 S. Ct. at 2472.[3]

The Court explained that this analysis was to be applied in light of the following considerations. First, "the duty of prudence . . . does not require a fiduciary to break the law" by "divesting [a] fund's holdings of the employer's stock on the basis of inside information." *Id.* Second, courts should "consider the extent to which an ERISA based obligation either to refrain [from trading] or to disclose inside information to the

[3] *Fifth Third* rejected a "presumption of prudence" standard that had been developed by the Courts of Appeals. *Id.* at 2463 ("We hold that no such presumption applies. Instead, ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets.").

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public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Id.* at 2473. Third, courts should consider "whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases -- which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment -- or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.*

Fifth Third acknowledged that motions to dismiss under this standard are an "important mechanism for weeding out meritless claims." *Id.* at 2471. And, it directed courts to engage in "careful, context-sensitive scrutiny of a complaint's allegations" and "careful judicial consideration of whether the complaint states a claim that the defendant acted imprudently." *Id.* at 2470-71.

The Supreme Court addressed similar issues in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). There, the plaintiffs alleged that Amgen fiduciaries breached their respective duties of prudence by allowing their defined contribution plans to purchase and hold their employer's stock. The predicate of the claim was that the fiduciaries allegedly knew that the price of the stock was artificially inflated due to improper, off-label drug marketing and sales efforts. Specifically, Amgen engaged in extensive marketing, encouraging both "on- and off- label uses" of certain of its drugs. 788 F.3d at 931. After these and other efforts were publicly disclosed, Amgen stock decreased in value.

The Ninth Circuit determined that it was plausible that the Amgen fiduciaries "*knew or should have known* that the Amgen Common Stock Fund was purchasing stock at an artificially inflated price due to material misrepresentations and omissions by company officers." 788 F.3d 916, 921 (9th Cir. 2014) (emphasis in original). The Ninth Circuit made clear that the obligation of a fiduciary to act is triggered only if he or she knows or should know of a violation of securities laws. This standard is not met when a fiduciary "only . . . suspect[s]" such a violation. *Id.* The opinion also emphasized that, in a parallel securities class action that arose out of the same underlying allegations as to the inflated stock price, the district court concluded that the investors sufficiently alleged material misrepresentations and omissions, scienter, reliance and resulting economic loss to state claims under Sections 10(b) and 20(a) of the 1934 Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a). *Id.* at 920. In light of this, the Ninth Circuit determined that the plaintiffs stated a duty of prudence claim under *Fifth Third* because, *inter alia*, it was "plausible" that "defendants could remove the Fund from the list of investment options without causing undue harm to plan participants." *Id.* at 938.

The Supreme Court reversed. It stated that the Ninth Circuit erred by failing to assess whether the complaint plausibly alleged that a prudent fiduciary in the same position as defendants "could not have concluded" that the alternative action -- removing the Amgen common stock fund from the list of investment options of the relevant plan -- "would do more harm than good." *Amgen*, 136 S. Ct. at 760. The Court accepted the possibility that "removing the Amgen Common Stock Fund from the list of investment options" might be "an alternative action that could plausibly have satisfied *Fifth Third*'s standards." *Id.* Nevertheless, the Court found that plaintiffs had failed to plead "facts and allegations supporting that proposition." *Id.* ("The Ninth Circuit's proposition that removing the Amgen Common

Stock Fund from the list of investment options was an alternative action that could plausibly have satisfied *Fifth Third*'s standards may be true. If so, the facts and allegations supporting that proposition should appear in the stockholders' complaint. Having examined the complaint, the Court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence.")

3. Whether the Complaint is Sufficient

In apparent recognition of the standards of *Fifth Third*, the Complaint alleges two alternative actions Defendants could have taken. The Complaint alleges that each would have been consistent with securities laws and one that a prudent fiduciary in the same circumstances could not have viewed as more likely to harm the fund than to help it. First, Defendants could have made corrective disclosures to the public, thereby allowing the market to cause the price of Edison stock to return to its true value. As the Complaint describes this alternative, the Defendants "simply could have told the public the truth." Dkt. 1 ¶ 26. Second, the Complaint alleges that Defendants could have amended the Plan to suspend new investments in the Stock Fund -- or remove the Stock Fund as an investment option altogether -- until such time as the Stock Fund was no longer an imprudent investment*, i.e.,* after the market became aware of the actual, lower value of Edison stock. *Id.* ¶ 29.

The parties do not present a material dispute as to whether, based on the allegations of the Complaint, it would have been consistent with securities laws to disclose insider information to the market to allow a correction in the market price of the stock.[4] *See In re BP p.l.c. Sec. Litig*., 2015 WL 1781727, at *14 (S.D. Tex. Mar. 4, 2015). Nor is there a significant disagreement that removing the Stock Fund as an investment option for the ESOP would not have violated the securities laws.[5] Therefore, the core issued

[4] Defendants argue that the securities laws do not require disclosure. Dkt. 30 at 19-20. However, they do not contend that the securities laws would not permit disclosure.

[5] The SEC recently set forth its views on this issue in its amicus brief in *Whitley v. BP, P.L.C*., No. 15-282 (5th Cir.). There, the SEC argues that both of these proposed alternatives are generally consistent with securities laws. As to the first proposed alternative, the amicus brief states:

> Under the securities laws, an ESOP manager who made or was responsible for misstatements or omissions constituting the fraud has a duty to make a disclosure that renders the prior statements not misleading. Under the securities laws, a manager who was not responsible for the fraud, but who knew about it, may nevertheless elect to disclose it if possible. Any such disclosure must be public; an ESOP manager of a publicly traded issuer cannot disclose the fraud solely to ESOP participants because that would either cause a violation of the selective disclosure rules under Regulation FD of the Exchange Act or it would constitute an illegal tip under the securities laws' insider trading prohibitions.

RJN, Dkt. 36 (Ex. C at 83).

As to the second proposed alternative the amicus brief states:

> The other main alternative . . . is for the ESOP manager to refrain from effecting both purchases and sales on behalf of plan participants. ERISA may require the ESOP manager to refrain from effecting purchases of additional shares of overvalued employer stock. To avoid violating the securities laws, a plan manager in

presented by the Motion is presented by the second requirement of *Fifth Third* -- whether the Complaint plausibly has alleged that a prudent fiduciary in the position of the Defendants "could not have concluded" that these alternative actions "would do more harm than good to the fund." *Fifth Third*, 134 S. Ct. at 2463.

Plaintiff argues that this requirement is satisfied where a complaint plausibly alleges that a defendant concealed a fraud about which that person had knowledge. They argue that this is distinct from a complaint that alleges only that the defendant suspected fraud or had not adequately investigated a potential fraud. Defendants respond that such an approach is inconsistent with the reasoning in *Fifth Third* . Thus, they claim that the allegation that a fiduciary knew about a fraud underlies every breach of a duty of prudence claim based on the theory that the fiduciary knew that the employer's stock price was artificially inflated. If pleading a known fraud were sufficient to survive a motion to dismiss, Defendants argue that *Fifth Third*'s mechanism for "weeding out meritless claims" would not have substance. 134 S. Ct. at 2471.

Amgen makes clear that pleading a known fraud is not per se sufficient to meet the *Fifth Third* standard. The Ninth Circuit had determined that the Amgen fiduciaries knew or should have known of the alleged fraud. In support of this position, the opinion cited the parallel securities action in which the complaint had survived a motion to dismiss. However, the Supreme Court disagreed, when it concluded that the standard of *Fifth Third* was not met by the complaint, which lacked "facts and allegations" supporting the contention that a prudent fiduciary "could not have concluded" that the proposed alternative "would do more harm than good to the fund." *Fifth Third*, 134 S. Ct. at 2463.

In light of these standards, the issue presented is whether the Complaint plausibly has alleged that -- even if Defendants were aware of fraudulent activity that inflated the value of Edison stock -- they "could not have concluded" that disclosing the fraudulent activity or freezing new purchases of the Edison stock would have done "more harm than good to the fund." *Id.*[6]

> such circumstances must concurrently refrain from effecting sales of shares on behalf of plan participants in order to completely abstain from trading on the basis of inside information about the employer's fraud. In the Sarbanes-Oxley Act of 2002, Congress formalized the mechanism to suspend both ESOP purchases and sales. Such a suspension of trading must be promptly and accurately disclosed in a Form 8-K -- including the reason for the suspension.

Id. at 83-84.

[6] Defendants also contend that the Complaint does not plausibly allege securities fraud. Thus, they argue that there are no allegations that Defendant Boada knew about any of the eight ex parte communications, which were later found to be ones that should have been reported. Defendants concede that the Complaint alleges that Defendant Craver was aware that certain of the communications had occurred. However, Defendants argue that the Complaint does not allege facts sufficient to show why Defendant Craver would have known that the communications were ones that should have been reported. These arguments are not persuasive in connection with the Motion because they concern disputed facts. Thus, the Complaint alleges that: (i) Defendant Boada was privy to email communications discussing certain of the unreported ex parte communications (Dkt. 1 ¶ 104); and (ii) Defendant Craver was a party to certain of the unreported ex parte communications. *Id.* ¶ 92. It is reasonable to infer from

Decisions by two district courts on this issue are incisive. In *In re BP p.l.c. Sec. Litig.*, 2015 WL 1781727 (S.D. Tex. Mar. 4, 2015), the complaint alleged that plan fiduciaries knew or should have known that the market price of the employer's stock, in which the ESOP had invested, was distorted due to the alleged fraudulent conduct of certain BP executives. Thus, the complaint alleged that, prior to the explosion on BP's Deepwater Horizon oil platform, the company had misrepresented the risk of such an incident. It also alleged that, following the incident, the company made false and misleading statements concerning the magnitude of the damage caused by the incident. The defendants argued that the complaint contained no well pleaded factual allegations that the fiduciaries "could not have concluded" that the potential alternative actions "would do more harm than good to the fund." *Id.* at *13 (quoting *Fifth Third*, 134 S. Ct. at 2473).

BP addressed *Fifth Third*'s "more harm than good" standard. The decision acknowledged that the plaintiff's proposed alternatives "would be available in almost any case," and that generically endorsing them "would turn the filter of [*Fifth Third*] into a tap." *Id.* at *17. At the same time, *BP* noted that a strict interpretation of the standard would result in a bar "virtually insurmountable" for would-be plaintiffs. *Id.* In light of these difficulties, BP certified the following question for interlocutory appeal to the Fifth Circuit: "What plausible factual allegations are required to meet the 'more harm than good to the fund' pleading standard articulated by the Supreme Court in [*Fifth Third*]." *Id.* at *19. The appeal remains pending.

In *In re JPMorgan Chase & Co. Erisa Litig*., 2016 WL 110521, at *2 (S.D.N.Y. Jan. 8, 2016), the complaint set forth similar allegations. It alleged that various officers at JPMorgan Chase & Co. ("JPMorgan") breached their respective duty of prudence by concealing trades that over time escalated in their level of risk. The complaint there alleged that defendants could have taken the same alternative actions proposed here and in *BP*: freeze new purchases of the JPMorgan stock fund or publicly disclose the misconduct.

In *JPMorgan*, the district court granted defendants' motion to dismiss the complaint. It concluded that the complaint failed plausibly to allege that a prudent fiduciary "would not have viewed public disclosures as more likely to harm than help the fund." *Id.* at *3. There, the plaintiffs acknowledged that the defendants' possible concern about a stock price drop upon disclosure was "well-founded." *Id.* at *4. The plaintiffs also argued that the "fact" that "disclosing a fraud *always* causes a company's stock price to drop" does not "justif[y] perpetuating a fraud" because "the longer a fraud goes on, the more painful the correction w[ill] be." *Id. JPMorgan* addressed this theory:

> 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 Defendants might have considered when deciding whether to make public disclosures. But [*Fifth Third*] sets a higher pleading standard. Plaintiffs must plead enough facts to plausibly allege that a prudent fiduciary in Defendants' circumstances would not have believed that public disclosures of

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these allegations that Defendants were aware that these communications were in violation of the CPUC reporting requirements.

> JPMorgan's purported misconduct were more likely to harm than help the fund.
>
> Plaintiffs' allegations of fraud do not excuse them from satisfying *[Fifth Third*]. As here, the complaint in *[Fifth Third*] alleged that certain ERISA fiduciaries, who were also corporate insiders, knew inside information indicating that the employer's officers had made material misstatements to the market that inflated the price of the employer's stock. *[Fifth Third*]'s two-part pleading standard surely applies to cases such as this one where plaintiffs allege fraud and artificial inflation. Plaintiffs therefore are not excused from satisfying *[Fifth Third*]'s second prong. As Plaintiffs have failed to plausibly allege that a prudent fiduciary in Defendants' circumstances would not have viewed making public disclosures of JPMorgan's purported misconduct as more likely to harm than help the fund, Plaintiffs have failed to state a claim for breach of ERISA's duty of prudence.

Id.

Fifth Third requires that the Complaint plausibly allege facts specific to this action that, if established, would show that a prudent fiduciary "could not have concluded" that the alternative actions proposed in the Complaint "would do more harm than good to the fund." *Fifth Third*, 134 S. Ct. at 2463. The Complaint does not satisfy this standard. Instead, the Complaint makes conclusory allegations that the alternatives would not have caused more harm than good. Dkt. 1 ¶ 113 (the proposed alternatives "would not have caused more harm than good"). The Complaint fails to account for the risk that the market might overreact to the proposed public disclosures, causing harm to Plan participants that was greater than the potential decline in share price upon disclosure of the claimed improper conduct in the course of the SONGS Settlement. A prudent fiduciary may consider that, if he erred in "spark[ing] market fears" the "decline could be far worse than what was actually warranted, and a prudent fiduciary would not so act." *In re HP Erisa Litig.*, 2015 WL 3749565, at *9 (N.D. Cal. June 15, 2015). The "careful, context-specific scrutiny of a complaint's allegations" mandated by *Fifth Third* does not permit the non-specific allegations of this Complaint to withstand a motion to dismiss. 134 S. Ct. at 2470-71.

Defendants argue that the duty of prudence claim also fails against Defendant Craver for an independent reason. Thus, they claim, and Plaintiff does not dispute, Defendant Craver was "only an appointing and monitoring fiduciary." Dkt. 35 at 13. The parties agree that the fiduciary duty that was imposed on Defendant Craver was limited to the prudent appointment and monitoring of the Trust Investment Committee. Plaintiff's only response is that Defendant Craver "could have used his appointment power to replace the Trust Investment Committee, particularly defendant Boada, when he observed, in the course of his monitoring duty, the latter's failure to take the necessary prophylactic action." Dkt. 35 at 13-14. To show that Craver breached his limited appointment duty, Plaintiff must plausibly allege that a member of the Trust Investment Committee breached his or her duty of prudence. The Complaint does not do so.

As a second cause of action, the Complaint alleges that Defendants failed to provide the public and co-fiduciaries with accurate information concerning the aforementioned ex parte communications. Dkt. 1 ¶¶ 135-142. Plaintiff cites no authority to support the claim that there is such a duty. Indeed, Plaintiff appears to concede that ERISA does not compel fiduciaries to provide inside information to co-fiduciaries. *See, e.g.*, *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016) ("ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information."); *In re BP p.l.c. Sec. Litig.*, 2015 WL 6674576, at *9 (S.D. Tex. Oct. 30, 2015) ("duty to inform appointed fiduciaries is nowhere to be found" in any "ERISA provision or federal regulation" despite the DOL's specific guidance on the "ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries").

Plaintiff argues that Defendants had a duty to inform the public. Dkt. 35 at 26 ("[E]ven if no limited duty to inform [co-fiduciaries] exists under ERISA, the general duty to inform the public, to which defendants were subject, should have compelled them to take action."). Plaintiff has cited no case, and the Court has found none, that imposes such a duty. *In re Calpine Corp.*, 2005 WL 1431506, at *7 (N.D. Cal. Mar. 31, 2005) ("[T]here is no general fiduciary duty of disclosure under ERISA."). In the absence of any authority recognizing the viability of this claim, Plaintiff's duty to inform claim fails as a matter of law.[7]

IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED**, with leave to amend. Any amended complaint shall be filed within 21 days of the issuance of this Order.

IT IS SO ORDERED.

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[7] Defendants argue that this action should be stayed in the event it is not dismissed, pending completion of the securities action on which it is based. As noted, a motion to dismiss is currently pending in the Southern District's Securities Action. *Eng v. Edison Int'l,* No. 3-15-CV-1478-BEN-KSC (S.D. Cal.) (Benetiz, J.). As discussed at the hearing on this Motion and as reflected by the adoption of dates at the Scheduling Conference (Dkt. 47), Defendants' request is **DENIED**, without prejudice to its renewal based on developments in one or both actions.