IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES, DERIVATIVE & "ERISA" LITIGATION,	§ § §	MDL 1446
PAMELA M. TITTLE, THOMAS O. PADGETT, GARY S. DREADIN, JANICE FARMER, LINDA BRYAN, JOHN L. MOORE, BETTY J. CLARK, SHELLY FARIAS, PATRICK CAMPBELL, FANETTE PERRY, CHARLES PRESTWOOD, ROY RINARD, STEVE LACEY, CATHERINE STEVENS, ROGER W. BOYCE, WAYNE M. STEVENS, NORMAN L. AND PAULA H. YOUNG, MICHAEL L. MCCOWN, AND DAN SCHULTZ, on behalf of themselves and a class of persons similarly situated, and on behalf of the Enron Corp. Savings Plan, the Enron Corp. Employee Stock Ownership Plan, and the Enron Corp. Cash Balance Plan,	§ § § § § § § § § § § § § § § § § § §	
Plaintiffs	§ § §	
VS.	§ §	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES
ENRON CORP., an Oregon Corporation, ENRON CORP. SAVINGS PLAN ADMINISTRATIVE COMMITTEE, ENRON EMPLOYEE STOCK OWNERSHIP PLAN ADMINISTRATIVE COMMITTEE, CINDY K. OLSON, MIKIE RATH, JAMES S. PRESTON, MARY K. JOYCE, SHEILA KNUDSEN, ROD HAYSLETT, PAULA RIEKER, WILLIAM D. GATHMANN, TOD A. LINDHOLM, PHILIP BAZELIDES, JAMES G. BARNHART, KEITH CRANE, WILLIAM J. GULYASSY, DAVID SHIELDS, JOHN DOES NOS. 1-100, UNKNOWN FIDUCIARIES OF THE ENRON CORP. SAVINGS PLAN OR THE ESOP, THE NORTHERN TRUST CO., KENNETH L. LAY, JEFFREY SKILLING, ANDREW S. FASTOW, MICHAEL KOPPER, RICHARD CAUSEY, JAMES V. DERRICK, JR., THE ESTATE OF J. CLIFFORD BAXTER,	§ §	

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MARK A. FREVERT, STANLEY C. §
HORTON, KENNETH RICE, RICHARD §
B. BUY, LOU L. PAI, ROBERT A. §
BELFER, NORMAN P. BLAKE, JR., §
RONNIE C. CHAN, JOHN H. DUNCAN, §
WENDY L. GRAMM, ROBERT K. §
JAEDICKE, CHARLES A. LEMAISTRE, §
JOE H. FOY, JOSEPH M. HIRKO, §
KEN L. HARRISON, MARK E. §
KOENIG, STEVEN J. KEAN, REBECCA §
P. MARK-JUSBASCHE, MICHAEL S. §
MCCONNELL, JEFFREY MCMAHON, §
J. MARK METTS, JOSEPH W. §
SUTTON, ARTHUR ANDERSEN & CO. §
WORLDWIDE SOCIETE COOPERATIVE, §
ARTHUR ANDERSEN LLP, ARTHUR §
ANDERSEN UNITED KINGDOM, DAVID §
B. DUNCAN, THOMAS H. BAUER, §
DEBRA A. CASH, ROGER D. WILLARD §
D. STEPHEN GODDARD, JR., §
MICHAEL M. LOWTHER, GARY B. §
GOOLSBY, MICHAEL C. ODOM, §
MICHAEL D. JONES, WILLIAM §
SWANSON, JOHN STEWART, NANCY A. §
TEMPLE, DONALD DREYFUSS, JAMES §
A. FRIEDLIEB, JOSEPH F. §
BERARDINO, ANDERSEN DOES 2 §
THROUGH 1800 UNKNOWN PARTNERS §
IN ANDERSEN LLP, MERRILL LYNCH& §
CO., INC., J.P. MORGAN CHASE & §
CO., CREDIT SUISSE FIRST BOSTON §
CORPORATION, CITIGROUP, INC., §
SALOMON SMITH BARNEY INC., §
VINSON & ELKINS, LLP, RONALD T. §
ASTIN, JOSEPH DILG, MICHAEL §
FINCH, AND MAX HENDRICK, III, §
§
Defendants. §

TITTLE ROADMAP

MEMORANDUM AND ORDER

***RE* TITTLE DEFENDANTS' MOTIONS TO DISMISS**

The above referenced action is brought on behalf of Enron Corporation ("Enron") employees who were participants in three employee pension benefit plans governed by the Employment Retirement Income Security Act of 1974 ("ERISA"), § 3(2), 29 U.S.C. § 1002(2), specifically the Enron Corporation Savings Plan ("Savings Plan"), the Enron Corporation Employee Stock Ownership Plan ("ESOP"), and the Enron Corporation Cash Balance Plan ("Cash Balance Plan"),[1] and also on behalf of Enron employees who received "phantom stock" as compensation.[2] The first consolidated amended

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[1] While various parties have submitted copies of the relevant plans and trust agreements, some not the controlling version, the governing versions of all three are available as exhibits A.1-A.5 to the Joint Appendix in Support of Defendants' Motions to Dismiss Amended and Consolidated Complaint (#271) and as exhibits A-D to *Tittle* Plaintiffs' Appendix for Opposition to Defendants' Motions to Dismiss the First Consolidated and Amended Complaint (#322).

[2] The complaint at 54, ¶192 states that the phantom stock was given in lieu of money as wages (or bonuses for work done) and "was not part of any ERISA plan." ERISA governs only employee welfare benefit plans (which provide medical, unemployment, disability, death, vacation, and other benefits) and employee pension benefits plans (which provide retirement income to employees or defers payment of income to employees until termination of covered employment or thereafter), or plans that are a combination of the two. 29 U.S.C. § 1002 (1), (2), and (3); *Absher v. Flexi International Software, Inc.*, No. Civ. 3:02CV171 (AHN), 2003 WL 2002778, *6 (D. Conn. Apr. 10, 2003), *citing Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir. 1980)(Where payments are made not to "provide retirement income" but for some other purpose, ERISA does not apply.); *Hahn v. Nat'l Westminster Bank, N.A.*, 99 F. Supp. 2d 275, 278-81 (E.D.N.Y. 2000)(citing Department of Labor regulation, 29 C.F.R. § 2510.3-2(c), excluding from the definition of employee benefit plans those that involve payments made to employees as "bonuses for work performed"). In contrast to a pension benefit plan, a bonus plan does not proffer retirement income, but functions for another purpose, such as increased compensation for an incentive or a reward for good work. *Absher*,

class action complaint (instrument #145) alleges that Defendants are liable for the following violations during a proposed Class Period from January 20, 1998 through December 2, 2001: (1) breach

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2003 WL 2002778 at *6. In the *Tittle* complaint there are no allegations that the phantom stock was designated for retirement income so that it might have constituted an employer "program" that might qualify as an "employee pension benefit" plan under 29 U.S.C. § 1002(2)(A)(i). *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 118-20 (1989)(payments by an employer out of general company assets as compensation for work, even if deferred, are not employee welfare benefit plans under ERISA); *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 927, 931-32 (8th Cir. 1999)(holding that a phantom stock plan for executive employees to provide incentives and compensation for remaining in their employment "with additional incentives for industry and efficiency," was not a pension plan because redemption of shares was not conditioned upon termination of employment and its purpose was not deferral of income, but was instead a bonus plan exempted from coverage by ERISA). Thus the Court assumes none of the ERISA causes of action is or can be asserted on behalf of the proposed class of the phantom stock recipients.

Moreover, phantom stock is not actually stock. It has been defined as

> [a] right . . . to receive an award with a value equal to the appreciation of a share of stock from the date that Phantom Stock is cashed out. . . . Phantom Stock programs are designed to provide executives with cash payments equivalent to amounts they could receive under an actual stock option or similar program. . . . Phantom programs are based on "phantom" or "hypothetical" shares or units.

Whitt v. Sherman Int'l Corp., 147 F.3d 1325, 1327 (11th Cir. 1998)(*quoting* Coopers & Lybrand, *Executive Summary of Nonqualified Long-term Incentive Plans*, CV01 ALI-ABA 619, 632 (1996)). The *Tittle* complaint fails to state what company issued the stock, but in Plaintiffs' Opposition to Defendants' Motions to Dismiss State Law Claims (#319 at 19), Plaintiffs represent that at this stage of the litigation they believe the stock does not constitute a "covered security," or a "nationally traded security" or a security issued by a registered investment company under 15 U.S.C. § 77r(b), nor that it constitutes an investment contract of any kind and thus any conduct related to the phantom stock is not actionable under the federal securities laws.

The complaint does assert phantom stock claims under RICO and Texas common law civil conspiracy.

of fiduciary and co-fiduciary duties under ERISA, 29 U.S.C. §§ 1104 and 1105; (2) the commission of or conspiracy to commit unlawful acts or omissions in the conduct of certain enterprises' affairs through a pattern of racketeering activity in a scheme to mislead and defraud Enron employees, shareholders, potential investors, and the securities market in violation of the Racketeer Influenced and Corrupt Organizations Act (civil "RICO"), 18 U.S.C. §§ 1961-1968; and (3) negligence and civil conspiracy under Texas common law.

I. OVERVIEW OF CAUSES OF ACTION AND PENDING MOTIONS

Defendants fall into five groups: (1) Enron and individual officers and directors of the company; (2) committees, trustees, and individuals that administered the three pension plans; (3) Enron's accountant Arthur Andersen LLP and some of its individual partners and employees (Thomas H. Bauer, Joseph F. Berardino, Debra A. Cash, Donald Dreyfus, James A. Friedlieb, D. Stephen Goddard, Jr., Gary B. Goolsby, Michael D. Jones, Michael M. Lowther, John Stewart, William Swanson, Nancy A. Temple, and Roger D. Willard); (4) Enron's outside law firm Vinson & Elkins L.L.P. and some of its individual partners (Ronald Astin, Joseph Dilg, Michael Finch, and Max Hendrick, III); and (5) five investment banks (J.P. Morgan Chase & Co., Merrill Lynch & Co., Inc., Credit Suisse First Boston, Citigroup, Inc., and Salomon Smith Barney, Inc).

The complaint asserts its causes of action in nine counts: five under ERISA, two under RICO, one under Texas common-law negligence, and the last under Texas common-law civil conspiracy.

Count I originally asserted a claim on behalf of the Savings Plan and the ESOP[3] against Defendants Enron, the Enron

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[3] As explained by the Sixth Circuit Court of Appeals in *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 425 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 966 (2003),

> Under ERISA, a plan that primarily invests in shares of stock of the employer that creates the plan is referred to as an ESOP. . . . Congress intended ESOPS to function as both "an employee retirement benefit plan and a 'technique of corporate finance' that would encourage employee ownership." . . . "Because of these dual purposes, ESOPS are not designed to guarantee retirement benefits, and they place employee retirement assets at much greater risk than the typical diversified ERISA plan." [citations omitted]

The Fifth Circuit has provided "a thumbnail sketch of basic ESOP mechanics":

> An employer desiring to set up an ESOP will execute a written document to define the terms of the plan and the right of beneficiaries under it. 29 U.S.C. § 1102(a)(1976). The plan document must provide for one or more named fiduciaries "to control and manage the operation and administration of the plan." *Id.*, §1102(a)(1). A trust will be established to hold the assets of the ESOP. *Id.*, § 1103. The employer may then make tax-deductible contributions to the plan in the form of its own stock or cash. If cash is contributed, the ESOP then purchases stock in the sponsoring company, either from the company itself or from existing shareholders. Unlike other ERISA-covered plans, an ESOP may also borrow in order to invest in the employer's stock. In that event, the employer's cash contributions to the ESOP would be used to retire the debt.

Donovan v. Cunningham, 716 F.2d 1455, 1459 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

Furthermore the fiduciary of an ESOP is not relieved of

ERISA Defendants,[4] Kenneth L. Lay,[5] Jeffrey K. Skilling [to be

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his traditional duties of loyalty, prudence, and care under § 404 of ERISA,(9 U.S.C. § 1104(a), although the fiduciary is not bound by the requirement of diversification of plan assets under § 404(a)(2), 29 U.S.C. § 1104(a)(2), or by the prohibited transaction rules of § 406, 29 U.S.C. § 1106 and § 408, 29 U.S.C. § 1108(e), to be discussed in detail later. *Id.* at 1463-67. Plaintiffs here maintain that they are not alleging that Defendants failed to diversify the ESOP assets, but that in breach of their fiduciary duties to plan participants and beneficiaries, they permitted an imprudent investment in Enron stock when they knew or should have known it was very risky.

The Third Circuit has held that in light of the special nature of an ESOP and the special provisions for it, an ESOP trustee is entitled to a presumption that it acted consistently with ERISA in investing plan assets in the employer's securities unless a showing was made that circumstances have arisen that would make such an investment defeat or impair the original purpose of the trust. *Moench v. Robertson*, 62 F.3d 553, 568-71 (3d Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). A determination as to whether an ESOP fiduciary breached its fiduciary duty should not be made on a motion to dismiss, but only after discovery develops a factual record. *Id.* (reviewing whether ERISA fiduciary was entitled to presumption on summary judgment; under a showing of circumstances that made such an investment defeat or impair the original purpose of the trust, the trustee was subject to the prudent man rule); *in accord Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *In re IKON Office Solutions, Inc.*, 86 F. Supp. 2d 481, 492 (E.D. Pa. 2000)(denying motion to dismiss because "it would be premature to dismiss even a portion of the ERISA complaint without giving plaintiffs an opportunity to overcome the presumption"). *But see Canale v. Yegen*, 782 F. Supp. 963, 967-68 ("the allegation that [an ESOP] Plan administrator has failed to prudently diversify plan assets invested exclusively in the stock of the beneficiaries' employer can state a claim for breach of fiduciary duty under ERISA."), *on reargument*, 789 F. Supp. 147, 153-54 nn.4 & 5 (D.N.J. 1992)(the relevant fiduciary duty, described in the [earlier] opinion only in terms of the duty to diversify, is better characterized as both the duty to diversify and to discharge her duties with the prudence that a prudent person would use in the conduct of a like enterprise.").

[4] The complaint at ¶62 states that the term "Enron ERISA Defendants" refers to those Defendants named in ¶¶ 44-61, i.e., the Enron Corp. Savings Plan Administrative Committee ("Administrative Committee"), the Enron Stock Ownership Plan Administrative Committee ("ESOP Administrative Committee"), the Cash Balance Plan Administrative Committee, Cindy Olson, Mikie Rath (since dismissed from this action, #367), James S. Prentice, Mary K. Joyce, Sheila Knudsen, Rod Hayslett, Paula Rieker, William D. Gathmann (since dismissed from this action, #363), Tod A. Lindholm, Philip J.

dismissed],[6] Richard A. Causey [to be dimsissed],[7] and Arthur Andersen,[8] at a time when Enron, the Enron ERISA Defendants, Lay, and Skilling knew or should have known that Enron stock was an imprudent investment choice, for breaches of their fiduciary and co-fiduciary duties of prudence, care and loyalty under 29 U.S.C. §§ 1104(a)(1)(A)-(D)[9] and 1105, for (1) allowing Savings Plan

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Bazelides, James G. Barnhart, Keith Crane, William J. Gulyassy, David Shields, and John Does Nos. 1-100 (at all relevant times members of the Administrative Committees of the Savings Plan, ESOP, and/or the Cash Balance Plan).

Plaintiffs have indicated that they are dismissing without prejudice Counts I-V against Gathmann and Barnhart. #314 at 11. They are also dismissing without prejudice Defendant the Cash Balance Plan, successor to the Enron Corporation Retirement Plan, which is sued only under Count IV. *Id.* at 10-11.

[5] The complaint asserts that Lay was Chairman of the Board of Directors of Enron, served as Enron's CEO from 1986-February 2001 and August 2001-January 2002, and was a fiduciary of the Savings Plan, the ESOP, and the Cash Balance Plan. In their Overview Memorandum (#314) at 11 n.5, Plaintiffs state they are dismissing their Count I claim against Lay based on "his alleged fraudulent promotion of Enron stock," but not their claim against Lay for breach of his fiduciary duty to monitor the appointment and conduct of the Savings Plan and ESOP Committee Members.

[6] According to the complaint, Skilling was a director of Enron at all relevant times, was CEO of Enron from February 2001-August 14, 2001, and was a fiduciary of the Savings Plan, the ESOP, and the Cash Balance Plan. In Plaintiffs' Overview Memorandum (#314) at 11 and n.5, Plaintiffs state they are dismissing their Counts I and II claims against Skilling.

[7] Causey was Executive Vice-President and Chief Accounting Officer of Enron. He is alleged to have signed each of Enron's Form 10-K's and 10-Q's that were filed with the SEC from 1997-2000. Plaintiffs have indicated they are dismissing without prejudice their claims against Causey under Counts I-IV. #314 at 11.

[8] Arthur Andersen L.L.P. is sued in its capacity as auditor of the Savings Plan and in its capacity as the auditor of Enron's financial statements generally.

[9] Section 404(a) of ERISA, 29 U.S.C. § 1104(a), addressing fiduciary duties and the prudent man standard of care,

participants the ability to direct the Plan's fiduciaries to purchase Enron stock for their individual accounts from monies the participants contributed as deductions from their salaries; (2) inducing the participants to direct the fiduciaries to purchase Enron stock for their individual accounts in exchange for funds they contributed to the Plan; (3) causing and allowing the Savings Plan to purchase or accept Enron's matching contributions in the form of Enron stock; (4) imposing and maintaining age restrictions and other restrictions on the participants' ability to direct the Savings Plan fiduciaries to transfer both Savings Plan and ESOP

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provides,

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with 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 like character and with like aims;
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

This provision imposes fiduciary duties that overlap one another, i.e., a duty to diversify the investments of the plan, a duty of loyalty, and a duty of care. *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 293-94 (5^{th} Cir. 2000).

assets out of Enron stock; and (5) inducing the Savings Plan and ESOP participants to direct or allow the fiduciaries of both Plans to maintain investments in Enron stock. Arthur Andersen is charged with breaching its fiduciary duty under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), by participating in the Enron Defendants' breach of fiduciary duties by actively concealing from the Plan fiduciaries and Plan participants the actual financial condition of Enron and the imprudence of investing in Enron stock.

Count II is brought on behalf of the Savings Plan and the ESOP against Defendants Enron, the Enron ERISA Defendants, Lay, Skilling [since dismissed], Causey [since dismissed], and the Northern Trust Company ("Northern Trust"), for breach of their fiduciary duties under 29 U.S.C. §§ 1104(a)(1)(A)-(D) and 1105, based on the lockdown (freeze, blackout)[10] of the two Plans, without

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[10] The complaint states that Northern Trust was a trustee and fiduciary of the Savings Plan and the ESOP within the meaning of 29 U.S.C. § 1002(21)(A). According to the complaint, during the lockdown, plan participants were unable to move their investments from one plan investment fund to another despite exigent circumstances that made the blackout imprudent. The complaint asserts that Northern Trust exercised authority and control over the plan assets by imposing the lockdown, which it had the ability to stop or delay, and that by not stopping or delaying that lockdown, Northern Trust breached its fiduciary duties to plan participants.

In its *amicus curiae* brief (#446), the SPARK (Society of Professional Administrators and Recordkeepers) Institute insists that Northern Trust filled two distinct roles, one as a directed trustee and one as a recordkeeper, and charges that the Department of Labor in its own *amicus curiae* brief is trying to conflate the two to make Northern Trust a trustee of the Savings Plan. *Id.* at 14. SPARK Institute insists that the allegations in the complaint, i.e., that Northern Trust exercised authority and control over the plan by imposing the blackout and not delaying it in breach of its duties to the participants, relate solely to Northern Trust's role as a nonfiduciary, ministerial recordkeeper. *Id.* at 15. SPARK Institute explains the typical procedure of a lockdown and the trustee's role. #446 at 8 n.1. SPARK Institute asserts that adequate notice to participants, effectually from October 17, 2001

"lockdown" is not a term used in the retirement services industry. Instead "conversion" is used to identify the transaction in which a plan transfers administration of the plan from one recordkeeper to another, while a "blackout," which is one part of the conversion process, is a cessation of trading activity relating to the plan investments so that the transfer can occur without mistakes. *Id.* at 8 n.1. According to SPARK Institute, during a blackout, generally salary deferrals, employer matching contributions, and monthly payments to retirees are not frozen, but exchanges from one investment option to another, in-service withdrawals, loans, and lump-sum final distributions are. *Id.* at 8-9. SPARK Institute contends that there is no independent decision to impose a blackout; it is a mandatory part of the complex process of conversion, and the only way to prevent a blackout is to stop the conversion. *Id.* at 16. Moreover, SPARK Institute maintains that the decision regarding conversion and imposition of a blackout is controlled by the plan sponsor and named fiduciary, not by the recordkeeper. *Id.* at 9. The plan documents adopted by the plan sponsor establish the rules and procedures governing the plan, including the handling of employer securities, while named fiduciaries give the orders. *Id.* at 10. Furthermore, the recordkeeping contract generally requires a recordkeeper to cooperate with a plan sponsor and the successor recordkeeper in effecting the conversion, while Department of Labor regulations require that these contracts must be terminable on reasonably short notice. *Id.* at 8, 17, 18. SPARK Institute argues that the recordkeeper's role is purely ministerial and nonfiduciary (consisting of keeping track of all the individual accounts, the sources of the funds in each and the amounts, employer matching contributions, pre- and post-tax contributions, rollovers from other 401(k) plans, etc., matters largely handled by automated systems), and that conversion activities are conducted exclusively by recordkeepers). *Id.* at 11-13. *See Freimark & Thurston Agency, Inc. v. National City Bank of Dayton*, 231 F. Supp. 2d 713, 715 (S.D. Ohio 2002)(record keeper charged with delaying a conversion, had no discretion in the transfer and was not a fiduciary).

Plaintiffs charge SPARK Institute with obfuscation because Plaintiffs have not sued the recordkeeper here, but only Northern Trust in what Plaintiffs contend is its role as trustee and fiduciary. They also point out that Northern Trust, itself, has never argued that it was not the proper defendant nor that the functions challenged by Plaintiffs amounted to mere recordkeeping. This Court has previously ruled that Plaintiffs have produced sufficient evidence under seal to raise material issues of fact about the nature of Northern Trust's role.

until November 14, 2001,[11] while the Plans were switched to a new record keeper and trustee,[12] during which time the price of Enron stock fell from $33.84 to $10.00 per share.[13]

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[11] The complaint highlights the significance of the timing of the lockdown by emphasizing the extreme circumstances that Plaintiffs maintain made the lockdown imprudent. On October 16, 2001, Enron made a surprise announcement, stunning Wall Street and triggering the first public investigations, that Enron was taking a $1.2 billion charge against its third quarter results. According to the complaint, stories immediately appeared in the media questioning Enron's financial condition, and many class members complained to Northern Trust and requested or demanded a postponement of the lockdowns. According to the complaint, when Enron asked Northern Trust and Hewitt Associates (the incoming recordkeeper) about the possibility of postponing the lockdowns, both responded that a postponement would be possible. On October 22, 2001 Enron publicly announced that the SEC had opened an informal investigation of Enron's accounting practices. On October 24, 2001 Andrew S. Fastow was forced to relinquish his position as Chief Accounting Officer, which was assumed by Jeff McMahon, who had previously complained about accounting improprieties. Just before midnight on October 25, 2001, Enron sent employees an e-mail stating that it would not delay the lockdown because it would be too inconvenient to do so. The alleged "constructive and/or actual" lockdown of the assets in the Savings Plan and the ESOP occurred between October 17 and 26, 2001. Meanwhile, the price of Enron stock declined during this period until it closed at $11.17 per share on November 5, 2001. The lockdown was lifted on November 14, 2001. The price of Enron stock continued to plunge, closing at $4.11 on November 27, 2001. Enron filed for bankruptcy protection on December 2, 2001.

[12] Purportedly from Northern Trust and its recordkeeper, Northern Trust Retirement Consulting, to new trustee Wilmington Trust and new recordkeeper Hewitt Associates.

[13] Northern Trust argues that Plaintiffs fundamentally misconstrue the terms of the ESOP (Ex. B to #243), as opposed to the Savings Plan, and that there was no "lockdown" of the ESOP. See footnotes 3 and 10 of this memorandum and order. Northern Trust contends that unlike the members of the Savings Plan, members of the ESOP do not choose what investments should be made with their contributions; they can only choose to contribute or withdraw funds from the ESOP. Furthermore, under the terms of the ESOP, at

In Count III, Plaintiffs, on behalf of the Savings Plan,[14] assert a breach of fiduciary duty in violation of 29 U.S.C. § 1104(a)(1)(D) against Enron, the Enron ERISA Defendants (excluding the ESOP Administrative Committee and the Cash Balance Administrative Committee), Lay, Skilling, Causey [since dismissed], and the Northern Trust Company for their failure to diversify the Savings Plan assets, i.e., to liquidate the Enron stock, in

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any and all times participants were required to submit any request to sell assets held in the ESOP by the twentieth day of the month in which the request was made or they would have to wait until the last day of the next month for the withdrawal to be effective. #243, Ex. B at XIII-2.

Plaintiffs respond that their claim is not based on the normal business schedule, but on the fact that the exigent circumstances required Northern Trust, pursuant to its overriding fiduciary duty to act prudently and loyally in the best interests of plan participants and beneficiaries at all times, to disrupt that routine procedure to prevent grievous harm to them, and that although it had the ability to stop or delay the lockdown, Northern Trust breached its fiduciary duties in failing to do so.

[14] Plaintiffs have indicated that they will seek leave of Court to amend to add the ESOP Plan to Count III based on ESOP plan language requiring Northern Trust to ensure prudent diversification of plan assets. #316 at 38 n.19. With respect to ESOPS' purchases of employer securities generally, courts have held that fiduciary duties are met where the decision to purchase is made by or on the recommendation of independent financial and legal advisors after thorough examination of all relevant matters and consideration of the positive and negative effects of such investment to plan participants and beneficiaries. *See, e.g., Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982); *Andrade v. Parsons Corp.*, 1992 U.S. App. LEXIS 18220 (9th Cir. 1992). At least two district courts have determined there is a duty of prudence on new plan fiduciaries to protect existing ESOP assets. *Keach v. U.S. Trust Co.*, 240 F. Supp. 2d 840, 844-45 (C.D. Ill. 2002); *Neyer, Tiseo & Hindo, Ltd. v. Russell*, 1993 WL 334951, *11 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1488 (3d Cir. 1994)(Table).

accordance with the terms of the plan, because Defendants knew or should have known that investment in Enron stock was imprudent.

In Count IV Plaintiffs on behalf of Certain Retirement Plan Participants and Beneficiaries assert against Enron, the Enron ERISA Defendants, and the Enron Corp. Cash Balance Plan as Successor to the Enron Corp. Retirement Plan [since dismissed], another claim of breach of fiduciary duty, this time with respect to offsets (reductions) of accrued pension benefits that were based on the artificially inflated price of Enron stock from 1998-2000. The Enron Corp. Cash Balance Plan and its predecessor, the Enron Corp. Retirement Plan, constituted a "defined benefit plan" under 29 U.S.C. § 1002(35)[15] and was fully funded by Enron. In essence

[15] There are two broad categories of employee benefit plans: defined benefit plans and defined contributions plans. The S.E.C. in S.E.C. Release No. 33-6188, 1980 WL 29482, at *6-7 Feb. 1, 1980), succinctly explains the difference:

> A defined benefit plan pays fixed or determinable benefits. The benefits ordinarily are described in a formula which specifies the amount payable in monthly or annual installments to participants who retire at a certain age.
>
> As long as the plan and the employer(s) contributing to the plan remain solvent, and the plan continues to be operated, vested participants will receive the benefits specified. In the event the investment results of the plan do not meet expectations, the employer(s) usually will be required, on the basis of actuarial computations, to make additional contributions to fund the promised benefits. Conversely, if the plan earnings are better than anticipated, the employer(s) may be permitted to make contributions that

Plaintiffs allege that until January 1, 1996, the retirement benefits provided to a plan participant of five years or more service were determined by adding different percentages of final average pay multiplied by levels of years of accrued service, and then offset by the annuity value of a portion of that participant's account in the ESOP ("Offset Account") as of certain determination dates, usually the date the benefit payments began or, if earlier,

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> are less than the projected amounts.
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> A defined contribution plan does not pay any fixed or determinable benefits. Instead, benefits will vary depending on the amount of plan contributions, the investment success of the plan, and allocations made of benefits forfeited by non-vested participants who terminate employment. Thus the amount of benefits is based, in part, on the earnings generated by the plan.
>
> Both defined benefit and defined contribution plans can provide for employee contributions. In addition, defined contribution plans maintain individual accounts for all participating employees. These accounts reflect each participant's share in the underlying trust assets and are adjusted annually to take into account plan contributions, earnings and forfeitures. In contrast defined benefit plans ordinarily do not maintain individual accounts, except to the extent necessary under the Internal Revenue Code to record benefits attributable to voluntary contributions by employees. [footnotes omitted]

Of the plans at issue here, only the Cash Balance Plan was a defined benefit plan, the others being defined contribution plans. ERISA created the Pension Benefit Guarantee Corporation, which insures minimum pension benefits for defined benefit plans if the employer becomes unable to pay the pension; there is no insurance for the defined contribution plans like the Savings Plan and the ESOP.

the date(s) of distribution(s) from the Offset Account. Effective January 1, 1996, the Retirement Plan was amended, renamed the Enron Corp. Cash Balance Plan, and the benefit formula was changed from an average pay formula to a cash balance formula, while the offset arrangement between the Plan and the ESOP was to be phased out over the coming five-year period. Under the new plan, a plan participant's accrued benefit under the Cash Balance Plan was based on his employment from 1987-1994 and was offset over the five-year phase-out period by the value of his ESOP stock based on a formula set out in §§ 5.1-5.5 of the Plan. Each January 1st from 1996-2000, the value of one-fifth of the shares of Enron stock credited to each participant's Offset Account was to be calculated based on the stock's market price on that date as reported at closing time on the New York Stock Exchange and was thereafter permanently fixed at that amount. Plaintiffs allege that Defendants knew or should have known that the market price of Enron stock from 1998 to 2000 was artificially inflated and not representative of its true value, and that Defendants breached their fiduciary duty by not computing the component of the offset at its true, much lower value. As a result, participants and beneficiaries who accrued benefits under the Retirement Plan between January 1, 1987 and December 31, 1994 have suffered losses because their retirement benefits would be offset by the inflated market price of one-fifth of the shares of Enron stock in their ESOP Offset Account in 1998, 1999, and 2000.

Count V, brought on behalf of the Savings Plan, the ESOP, and the Cash Balance Plan against Enron and the Compensation Committee Defendants, alleges another breach of fiduciary and co-fiduciary duties under 29 U.S.C. § 1104(a)(1)(A)-(D) and § 1105 relating to their failure to appoint and monitor other plan fiduciaries and their failure to disclose to the investing fiduciaries material information about Enron's true financial condition. Specifically Plaintiffs claim that Defendants breached their fiduciary duties (1) by appointing fiduciaries to manage Plan assets that Defendants knew, or should have known, were not qualified to manage Plan assets loyally and prudently; (2) by failing to monitor adequately the investing fiduciaries' investment of these assets; (3) by failing to monitor adequately the Plans' other fiduciaries' implementation of the terms of the Plans, including but not limited to investment of the assets; (4) by failing to disclose to the investing fiduciaries material facts concerning Enron's financial condition that they knew or should have known were material to loyal, prudent investment decisions concerning the use of Enron stock in the Plans and/or with respect to the implementation of the terms of the Plans; (5) by failing to remove fiduciaries who Defendants knew or should have known were not qualified to manage the Plans' assets loyally and prudently; (6) by knowingly participating in the investing fiduciaries' breaches by accepting the benefits of those breaches, both personally and on behalf of Enron; (7) by knowingly undertaking to hide acts and omissions of the fiduciaries that Defendants knew constituted fiduciary breaches; and (8) by failing to remedy those fiduciaries' known breaches.

Count VI asserts RICO violations under section 1962(c), conducting the affairs of a RICO enterprise through a pattern of racketeering activities involving Enron stock, and 1962(d), conspiring to do so, thereby causing injury to Plaintiffs' and proposed Class Members' property.[16] Count VI is brought on behalf

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[16] Section 1962(c) states,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The word, "conduct," means "participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). The defendant who directs the enterprise need not have the primary responsibility for directing the enterprise, but must have some role in directing it. *Id.* at 179. "Operation" of an enterprise can be performed by upper management or by "lower rung participants in the enterprise who are under the direction of the upper management." *Id.* at 184. The "pattern of racketeering activity" must consist of two or more related predicate acts, which are federal or state crimes, and which amount to or pose a threat of continued criminal activity. *In re MasterCard Intern., Inc.*, 313 F.3d 257, 261-62 (5th Cir. 2002). A plaintiff's injury for purposes of § 1962(c) must flow from one of the alleged predicate acts. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992).

Section 1962(d) provides, "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a),(b), or (c) of this section."

of all proposed classes against the "Enron Insider Defendants" (i.e., Kenneth L. Lay, Jeffrey K. Skilling, Andrew S. Fastow,[17] Michael Kopper,[18] Richard A. Causey, James V. Derrick, Jr.[19], the Estate of J. Clifford Baxter,[20] Mark A. Frevert,[21] Stanley C. Horton,[22] Kenneth Rice,[23] Richard B. Buy,[24] Lou L. Pai,[25] Robert A.

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[17] Fastow was Chief Financial Officer of Enron at all relevant times.

[18] The complaint describes Kopper as a Managing director of Enron's Global Equity Markets Group, "an underling of Fastow," and the person who ran Chewco and JEDI.

[19] Derrick was Senior Vice President and General Counsel of Enron before July 1999, when he became Executive Vice President and General Counsel.

[20] Baxter was Chairman and Chief Executive Officer of Enron North America Corporation from June 1999-June 2000, Vice Chairman of Enron from October 2000, and Chief Strategy Officer from June 2000 until his death.

[21] Frevert is identified as Chairman and Chief Executive Officer of Enron Wholesale Services since June 2000, after serving as Chairman and Chief Executive Officer of Enron Europe from March 1997-June 2000.

[22] Horton was Chairman and Chief Executive Officer of Enron Transportation Services at all relevant times.

[23] Rice was Chairman and Chief Executive Officer of Enron Capital and Trade ("ECT")-North America from March 1997-June 1999, and Chairman and Chief Executive Officer of Enron Broadband Services, Inc. since June 2000.

[24] Buy was Managing Director and Chief Risk Officer of ECT from January 1998-March 1999, Senior Vice President and Chief Risk Officer from March 1999-July 1999, and Executive Vice President and Chief Risk Officer of Enron since July 1999.

[25] Pai was Chairman and CEO of Enron Accelerator, after serving as director of Enron Energy Services, and became the Chairman of New Power, one of the vehicles allegedly used by Enron

Belfer, Norman P. Blake, Ronnie C. Chan, John H. Duncan, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, Joe H. Foy,[26] Joseph M. Hirko,[27] Ken L. Harrison,[28] Mark E. Koenig,[29] Steven J. Kean,[30] Rebecca P. Mark-Jusbasche,[31] Michael S. McConnell,[32] Jeffrey

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to inflate its earnings and conceal losses through unlawful, labyrinthine transactions.

[26] According to the complaint, Robert A. Belfer, Blake, Chan, Duncan, Gramm, Jaedicke, LeMaistre, and Foy were directors of Enron. Blake, Duncan, Jaedicke and LeMaistre were also members of the Compensation and Management Committee of the Enron Board of Directors (collectively, "Compensation Committee Defendants") and allegedly fiduciaries with respect to the Enron Corp. Savings Plan and the ESOP.

Outside Directors state the proper name of the committee is the Compensation and Management Development Committees," which were charged with "creat[ing] an employee compensation system linked to the enhancement of shareholder value." #240 at 3 n.2.

[27] Hirko was Chief Executive Officer of Enron Broadband.

[28] Harrison was Chief Executive Officer of Portland General Electric, a subsidiary of Enron, until March 31, 2000, when he became a director of Enron.

[29] The complaint states that Koenig was Executive Vice President, Investor Relations of Enron at all relevant times.

[30] Kean was Executive Vice President and Chief of Staff of Enron since 1999.

[31] The complaint identifies Mark-Jusbasche as a director of Enron until August 2000.

[32] McConnell was Executive Vice President, Technology during all relevant times.

McMahon,[33] J. Mark Metts,[34] Joseph W. Sutton[35]); the "Accounting Defendants" (Arthur Andersen,[36] David B. Duncan, Thomas H. Bauer, Debra A. Cash, Roger D. Willard, D. Stephen Goddard, Jr., Michael M. Lowther, Gary B. Goolsby, Michael C. Odom, Michael D. Jones, William Swanson, John E. Stewart, Nancy A. Temple, Donald Dreyfuss, James A. Friedlieb, Joseph F. Berardino, and Andersen Does 2 through 1800); the "Attorney Defendants" (Vinson & Elkins, LLP, Ronald T. Astin, Joseph Dilg, Michael P. Finch, and Max Hendrick, III); and the "Investment Banking Defendants" (Merrill Lynch & Co., Inc., J.P. Morgan Chase & Co., Credit Suisse First Boston Corporation, and Citigroup, Inc. and its subsidiaries, Citigroup Securities and Salomon Smith Barney).

Count VI identifies the following as RICO enterprises, either legal entities or association-in-fact enterprises: Enron Corporation; an association-in-fact enterprise comprised of the Enron Insider Defendants, the Enron ERISA Defendants, the Accounting Defendants and/or Andersen, the Attorney Defendants, the

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[33] McMahon was Chief Financial Officer of Enron Europe from 1994-July 1998, Senior Vice President, Finance and Treasurer from July 1998 to July 1999, and Executive Vice President, Finance and Treasurer of the Company from July 1999.

[34] Metts was Executive Vice President, Corporate Development.

[35] Sutton was Vice Chairman of Enron until early 2001.

[36] Plaintiffs have settled with and dismissed the foreign Arthur Andersen entities.

Investment Banking Defendants, and other investment banks not named as defendants in the complaint(Canadian Imperial Bank of Commerce, Deutsche Bank, Bank America, Lehman Brothers, Barclays Bank, UBS Warburg, First Union Wachovia, Bear Stearns, and Morgan Stanley Dean Witter); the Savings Plan/ESOP/Cash Balance Plan Enterprise (consisting of three separate RICO enterprises, i.e., legal entities); the Enron-Andersen Enterprise (association-in-fact enterprise); the Andersen Enterprise; the LJM1 Enterprise; the LJM2 Enterprise; the Enron-Merrill Lynch Enterprise(s) (association-in-fact enterprise); the Enron-J.P. Morgan Chase-Mahonia Enterprise (association-in-fact enterprise); the Enron-CSFB Enterprise (association-in-fact enterprise); and the Enron-Citigroup Enterprise (association-in-fact enterprise).

According to Count VI, the pattern of racketeering which Defendants allegedly committed, aided and abetted, or conspired to commit was made up of predicate offenses, e.g., violations of various federal statutes, including 18 U.S.C. § 664 (embezzlement and conversion of assets of an ERISA employee pension benefit plan),[37] 18 U.S.C. §§ 1341 and 1343 (federal mail and wire fraud),[38]

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[37] A person violates title 18 U.S.C. § 664 if he "embezzles, steals or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, . . . or other assets of any . . . employee pension plan . . . " subject to ERISA. *United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001). The elements of the violation are that the defendant (1) embezzled (2) funds (3) from an employee benefit plan with (4) specific intent to deprive the plan of funds. *United States v. Todd*, 108 F.3d 1329, 1330 (11th

18 U.S.C. § 1512(b)(2) (obstruction of justice[39]), and 18 U.S.C. § 2314 (interstate transportation offenses[40]).

Cir. 1997).

[38] The elements comprising mail and wire fraud under 18 U.S.C. § 1341 and § 1343 are (1) the defendant's participation in a scheme to defraud, which includes false or fraudulent pretenses, representations or promises; (2) the use of the mails or wire communications to execute the scheme; and (3) specific intent to defraud. *United States v. Bieganowski*, 313 F.3d 264, 275 (5th Cir. 2002), *cert. denied,* 123 S.Ct. 1959 (2003); *Chris Albritton Const. Co., Inc. v. Pitney Bowes, Inc.*, 304 F.3d 527, 532 (5th Cir. 2002); *United States v. Caldwell*, 302 F.3d 399, 406 (5th Cir. 2002); *United States v. Odiodio*, 244 F.3d 398, 402 (5th Cir. 2001). The defendant must act knowingly, willfully, and with the specific intent to defraud. *United States v. Richards*, 204 F.3d 177, 207 (5th Cir. 2000), *cert. denied sub nom. Braugh v. U.S.*, 531 U.S. 826 (2002), *overruled on other grounds, U.S. v. Cotton*, 535 U.S. 625, 629 (2002).

[39] Title 18 U.S.C. § 1512(b)(2)(B) states that a person may be fined or imprisoned for obstructing justice if he "knowingly uses intimidation or physical force, threatens or corruptly persuades another person with intent to--(1) cause or induce any person to--(A) withhold testimony, or withhold a record, document or other object, from an official proceeding; [or] (B) alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding."

The complaint at ¶796 charges defendants with persuading certain individuals to "(i) withhold records, documents and other objects from official proceedings (including, but not limited to, the SEC investigation), and (ii) alter, destroy, mutilate and conceal objects with the intent to impair those objects' integrity or availability for use in such official proceedings."

[40] To prove an offense in violation of 18 U.S.C. § 2314, the government must demonstrate (1) the interstate transportation of (2) goods, merchandise, wares, money or securities valued at $5,000 or more and (3) knowledge by the defendant that such items were stolen, converted, or taken by fraud. *United States v. Onyiego*, 286 F.3d 249, 253 (5th Cir. 2002), *cert. denied sub nom. Biegon v. U.S.*, 123 S. Ct. 254 (2002); *United States v. McIntosh*, 280 F.3d 479, 483 (5th Cir. 2002), *cert. denied sub nom. Braugh v. U.S.*, 531 U.S. 826 (2000), *overruled on other grounds*, *U.S. v. Cotton*, 535 U.S. 625, 629 (2002). A defendant need not have transported anything himself, but need only have caused the interstate transportation. *McIntosh*, 280 F.3d at 483.

Section 2314 also prohibits interstate transportation of persons in the execution of a scheme to defraud. The elements are

Count VII asserts a claim against Enron Insider Defendants, Arthur Andersen, and the Investment Banking Defendants for investing income that was derived from racketeering activities involving Enron stock in RICO enterprises, under §§ 1962(a)[41] and 1962(d). Among the various alleged enterprises is an Association-in-Fact Enterprise comprised of the Enron Insider Defendants, the Enron ERISA Defendants, the Accounting Defendants and/or Andersen, the Attorney Defendants, the Investment Banking Defendants, and other investment banks (Canadian Imperial Bank of Commerce, Deutsche Bank, Bank America, Lehman Brothers, Barclays Bank, UBS Warburg, First Union Wachovia, Bear Stearns, and Morgan Stanley

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(1) the defendant devised a scheme (2) intending to defraud the victim of money or property of a minimum value of $5,000 and (3) the scheme induced the victim to travel in interstate commerce. *United States v. Richards*, 204 F.3d at 206.

The complaint at ¶¶281-82 asserts violations of both provisions of § 2314, i.e., that Defendants (1) transmitted or transferred in interstate commerce money taken from the Savings Plan participants' contributions to the Savings Plan and/or investment in stock offered by the Savings Plan and (2) caused Enron employees to travel to Houston to attend meetings on May 18, 1999, July 13, 1999, December 1, 1999, February 28, 2000, and October 3, 2000, and others, conducted by Enron Insiders, at which the employees were assured that their 401(k) plan funds were safely invested and that they should hold their investments in Enron stock. For a violation of § 2314, a defendant must have fraudulent intent. *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied*, 450 U.S. 910 (1981).

[41] Section 1962(a) provides that a person who has received income from a pattern of racketeering activity cannot invest that income in the acquisition or operation of a RICO enterprise. A plaintiff asserting a claim under this provision must establish (1) the existence of an enterprise, (2) the acquisition of income by the defendant from a pattern of racketeering activity, (3) the use of any part or all of that income in acquiring an interest in or operating the enterprise, and (4) a nexus between the alleged violation (investment of the income received from the pattern of racketeering activity) and the plaintiff's injury. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000).

Dean Witter). Also named are the Enron Enterprise, the Savings Plan/ESOP/Cash Balance Plan Enterprise, the LJM1-LJM2 Enterprise, the Accountant Defendants Enterprise, the Enron-JP Morgan Chase-Mahonia Enterprise, the Enron CSFB Enterprise, the Enron-Citigroup Enterprise, and the TNPC-New Power Enterprise.

Count VIII asserts a Texas common-law claim for negligent misrepresentation on behalf of the participants and beneficiaries of the Savings Plan and the ESOP against the Andersen Defendants based on Andersen's data, audits, and certified financial statements for Enron.

Finally, Count IX alleges on behalf of all proposed classes a civil conspiracy claim against Andersen, the Enron Insider Defendants, the Attorney Defendants, and the Investment Banking Defendants. Specifically Count IX states that these Defendants conspired to conceal Enron's true financial condition and deceive Enron employees into accepting overvalued stock and phantom stock as compensation for their work, into keeping their retirement assets in artificially inflated Enron stock, and into continuing to work at Enron based on a false belief that it was a strong company.

In light of the length of the complaint, which is available to all counsel, and the fact that the *Tittle* action arises from many of the same facts summarized in detail in instrument #1194 in *Newby*, the Court will not here reiterate the facts alleged, but will reference relevant allegations relating to its decisions regarding the following pending motions:

(1) Defendant Michael J. Kopper's motion to dismiss for failure to state claims upon which relief can be granted (instrument #207);

(2) Arthur Andersen LLP and Andersen Individual Defendants' motion to dismiss the complaint (#208);

(3) Defendant Rebecca Mark-Jusbasche's Rule 12(b)(6) motion to dismiss all claims asserted against her (#209);

(4) Defendant Michael C. Odom's motion to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) and the PSLRA (#210);

(5) Defendant Ken L. Harrison's Rule 12(b)(6) motion to dismiss with prejudice all claims against him (#216);

(6) Defendant Lou Pai's motion to dismiss first consolidated and amended complaint (#222);

(7) Defendants Citigroup, Inc. and Salomon Smith Barney, Inc.'s motion to dismiss Plaintiffs' first consolidated and amended complaint (#227);

(8) Defendant J.P. Morgan Chase & Co.'s motion to dismiss Plaintiffs' first consolidated and amended complaint (#229) and corrected motion to dismiss (#351);

(9) Defendants Enron Corp. Savings Plan Administrative Committee, the Administrative Committee of the Enron Corp. Cash Balance Plan [since dismissed], and the Administrative Committee of the Enron Employee Stock Ownership Plan (#231);

(10) Vinson & Elkins Defendants' motion to dismiss (#232);

(11) Defendant James V. Derrick, Jr.'s motion to dismiss Plaintiffs' first consolidated and amended complaint (#233);

(13) Defendant Cindy K. Olson's motion to dismiss (#234);

(12) Defendant Richard A. Causey's motion to dismiss (#235);

(13) Defendant Credit Suisse First Boston Corporation's motion to dismiss Plaintiffs' first consolidated and amended complaint (#236);

(14) Defendant Merrill Lynch & Co.'s motion to dismiss Plaintiffs' first consolidated and amended complaint (#238);

(15) The Outside Director Defendants' motion to dismiss Plaintiffs' first consolidated and amended complaint (#240);

(16) Defendant the Northern Trust Company's motion to dismiss Counts II and III of

Plaintiffs' first consolidated and amended complaint as to the Northern Trust Company (#241);

(17) Defendant Andrew S. Fastow's motion to dismiss (#244);

(18) Defendant Joseph W. Sutton's motion to dismiss (#251);

(19) Defendant Jeffrey K. Skilling's motion to dismiss first consolidated and amended complaint (#262);

(20) Defendant Kenneth L. Lay's motion to dismiss (#264);

(21) Motion to dismiss Certain Officer Defendants (collectively, "Officer Defendants," i.e., The Estate of J. Clifford Baxter, Mark A. Frevert, Stanley C. Horton, Kenneth D. Rice, Richard B. Buy, Joseph M. Hirko, Mark E. Koenig, Steven J. Kean, Michael S. McConnell, Jeffrey McMahon, and J. Mark Metts, who are named as Defendants only in the two RICO and the common law conspiracy claims) (#265);

(22) Motion to dismiss on behalf of Certain Administrative Committee Members (Philip J. Bazelides,[42] James G. Barnhart, Keith Crane,

[42] Bazelides is identified as Chairman of the Enron Corp. Savings Plan Administrative Committee ("Administrative Committee")

William Gulyassy, Rod Hayslett, Mary K. Joyce,[43] Sheila Knudsen, Tod A. Lindholm, James S. Prentice,[44] Paula Rieker, and David Shields[45]) (#269)[46]; and

(23) Enron Corp.'s[47] motion to dismiss the first consolidated and amended complaint (#370).

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and Vice President in Charge of Employee Benefits through 1998, and thus allegdly a fiduciary of the Savings Plan, the ESOP, and the Cash Balance Plan within the meaning of 29 U.S.C. § 1002(21)(A).

[43] Joyce was vice-president of Compensation and Benefits for Enron, a member of the Administrative Committee, and allegedly a fiduciary of the Savings Plan within the meaning of 29 U.S.C. § 1002(21)(A). The complaint asserts that in her capacity as a Plan sponsor and as a Plan administrator, she signed the Savings Plan's Internal Revenue Service Form 5500 for the year ending December 31, 1998.

[44] Prentice, a chemical engineer, was Senior Vice President of Liquids Operations at EOTT Energy (an Enron affiliate), and was Chairman of the Savings Plan Administrative Committee from 1999 until 2002 and a member of the Committee for ten years, and thus a fiduciary of that Plan.

[45] The complaint states that Barnhart (since dismissed), Crane, Gulyassy, Hayslett, Knudsen, Lindholm, Rieker, and Shields were members of the Administrative Committee, and therefore fiduciaries, of the Savings Plan within the meaning of 29 U.S.C. § 1002(21)(A).

[46] Originally Defendant Mikie Rath, Enron's benefits manager and a fiduciary of the Savings Plan, the ESOP, and the Cash Balance Plan, joined the motion, but Rath was subsequently dismissed from this suit on July 8, 2002 (#367) and, as noted, Plaintiffs are dismissing all claims against the Cash Balance Plan without prejudice (#314 at 10).

[47] The bankruptcy court ordered that the automatic stay against Enron Corporation be lifted as of June 21, 2002. Enron is sued under the first five counts, charging breach of fiduciary and co-fiduciary duties in violation of ERISA.

When a district court reviews a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), it must construe the complaint in favor the plaintiff and take all well-pleaded facts as true. *Kane Enterprises v. MacGregor (US), Inc.*, 322 F.3d 371, 374 (5th Cir. 2003), *citing Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986). It may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id., quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Nevertheless, a plaintiff must plead specific facts, not merely conclusory allegations to avoid dismissal. *Id., citing Collins v, Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)("We will thus not accept as true conclusory allegations or unwarranted deductions of fact."). In addition to the complaint, the court may review documents attached to the complaint and documents attached to the motions to dismiss to which the complaint refers and which are central to the plaintiff's claim(s). *Collins*, 224 F.3d at 498-99.

II. APPLICABLE LAW

The Court hereby incorporates the conclusions of law set forth in its memoranda and orders dealing with the motions to dismiss in *Newby*. After reviewing the briefs and researching the issues raised in *Tittle*, the Court concludes that the following law applies.

A. ERISA

1. Fiduciary Liability

The issue of fiduciary status is a mixed question of law and fact. *Reich v. Lancaster*, 55 F.3d 1034, 1044 (5th Cir. 1995).

a. Expansive Definition of Fiduciary

Under ERISA, a person or entity may be deemed a fiduciary either by assumption of the fiduciary obligations (the functional or *de facto* method) or by express designation by the ERISA plan documents.

The phrase, "fiduciary with respect to a plan" is defined *de facto* in functional terms of control and authority in § 3(21)(A), 29 U.S.C. § 1002(21)(A):

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or has any discretionary authority or discretionary responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

"The phrase 'to the extent' indicates that a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority and control." *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan ("Sommers II")*, 883 F.2d 345, 352 (5th Cir. 1989). *See also Beddall v. State Street Bank and Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998)("[F]iduciary status is not an all or nothing proposition . . . ."). "Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives," and is defined ""in functional terms of control and authority over the plan, . . . thus expanding the universe of persons subject to fiduciary duties–and to damages–under § 409(a).'" *Arizona State Carpenters Pension Trust Fund v. Citibank (Arizona)*, 125 F.3d 715, 720 (9th Cir. 1997), *citing John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993), and *quoting Mertens v. Hewitt Assoc.*, 508 U.S. 248, 262 (1993). "[F]iduciary obligations can apply to managing, advising, and administering an ERISA plan." *Pegram v. Herdrich*, 530 U.S. 211, 223 (2000). Nevertheless, "'a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control.'" *Bannistor v. Ullman*, 287 F.3d 394, 401 (5th Cir. 2002), *quoting Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.* ("*Sommers I*"), 793 F.2d 1456, 1459-60 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987).[48] "[F]iduciary status is to be determined by looking at the *actual* authority or power demonstrated, as well as the formal title and duties of the parties at issue [emphasis in original]." *Landry v. Air Line Pilots Ass'n Inter. AFL-CIO*, 901 F.2d 404, 418 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990).

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[48] *See* Dept. of Labor, Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8, Question D-4 (2000):

> Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act.

Federal courts regularly cite to and rely upon Labor Department interpretive bulletins in determining the scope of ERISA liability and fiduciary responsibilities. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996).

In recent years several Circuit Courts of Appeals have focused on and contrasted the language used in the two clauses of subsection (i) of § 1002(21)(A), defining a fiduciary as a person who "exercises any **discretionary authority or discretionary control** respecting **management of such a plan** or who "exercises **any authority or control over the management or disposition of its assets**") and highlighted the fact that the word, "discretionary," is used only with regard to the first clause [emphasis added]. From a close reading of the literal language and structure of the provision, they conclude that where the person exercises any authority or control over the management or disposition of the **assets** of the plan, discretion is not required of a fiduciary. *See Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Associates, Inc.*, 237 F.3d 270, 273 (3d Cir. 2001), *quoting IT Corp. v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997)("any control over disposition of plan money makes the person who has control a fiduciary"), *cert. denied*, 522 U.S. 1068 (1998); *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir.)("Note that this section imposes fiduciary duties only if one exercises *discretionary* authority or control over plan *management*, but imposes those duties *whenever* one deals with plan *assets*. This distinction is not accidental--it reflects the high standard of care trust law imposes upon those who handle money or other assets on behalf of another."), *cert. denied sub nom. Vercoe v. FirsTier Bank, N.A.*, 513 U.S. 871 (1994); *Board of Trustees of Western Lake Superior Piping Industry Pension Fund v.*

American Benefit Adm'rs, Inc., 925 F. Supp. 1424, 1429 (D. Minn. 1996).[49]

Such a distinction between authority and control over plan management versus over plan assets in requiring discretion only with regard to the former before fiduciary obligations are triggered appears to have roots in the fiduciary's traditional duties. "At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries" and "the common law trustee's most defining concern historically has been the payment of money in the interest of the

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[49] The Fifth Circuit has not expressly addressed the structure of the statute and the verbal "discretion" distinction between control over plan management and control over plan assets. Although the district court in *Tower Loan of Mississippi v. Hospital Benefits, Inc.*, 200 F. Supp. 2d 642, 648-49 (S.D. Miss. 2001) concluded that the Fifth Circuit has rejected the rule that control over plan assets, without discretion, makes a plan manager a fiduciary, this Court finds that the judge's determination is improperly imposed on statements by the appellate court that do not focus on the statutory language and structure. The court cites *Reich v. Lancaster*, 55 F.3d 1034, 1047 (5th Cir. 1995) in which the Fifth Circuit, *citing American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Society of the United States*, 841 F.2d 658, 663 (5th Cir. 1988)("Holden's authority to grant or deny claims, to manage and disburse assets, and to maintain claims files clearly qualifies as discretionary control of a plan or its assets within the meaning of § 1002(21)(A)."), as holding that "a plan administrator, who possessed authority to grant or deny claims, to manage and disburse fund assets, and to maintain claim files, clearly has discretionary authority respecting management of a plan or its assets within the meaning of § 1002(21)(A) and therefor was an ERISA fiduciary." The Fifth Circuit merely viewed these duties together generally and conclusorily pronounced that they made the administrator a fiduciary; it did not examine the issue of control over plan assets alone and conclude that such control made the administrator a fiduciary, nor did examine the question of control over plan assets without discretion. In other words, a review of *Reich* and the underlying *American Federation* demonstrates that the Fifth Circuit looked at the authority granted by the contract to the plan administrator as a whole, without separate analysis of each duty.

took up the subject of fiduciary responsibility under ERISA, it concentrated on fiduciaries' financial decisions, focusing on pension plans, the difficulty many retirees faced in getting the payments they expected, and the financial mismanagement that had too often deprived employees of their benefits." *Id.* at 232, *citing as examples,* S.Rep. No. 93-127, p. 5 (1973); S. Rep. No. 93-383, pp. 17, 95 (1973).

In contrast to the functional definition of fiduciary in § 1002(21)(A), § 402(a)(2) of ERISA, 29 U.S.C. § 1102(a)(2), defines a formally "named fiduciary" as "a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly."

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), provides, "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable." It makes no distinction between the functional definition of a trustee and the formal designation of a fiduciary named by the plan documents or by following the procedure in those documents for designating a fiduciary and thus applies to both.

b. Fiduciary Duties

The common law of trusts "offers a 'starting point for analysis of [ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes.'" *Harris*

Trust, 530 U.S. at 249, *quoting Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999). "[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.'" *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996), *quoting Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 427 U.S. 559, 570 (1985). Thus a federal common law based on the traditional common law of trusts has developed and is applied to define the powers and duties of ERISA plan fiduciaries, at least in part, with modifications appropriate in light of the unique nature of the statutory employee benefit plans. *See, e.g.*, *Pegram*, 530 U.S. at 224; *Varity Corp.*, 516 U.S. at 497 ("We also recognize . . . that trust law does not tell the entire story."); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000)("Although ERISA's duties gain definition from the law of trusts, the usefulness of trust law to decide cases brought under ERISA is constrained by the statute's provisions."); *Donovan v. Cunningham*, 716 F.2d 1455, 1464 and n.15 (5th Cir. 1983)("ERISA's modifications of existing trust law include imposition of duties upon a broader class of fiduciaries, 29 U.S.C. § 1003(21)(1976), prohibition of exculpatory clauses, *id.* § 1110(a), broad disclosure and reporting requirements, *id.* §§ 1021-31, and nationwide uniformity of rules," and § 406's "detailed list" of *per se* illegal types of transactions), *cert. denied*, 467 U.S. 1251 (1984). For example, the traditional four overlapping fiduciary duties (of loyalty, care, diversification of plan assets, and adherence to plan care, diversification of plan assets, and adherence to plan documents, where prudent), cited in footnote 9 of this memorandum and order and discussed in detail *infra*, are derived from the common law of trusts and are imposed upon ERISA fiduciaries. At the same time, in contrast to the common law of trusts, under ERISA the plan fiduciary may have multiple roles and wear many hats; he may serve as an employer and as a plan fiduciary.[50] The scope of the incorporation of the common law of trusts is not clearly defined, however, and different courts have frequently come to different conclusions about the extent of its application.

The most fundamental duty of ERISA plan fiduciaries is a duty of complete loyalty, under 29 U.S.C. § 1104(a)(1)(B), to insure that they discharge their duty "solely in the interests of the participants and beneficiaries," and to "exclude all selfish interest and all consideration of the interests of third persons." *Id.* Fiduciaries must discharge their duties with respect to the plan "solely in the interest of the participants and the beneficiaries," i.e., "for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29

[50] *See Variety Corp.*, 516 U.S. at 497: "In some instances, trust law will offer only a starting point, after which courts must go on to as whether, or to what extent, the language of the statute, its structure, or its purpose require departing from common-law trust requirements." The high court explained that Congress enacted ERISA to provide extra protections for both employers establishing ERISA benefit plans and for plan participants and beneficiaries that the law of trusts lacked. Thus, for example, ERISA permits an employer to serve as a plan administrator under 29 U.S.C. § 1002(1), unlike trust law. *See Varity Corp.*, 516 U.S. 489 (allowing employees to sue employer company for breach of fiduciary duty).

imposed on fiduciaries by ERISA is avoidance of conflicts of interest. *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 251-52 (1993).

Second, the fiduciary must meet a "prudent man" standard under 29 U.S.C. § 1104(a)(1)(B), to act "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" and "with single-minded devotion" to these plan participants and beneficiaries. According to the Department of Labor, 29 C.F.R. § 2550.404a-1(b), these requirements are satisfied if the fiduciary

> (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
>
> (ii) Has acted accordingly.

"Appropriate consideration" for purposes of this regulation includes but is not limited to

> (i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and
>
> (ii) Consideration of the following factors as they relate to such portion of the portfolio:

> (A) The composition of the portfolio with regard to diversification;
>
> (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
>
> (C) The projected return of the portfolio relative to the funding objectives of the plan.

Id. at § 2550.404a-1(b)(2); *Laborers National Pension Fund v. Northern Trust Quantitative Advisors, Inc.* 173 F.3d 313, 317-18 (5th Cir.)(noting that these regulations from the Department of Labor, 29 C.F.R. § 2550.404a-1, generally reflect that a fiduciary with investment duties must act as a prudent investment manager under the modern portfolio theory rather than under the common law of trusts standard which examined each investment with an eye toward its individual riskiness), *cert. denied*, 528 U.S. 967 (1999). In 29 C.F.R. § 2509.94-1 Interpretive Bulletin, the Department of Labor observes, " . . . [B]ecause every investment necessarily causes a plan to forego other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return."

Regarding this overlapping duty of "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," the Fifth Circuit has stated,

> In determining compliance with ERISA's prudent man standard, courts objectively assess

> whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and exercised independent judgment when making investment decisions. "'[ERISA's] test of prudence . . . is one of conduct, and not a test of the result of performance of the investment. The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed.'" Thus, the appropriate inquiry is "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment [citations omitted]."

Laborers National Pension Fund v. Northern Trust Quantitative Advisors, Inc. 173 F.3d at 317. Since the prudence standard focuses on whether the fiduciary utilized appropriate methods to investigate and evaluate the merits of a particular investment, the "appropriate methods" in a particular case depend "on the 'character' and 'aim' of the particular plan and decision at issue and the 'circumstances prevailing' at the time a particular course of action must be investigated and undertaken.'" *Bussian*, 223 F.3d at 299. Furthermore, the standard of the prudent man is an objective standard, and good faith is not a defense to a claim of imprudence. *Reich*, 55 F.3d at 1046; *Donovan v. Cunningham*, 716 F.2d at 1467 ("this is not a search for subjective good faith--a pure heart and an empty head are not enough").

Third, the ERISA fiduciary must diversify the plan's investments to minimize risk of loss unless, under the circumstances, it is clearly prudent not to diversify. 29 U.S.C.

§ 1104(a)(1)(C). The legislative history offers some guidance about diversifying the assets of an ERISA plan:

> The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case. The factors to be considered include (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds or shares of stock or otherwise; (5) distribution as to geographical location; (6) distribution as to industries; (7) dates of maturity.

Metzler v. Graham, 112 F.3d 207, 208-09 (5th Cir. 1997), *citing* H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5084-85 (Conf. Rpt. at 304). The panel further noted, "We think it is entirely appropriate for a fiduciary to consider the time horizon over which the plan will be required to pay out benefits in evaluating the risk of large loss from an investment strategy." *Metzler*, 112 F.3d at 210 n.6. Moreover, the panel admonished courts, "It is clearly imprudent to evaluate diversification solely in hindsight--plan fiduciaries can make honest mistakes that do not detract from a conclusion that their decisions were prudent at the time." *Id.* at 209.

To prevail on a claim that a fiduciary violated its duty to diversify, a plaintiff must show that the portfolio, on its face, is not diversified. The burden then shifts to the defendant to demonstrate that it was "clearly prudent" not to diversify, the express statutory exception to the duty to diversify. *Metzler*, 112 F.3d at 209. Factors such as the trustees' "investigation of the purchase, the evaluation of other investment alternatives, and the relative expertise of the trustee . . . are relevant to whether there was risk of large loss." *Id.* at 212. Both the plaintiff's evidentiary burden and the defendant's evidentiary burden "must be analyzed from the perspective of what both parties acknowledge as their purpose; to reduce the risk of large loss." *Id.* at 210. "Prudence is evaluated at the time of the investment without the benefit of hindsight." *Metzler*, 112 F.3d at 209.

Fourth, the plan fiduciary must follow the documents and instruments governing the plan to the extent that they are consistent with ERISA. 29 U.S.C. § 1104(a)(1)(D). "In case of a conflict, the provisions of the ERISA policies as set forth in the statute and regulations prevail over those of the Fund guidelines." *Laborers Nat. Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d at 322. *In accord, Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985)("[T]rust documents cannot excuse trustees from their duties under ERISA and . . . trust documents must generally be construed in light of ERISA's policies . . . ."); *Donovan v. Cunningham*, 716 F.2d at 1467 ("Though freed by Section 408 from the prohibited transaction rules, ESOP fiduciaries remain subject to the general requirements of Section 404."); *Herman v. NationsBank Trust Co., (Georgia)*, 126 F.3d 1354, 1368 (11th Cir. 1997)(fiduciary was "obligated to determine whether the plan provisions . . . were contrary to ERISA" and to fulfill his duties to act prudently and solely in the interests of the plan participants), *cert. denied*, 525 U.S. 816 (1998). *See also Moench v. Robertson*, 62 F.3d 553, 567 (3d Cir. 1995)(where the plan language "constrains the [fiduciaries'] ability to act in the best interest of the beneficiaries," it is inconsistent with ERISA and with the common law of trusts and must not be followed), *cert. denied*, 516 U.S. 1115 (1996); *Eaves v. Penn*, 587 F.2d 453, 459 (10th Cir. 1978)("While an ESOP fiduciary may be released from certain Per Se violations on investments in employer securities . . ., the structure of [ERISA] itself requires that in making an investment decision of whether or not a plan's assets should be invested in employers [*sic*] securities, an ESOP fiduciary, just as fiduciaries of other plans, is governed by the 'solely in the interest' and 'prudence' tests of §§ 404(a)(1)(A) and (B).").[51]

Given that a fiduciary's duties are "the highest known to the law," "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982); *cited and quoted by Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000). In determining whether a trustee has breached his duties, the court examines both the merits of the challenged transaction(s) and the thoroughness of

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[51] Article VII of the ESOP mandates that "the assets of the Plan will at all times be primarily invested [80% or more]" in Enron stock. The Savings Plan at V.16(a) provided that the employer's contributions should be primarily in shares of its own stock. Plaintiffs contend that where the plans mandated that the plans acquire and retain Enron stock, ERISA requires that fiduciaries investing and managing plan assets must disregard the terms of the plan if following those terms would be disloyal, imprudent or otherwise violate ERISA.

the fiduciary's investigation into the merits of the transaction(s). *Donovan v. Cunningham*, 716 F.2d at 1467.[52]

Unlike the law of conspiracy, "[n]o fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary." 29 U.S.C. § 1109(b); *see also Bannistor v. Ullman*, 287 F.3d 394, 405 (5th Cir. 2002).

c. "Two-Hat" Doctrine

Unlike the trustee at common law, who must wear only his fiduciary hat when he acts in a manner to affect the beneficiary of the trust, an ERISA trustee may wear many hats, although only one at a time, and may have financial interests that are adverse to the interests of the beneficiaries but in the best interest of the

[52] Where conflicting interests potentially involving a fiduciary and his duty to act in the best interests of the plan participants and beneficiaries arise, depending on the circumstances of the case and the degree of the conflict, to avoid any taint the fiduciary at minimum might have to perform an "'intensive and scrupulous independent investigation of [the fiduciary's] options.'" *Bussian*, 223 F.3d at 299. If the fiduciary chooses to obtain an independent expert's help, merely hiring an expert and relying blindly on his advice does not satisfy a conflicted fiduciary's investigative duty or serve as a complete defense to an imprudence charge; the fiduciary must "'(1) investigate the expert's qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances.'" *Id.* at 301, *quoting Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir. 1996). The fiduciary needs to consider the expert's reputation and experience, the breadth and thoroughness of the expert's investigation, the material supporting his opinion, and the appropriateness of his methods and assumption. *Id.* Similarly, the fiduciary may not blindly rely on credit ratings or other ratings, but must investigate further. *Id.* Alternatively, in an extreme situation, the fiduciary may be forced to appoint an independent fiduciary. *Bussian*, 223 F.3d at 299.

company. *Pegram*, 530 U.S. at 225; *Bussian*, 223 F.3d at 294-95; *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 412-13 (5th Cir. 2003). For example a fiduciary may wear the hat of an employer and fire a beneficiary for reasons not related to the ERISA plan, or the hat of a plan sponsor and modify the terms of a plan to be less generous to the beneficiary. *Pegram*, 530 U.S. at 225. When making fiduciary decisions, however, a fiduciary may wear only his fiduciary hat. *Id.* Thus instead of defining a fiduciary merely as an administrator of or manager of or advisor to a plan, the statute states that he is a fiduciary only "to the extent" that he acts in such a capacity in relation to a plan." *Pegram*, 530 U.S. at 225-26, *citing* 29 U.S.C. § 1002(21)(A); *Schlumberger*,338 F.3d at 412-13. Accordingly, when a plaintiff alleges a cause of action for breach of fiduciary duty, the threshold question is whether the defendant was acting as a fiduciary, i.e., performing a fiduciary function, when he performed the action that constitutes the basis of the complaint. *Pegram*, 530 U.S. at 226; *Schlumberger*, 338 F.3d at 413.

For example, under the "two hats" doctrine, adopted by the Supreme Court in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)(holding that an employer does not act as a fiduciary, but as a settlor[53] in adopting, amending[54] or terminating

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[53] The plan sponsor is technically a settlor because it is creator of the trust fund in which the plan assets will be placed.

[54] *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999)("in general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties, which

a welfare plan [55]), a plan sponsor may function in a dual capacity as a business employer (settlor or plan sponsor[56]) whose activity is not regulated by ERISA and as a fiduciary of its own established ERISA plan, subject to ERISA. "The . . . act of amending . . . does not constitute the action of a fiduciary"; "ERISA's fiduciary duty requirement simply is not implicated where [the employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated." *Hughes Aircraft*, 525 U.S. at 444. The law does not require employers to establish employee benefit plans. Congress sought to encourage employers to set up plans voluntarily by offering tax incentives, methods to limit fiduciary liability, means to contain administrative costs, and giving employers flexibility and control over matters such as whether or when to establish an employee benefit plan, how to design a plan, how to amend a plan, when to terminate a plan, all of which are generally viewed as business decisions of a settlor, not of a fiduciary, and thus not subject to fiduciary obligations. *Pegram*, 530 U.S. 226-27; *Martinez v.*

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consist of such actions as the administration of the plan's assets"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996)(holding that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions").

[55] The Supreme Court subsequently extended the dual hat doctrine to pension benefit plans in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

[56] Title 29 U.S.C. § 1002(16)(B) defines "plan sponsor" as including the employer or employers responsible for establishment of the plan, or an employee organization if it is responsible.

Schlumberger, Ltd., 338 F.3d at 429 ("a company does not act in a fiduciary capacity by simply amending a plan" or by adopting, modifying or terminating a plan); Akers *v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995)("a company is only subject to fiduciary restrictions when managing a plan according to its terms, but not when it decides what those terms are to be"), *cert. denied*, 518 U.S. 1004 (1996); *Bennett v. Conrail Matched Savings Plan Administrative Committee*, 168 F.3d 671, 679 (3d Cir.)("in amending a plan, the employer is acting as a settlor"; thus "the mere fact that [the employer] amended its plan did not breach any fiduciary duties under ERISA"), *cert. denied*, 528 U.S. 871 (1999); *Southern Illinois Carpenters Welfare Fund v. Carpenters Welfare Fund of Illinois*, 326 F.3d 919, 924 (7th Cir. 2003)("[S]ince an employer has no duty to create a pension or welfare plan in the first place, neither does he have a duty to amend it to make it more generous, or a duty not to amend it if the amendment would make it less generous").

With respect to amendment of a plan that has the effect of reducing or eliminating pension benefits, the general rule is that the employer who amends the plan according to the procedures laid out in the plan documents does not breach its fiduciary duty as long as the benefits that are reduced or eliminated had *not accrued or were not vested at the time and the amendment does not otherwise violate ERISA or the plan terms*. *Hines v. Massachusetts Mutual Life Ins*. Co., 43 F.3d 207, 210 (5th Cir. 1995), *citing Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 804 (7th Cir. 2002)("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) ["substantial business hardship"] or 1441 [terminated multiemployer plans] of this title."), *petition for cert. filed*, 71 U.S.L.W. 3429 (Dec. 10, 2002), No. 02-891.

Section 204(g), as amended 29 U.S.C. § 1054(g), ERISA's anti-cutback provision, provides in relevant part,

> Decrease of accrued benefits through amendment of the plan
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan other than an amendment described in section 1082(c)(8) or 1441 of this title.[57]
> (2) For purposes of paragraph (1), a plan amendment which has the effect of--
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> (B) eliminating an optional form of benefit,
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

Section 1054(g) statutorily protects against the reduction or elimination of accrued benefits, but not against reduction or elimination of benefits that are expected but not accrued. *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 8-9 (1st Cir. 2003); *Board of Trustees of Sheet Metal Workers' Natl. Pension Fund v. C.I.R.*, 318 F.3d 599, 599 (4th Cir. 2003). "Accrued benefits" in the defined benefit context are defined as "the individual's accrued benefit determined under the plan," which is "equal to the employee's accumulated contributions." *Campbell*, 327 F.3d at 8, *citing* 29 U.S.C. § 1002(23)(A) and § 1054(c)(2)(B). Section

[57] Neither § 1441 nor § 1342 (addressing termination of a plan by the Pension Benefit Guarantee Corporation through appointment of a trustee) is relevant here.

1002(23) of ERISA provides, "The term "accrued benefit means . . . in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age." Section 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6), is a parallel provision prohibiting the same conduct, and Treasury Regulation § 1.411(d)-4, A-4(a), promulgated thereunder to "effectuate these 'anti-cutback' principles," provides in relevant part, "

> [A pension] plan that permits the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer's exercise of discretion) violates the requirements of section 411(d)(6).

Perreca v. Gluck, 295 F.3d 215, 228 (2d Cir. 2002), *citing* Treasury Regulation § 1.411(d)-4, A-4. Under Treasury Regulation § 1411(d)-4, A-5, "The term employer includes plan administrator . . . [and] trustee . . . ." *Id.* at 228 n.10.

d. Power to Appoint/Remove Plan Fiduciaries

A person or entity that has the power to appoint, retain and/or remove a plan fiduciary from his position has discretionary authority or control over the management or administration of a plan and is a fiduciary to the extent that he or it exercises that power. *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996)("the power . . . to appoint, retain and remove plan fiduciaries constitutes 'discretionary authority' over the management or administration of a plan within the meaning of § 1002(21)(A)")[58]; *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988)("Tosco is a fiduciary within the meaning of ERISA . . . because it appoints and removes the members of the administrative committee that administers the pension plan."); *American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc. of the U.S.*, 841 F.2d 658, 665 (5th Cir. 1988)("Liability for failure to adequately train and supervise an ERISA fiduciary arises where the person exercising supervisory authority is in a position to appoint or remove plan administrators and monitor their activities."); *Henry v. Frontier Industries, Inc.*, 863 F.2d 886 (Table), No. 87-3879, 87-3898, 1988 WL 132577, *2 (9th Cir. Dec. 1, 1988)("Largent was a fiduciary of the ESOP by virtue of his power to appoint and retain, and his duty to monitor, the member(s) of the Administrative Committee . . . ."); *Mehling v. New York Life Ins. Co.*, 163 F. Supp. 2d 502, 509-10 (E.D. Pa. 2001); *Liss v. Smith*, 991 F. Supp. 278, 310, 311 (S.D.N.Y. 1998)("It is by now well-established that the power to appoint plan trustees confers fiduciary status"; "[t]he duty to monitor carries with it, of course, the duty to take action upon discovery that the appointed fiduciaries are not performing properly").

In *Leigh v. Engle*, 727 F.2d 113, 133-35 (7th Cir. 1984), the Seventh Circuit noted that 29 C.F.R. § 2509.75-5 at FR-3

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[58] In *Coyne & Delany Co. v. Selman*, 98 F.3d at 1464-65, the Fourth Circuit recognized as an exception to the rule that plan sponsors are usually free to amend plans without triggering fiduciary status a situation where the sponsor amends to obtain and exercise the power to appoint, retain and remove plan fiduciaries.

provides that "a plan instrument which designates the corporation as 'named fiduciary' should provide for designation by the corporation of specified individuals or other persons to carry out specified fiduciary responsibilities under the plan." Furthermore, in *Leigh*, the Seventh Circuit concluded that two corporate officials exercising a duty to appoint fiduciaries had a duty to monitor their appointees' actions:

> As the fiduciaries responsible for selecting and retaining their close business associates as plan administrators, Engle and Libco had a duty to monitor appropriately the administrators' actions. Engle and Libco could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust. Engle and Libco were obliged to operate with appropriate prudence and reasonableness in overseeing " their appointees' management of the trust.

727 F.2d at 134-35. *See also* ERISA Interpretative Bulletin 75-8, 29 § 2509.75-8 (D-4) (members of a board of directors "responsible for the selection and retention of plan fiduciaries" have "'discretionary authority or discretionary control respecting the management of such plan' and are, therefore, fiduciaries with respect to the plan."); (FR-17 Q&A)("At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.").[59]

[59] Some Defendants have argued that the right to appoint and remove others to serve as fiduciaries by itself does not make one a fiduciary and have cited *In re WorldCom, Inc. ERISA*

Litigation, No. 02-CIV. 4816 (DLC), 2003 WL 21385870 (S.D.N.Y. June 17, 2003). In that case, the plaintiffs had relied on 29 C.F.R. § 2509.75-78 (FR-17 Q&A)("At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.") to impose fiduciary duties on three director defendants on WorldCom's Board, who were vested with WorldCom's power as plan administrator and investment fiduciary to appoint and remove individuals to positions. Disagreeing, Judge Cote granted the motions to dismiss filed by these three defendant directors. Defendants highlight Judge Cote's conclusion that the plaintiffs' arguments that the directors were ERISA fiduciaries merely because of their power to appoint and remove individuals as plan administrators or investment fiduciaries was "go[ing] too far. It would make any supervisor of an ERISA fiduciary also an ERISA fiduciary." *Id.* at *9.

This Court finds that the facts in the case before Judge Cote can be easily distinguished from those in *Tittle*. Judge Cote began by observing established law that fiduciary status depends not merely on appointment to a fiduciary status or position, but upon the exercise of discretionary authority by that person: "a person is a fiduciary with respect to a plan *to the extent* . . . that he exercises any discretionary authority or discretionary control" over the management of the plan or disposition of its assets or administration of the plan. *Id.* at *6, quoting § 3(21)(A) of ERISA. (As this Court has noted, there is a difference of opinion about the need for discretion with respect to managing plan assets, but assets are not at issue in *Worldcom*.) A key factor in *WorldCom*, not present here, was a provision in the ERISA plan: "'If WorldCom, Inc. does not appoint individuals to carry out the duties of the Administrator or Investment Fiduciary . . . then *any officer* of WorldCom, Inc. shall have the authority to carry out, on behalf of WorldCom, Inc. the duties of the Administrator and the Investment Fiduciary.'" *Id.* at *3. In fact WorldCom did not appoint anyone to be the Plan Administrator or Investment Fiduciary, and Judge Cote *inter alia* dismissed claims against three other officers, whom plaintiffs sued because the officers fell within reach of the plan's phrase "any officer . . . shall have the authority" to carry out fiduciary duties. Judge Cote concluded that the complaint failed to allege that the three officers were appointed as fiduciaries *and* that they *functioned* as fiduciaries. As for the Director Defendants, the Plaintiffs made two arguments that Director Defendants were fiduciaries because of the exercise of control and authority over management of the plan: (1)they signed or authored a Section 10(a) prospectus that was included in the SEC Form S-8 statements for WorldCom and (2) they had the right to appoint and remove individuals to fill the positions of plan administrator and investment fiduciary. The judge concluded that the first was a nondiscretionary, ministerial act because "SEC

Some courts have placed restrictions on such liability. For instance, in *Brock v. Self*, 632 F. Supp. 1509, 1523 (W.D. La. 1986), the district court wrote,

> [I]f the Plan instrument itself provided for a procedure whereby a named fiduciary may designate persons who are not named fiduciaries to carry out fiduciary responsibilities, the named fiduciaries might not be liable for the acts or omissions of the Third-Party Defendants. 29 C.F.R. § 2509.75-8, FR-14 (1985). Because the Plan in the case at bar does not provide for any such procedure, however, then any designation of Third-Party Defendants as fiduciaries by Third-Party Plaintiffs will not relieve Third-Party Plaintiffs from responsibility or liability for the acts and omissions of Third-Party Defendants.")

See also Newton v. Van Otterloo, 756 F. Supp. 1121, 1132 (N.D. Ind. 1991)(directors have duties to monitor plan fiduciaries whom they

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filings are documents that directors must execute to comply with corporation's obligations under the federal securities laws." *Id.* at 9. As for the power to appoint and remove fiduciaries, the judge noted that the plaintiffs provided no statutory or decisional support for their contention that this power made them fiduciaries, relied on a "Georgia statute that describes the general powers of a board of directors" and "addresses those circumstances in which a board is wearing its corporate 'hat' and not an ERISA 'hat,'" cited the DOL regulation *supra* that only "gives guidance for those who are already ERISA fiduciaries," and, significantly, "[did] not sufficiently allege that the Director Defendants functioned as ERISA fiduciaries." *Id.* at 9.

Here this Court has cited a number of opinions holding that the exercise of the power to appoint, retain and remove persons for fiduciary positions triggers fiduciary duties to monitor the appointees. Moreover in *WorldCom*, WorldCom did not appoint anyone as a fiduciary and there apparently were no allegations that Director Defendants *functioned* as fiduciaries, i.e., actually appointed persons to or removed persons from such positions. In *Tittle*, on the other hand, Defendants did appoint fiduciaries who, in turn, exercised discretionary authority or control over the plan and allegedly breached their fiduciary duties, while Director Defendants allegedly failed in their duty to monitor those appointed.

appoint but do not breach duties in the absence of "notice of possible misadventure by their appointees").

e. Duty to Disclose

Plaintiffs have alleged that Enron fiduciary Defendants, including the Administrative Committee members, Lay, and the Compensation Committee members (Blake, Duncan, Jaedicke and LeMaistre), have breached their duty of loyalty to the plan participants by affirmatively and materially misleading them about Enron's financial condition and performance and its accounting manipulations, while inducing them to hold and purchase additional Enron stock. Plaintiffs have also argued that Defendants charged in Count II (lockdown) and Count IV (Offset formula used by Cash Balance Plan) had a fiduciary duty to disclose Enron's financial condition to plan participants and beneficiaries.

The fiduciary's duty to disclose is an area of developing and controversial law.

Under the common law of trusts, which Congress indicated should apply as a threshold step to define duties of plan fiduciaries under ERISA, generally the trustee's duty to disclose information was triggered by a specific request from a plan participant or beneficiary. According to Restatement (Second) of Trusts § 173 (1959),[60]

> The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property,

[60] In *Harris Trust*, 530 U.S. at 250, the Supreme Court turned to the Restatement (Second) of Trusts as its source for the common law of trusts.

> and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents related to the trust."

In addition, as embodied in comment d to § 173, are the seeds of the trustee's duty to disclose:

> The trustee is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest. . . .

Although the duty to disclose has its roots in the common law of trusts, courts recently have been expanding a fiduciary's affirmative duty to disclose material information to plan participants under ERISA.

It is well established that a plan administrator acts in a fiduciary capacity when it explains plan benefits, even likely future benefits, to its employees. *See, e.g., Varity Corp.*, 516 U.S. at 502-03, 504-05; *McCall v. Burlington Northern/Santa Fe* Co., 237 F.3d 506, 510-11 (5th Cir. 2001)("Providing information about likely future plan benefits falls within ERISA's statutory definition of a fiduciary Act."), *cert. denied*, 534 U.S. 822 (2001). The Supreme Court has held that § 404(a) of ERISA, 29 U.S.C. § 1104(a)(1)("a fiduciary shall discharge his fiduciary duty with respect to a plan solely in the interest of the participants and beneficiaries"), imposes a duty on a plan fiduciary not to affirmatively miscommunicate or mislead plan participants about material matters regarding their ERISA plan. *See, e.g., Varity*

Corp. v. Howe, 516 U.S. 489, 493, 505 (1996)(holding that an employer which was also an ERISA Plan administrator breached its fiduciary duty of loyalty to the plan beneficiaries when it deceptively induced them to "switch employers and thereby voluntarily release [the company] from its obligation to provide them benefits"). In *Varity Corp.*, the Supreme Court proclaimed, "To participate knowingly and significantly in deceiving plan beneficiaries in order to save the employer money at the beneficiaries' expense is not to act solely in the interest of the participants and beneficiaries. . . . [L]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA"). *Id.* at 506. *See also Martinez v. Schlumberger,* Ltd., 338 F.3d at 425 ("When an ERISA plan administrator speaks in its fiduciary capacity concerning a material aspect of the plan, it must speak truthfully"); *McCall v. Burlington Northern/Santa* Fe, 237 F.3d at 510-11; *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 668 (2d Cir. 1994)(holding that "when a plan administrator speaks, it must speak truthfully").

In *Varity Corp.* 516 U.S. at 506, the Supreme Court chose not to "reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries." Nevertheless, in that case the Supreme Court found that a plan sponsor, which distributed materials and called a meeting where it persuaded approximately 1,500 employees to transfer, voluntarily, to positions at a new subsidiary by intentionally misrepresenting that the subsidiary was financially stable and the employees' benefits would be secure, was acting in a fiduciary capacity and violated its fiduciary duties. "While it may be true that amending or terminating a plan is beyond the power of a plan administrator--and, therefore, cannot be an act of plan 'management' or 'administration'--it does not follow that making statements about the likely future of the plan is also beyond the scope of plan administration. . . . [Plan administrators often have, and commonly exercise, discretionary authority to communicate with beneficiaries about the future of plan benefits." *Varity Corp.*, 516 U.S. at 505.

Courts have generally agreed that where an ERISA fiduciary makes statements about future benefits that misrepresent present facts, these misrepresentations are material if they would induce a reasonable person to rely on them. *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122-23 (2d Cir. 1997); *Mullins v. Pfizer*, 23 F.3d at 669; *Kurz v. Philadelphia Electric Co.*, 994 F.2d 136, 140 (3d Cir. 1993), *cert. denied sub nom Philadelphia Electric Co. v. Fischer*, 510 U.S. 1020 (1993); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 439 (6th Cir. 2002)("[A] mistrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in pursuing . . . benefits to which she may be entitled."), *cert. denied*, 123 S.Ct. 2077 (2003).

Concern for uninformed and vulnerable plan participants has increasingly led some courts, including the Third Circuit, to conclude that circumstances known to the plan fiduciary can give rise to an expanded affirmative duty to disclose information necessary to protect a participant or beneficiary because that participant or beneficiary "may have no reason to suspect that it should make inquiry into what may appear to be a routine matter." *Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1181 (3d Cir. 1996). *See also Griggs v. E.I. Dupont De Nemours & Co.*, 237 F.3d 371, 380 (4th Cir. 2001)("ERISA administrators have a fiduciary obligation 'not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures.' . . . Moreover, a fiduciary is at times obligated to affirmatively provide information to the beneficiary . . . [including] 'facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection . . . [citations omitted].'"); *Bins v. Exxon Co. U.S.A.*, 189 F.3d 939 (1999)("We believe that once an ERISA fiduciary has material information relevant to a plan participant or beneficiary, it must provide that information whether or not it is asked a question."), *on rehearing en banc*, 220 F.3d 1042, 1048-49 (9th Cir. 2000)(when a proposed change in retirement benefits becomes sufficiently likely and therefore material, the employer has a duty to provide complete and truthful information); *Schmidt v. Sheet Metal Workers' Nat. Pension Fund*, 128 F.3d 541, 546-47 (7th Cir. 1997)("A plan fiduciary may violate its duties . . . either by affirmatively misleading plan participants about the operations of a plan, or by remaining silent in circumstances where silence could be misleading."), *cert. denied*, 523 U.S. 1073 (1998).

A number of the Circuit Courts of Appeals have held that after an ERISA participant/beneficiary requests information from his plan's fiduciary, who is informed of that participant/beneficiary's circumstances, the fiduciary has a duty to provide full and accurate information material to the participant/beneficiary's situation, including information about which the participant/beneficiary did not specifically ask. *See, e.g., Watson v. Deaconess Waltham Hosp.*, 298 F.3d 102, 114 (1st Cir. 2002); *Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 380-81 (4th Cir. 2001); *Bowerman v. Wal-Mart-Stores, Inc.*, 226 F.3d 574, 590 (7th Cir. 2000); *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542, 547-48 (6th Cir. 1999)("[A] plan administrator has 'an affirmative duty to inform when it know that silence might be harmful'. . . ," including full information about short- and long-term disability benefits when asked about disability benefits generally); *Shea v. Esensten*, 107 F.3d 625, 629 (8th Cir.)("When an HMO's financial incentives discourage a treating doctor from providing essential health care referrals for conditions covered under the plan benefit structure, the incentives must be disclosed and the failure to do so is a breach of ERISA's fiduciary duties"), *cert. denied*, 522 U.S. 914 (1997); *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992)("A fiduciary must give complete and accurate information in response to participants' questions . . . ."); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990)("At the request of a beneficiary (and in some circumstances upon his own initiative), a fiduciary must convey complete and correct material information to a beneficiary.").

Thus some Circuits have concluded that there is an additional affirmative duty, beyond a full and accurate response triggered by a participant/beneficiary's specific question, to disclose material information to plan participants and beneficiaries. The Third Circuit, one of the most aggressive courts in this area, has held, "[I]t is a breach of fiduciary duty for an employer to knowingly make material misleading statements about the stability of a benefits plan." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 480 (3d Cir. 2000), *citing In re Unisys Corp. Retiree Med. Benefits "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996). "[T]he 'duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.'" *Bixler v. Central Pa. Teamsters Health-Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993), *quoted for that proposition by James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 452 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 2077 (2003), *Watson v. Deaconess Waltham Hosp.*, 298 F.3d at 115,[61] *Shea v. Esensten*, 107 F.3d at 381, and *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1054 (9th Cir. 2000)(*en banc)*. *In accord, Griggs*, 237 F.3d at 381 ("[A]n ERISA fiduciary that knows or should know that a

[61] The First Circuit has imposed two limitations on the concept of an affirmative fiduciary duty to inform ERISA beneficiaries of material facts about their ERISA plan: there must be a particular reason why fiduciary should know that his failure to communicate certain information would be harmful to the beneficiary/participant and a fiduciary does not have to provide unsolicited individual advice, but only advice general to the plan as a whole. 298 F.3d at 114-15.

beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent . . . ."); *Anweiler*, 3 F.3d at 991 ("Fiduciaries must also communicate material facts affecting the interests of beneficiaries. This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not."). The Third Circuit has asserted that

> an employer or plan administrator fails to discharge its fiduciary duty in the interest of the plan participants and beneficiaries when it provides, on its own initiative, materially false or inaccurate information to employees about the future benefits of a plan. Under these circumstances, it is not necessary that employees ask specific questions about future benefits or that they take the affirmative step of asking questions about the plan to trigger the fiduciary duty.

James v. Pirelli, 305 F.3d at 455; *in accord McGrath v. Lockheed Martin Corp.*, 48 Fed. Appx. 543, 555, Nos. 00-6601, 00-6602, 2002 WL 31269646, *10 (6th Cir. Oct. 9, 2002). *See also* Restatement(Second) of Trusts § 173, comment d (1957)(The trustee "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows that the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person . . . ."). The Sixth Circuit has additionally held, "A fiduciary breaches his duty by providing plan participants with materially misleading information, 'regardless of whether the fiduciary's statements or omissions were made negligently or intentionally.' . . . " *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d at 449.

In comparison, in the very few cases in which the Fifth Circuit has addressed a fiduciary duty to disclose, and then only in narrow circumstances, the Fifth Circuit appears to impose such a duty cautiously. Rather than promulgating broad rules, it approaches the issue case by case, examining the facts and circumstances of each to determine the nature and extent of any duty to disclose that should be imposed. Like many courts, it views the plan administrator as having a fiduciary duty to plan participants as a whole, but not to individual participants with particular problems who do not make a specific request for information. The Fifth Circuit has stated, "[A]bsent a specific participant-initiated inquiry, a plan administrator does not have any fiduciary duty to determine whether confusion about a plan term or condition exists. It is only after the plan administrator does receive an inquiry that it has a fiduciary duty to respond promptly and adequately in a way that is not misleading [footnotes omitted]." *Switzer v. Wal-Mart Stores, Inc.*, 52 F.3d 1294, 1299 (5th Cir. 1995)(holding that plan administrator has no duty to give personalized attention to each and every employee, and in particular to inform a plan participant that he was late in remitting his final COBRA premium).

Nevertheless, in *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995), *cert. denied*, 516 U.S. 1174 (1996), the panel observed, "Section 404(a) imposes on a fiduciary the duty of undivided loyalty to plan participants and beneficiaries, as well as a duty to exercise care, skill, prudence and diligence. An obvious component of those responsibilities is the duty to disclose material information." In *McDonald*, an appellate court held that § 404(a) required the fiduciary to disclose a change in its rate schedule that caused a prohibitive premium to be set because of the impact such a premium could have on small employers, including the plaintiff. Subsequently, in *Ehlmann v. Kaiser Foundation Health Plan of Texas*, 198 F.3d 552, 556 (5th Cir. 2000), *cert. dismissed*, 530 U.S. 1291 (2000)(holding that ERISA does not impose a fiduciary duty on health maintenance organizations to disclose physician compensation and reimbursement schemes to plan participants),[62] the Fifth Circuit described the imposition of a duty to disclose in *McDonald* as based on the "extreme impact" that the change in rate schedules would have on small employers. The panel observed about *McDonald inter alia*, "Clearly these cases, which adopt a case by case or an *ad hoc* approach, do not warrant the wholesale judicial legislation of a

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[62] The situation in *Ehlmann*, which focused narrowly on "why the text, structure, and legislative history of ERISA do not support the imposition [on health maintenance organizations ("HMOs") of a broad *duty to disclose physician compensation plans* [emphasis added]," is distinguishable from claims in *Tittle*. In *Ehlmann*, the panel, applying the canon of statutory construction that specific provisions control over general, pointed out that the general fiduciary provision of § 404 does not mention any duty to disclose, but that ERISA has "numerous other provisions detailing an HMO's disclosure duties [and] that these provisions do not reference physician reimbursement plans." 198 F.3d at 554. The panel reasoned that because Congress could have included such a requirement among these HMO-specific provisions, the absence of a disclosure requirement regarding physician compensation was probably intentional. *Id*. The appellate court stated, "Where ERISA provides a section specifically dealing with a particular information scheme," a court should not supplement that scheme by reference to another provision in another part of the statute. Id.

Here, with respect to the *Tittle* duty-to-disclose claims, there has been no showing of any such related detailed section of provisions in ERISA, so the general duties of § 404 and case law construing them govern.

broad duty to disclose that would apply regardless of special circumstance or specific inquiry." *Id.* Thus the Fifth Circuit does recognize that in addition to a specific inquiry from a plan participant, special circumstances with a potentially "extreme impact" on a plan as a whole, where plan participants generally could be materially and negatively affected, might support imposition of such an affirmative duty in a particular case.[63]

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[63] As an example of the growing trend to impose and expand a fiduciary duty to disclose where necessary to protect the plan participants, under the two-hat theory, an employer was traditionally seen as not wearing his fiduciary hat when it adopted or changed a plan, because amendment was viewed as a business decision of a settlor to which ERISA's fiduciary duty law did not apply. Nevertheless, some courts have been eroding the protection of the dual hat rule in the context of plan modification by viewing the employer as an administrator-fiduciary and imposing on it fiduciary duties to act solely in the interest of the participants and beneficiaries, including a duty to disclose information about plan changes, either in response to an inquiry or by recognizing an affirmative duty to advise, ***even where a change to the plan may not yet have been formally approved***.

A number of the federal appellate courts have adopted, with various modifications, the "serious consideration" test created by the Eleventh Circuit in *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991), to determine whether a fiduciary obligation to disclose to plan participants the existence of or potential changes to an ERISA plan in response to a plan participant's inquiry has been triggered. *See, e.g.*, *Hockett v. Sun Co., Inc.*, 109 F.3d 1515, 1522-25 (10th Cir. 1997); *Muse v. Int'l Bus. Machs. Corp.*, 103 F.3d 490, 493-94 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Vartanian v. Monsanto Co. ("Vartanian I")*, 14 F.3d 697, 702 (1st Cir. 1994). The test attempts to "balance the tension between an employee's right to information and an employer's need to operate on a day-today basis." *Hockett*, 109 F.3d at 1522. Under the test, a fiduciary's obligation to inform plan participants upon request about the existence of an ERISA plan or of potential changes to a plan arises at the point that the creation of a plan or proposed alterations to a plan come under "serious consideration." *Id.* If the breach of fiduciary duty claim is based on a misrepresentation, that misrepresentation had to occur when the plan was under serious consideration. *Id.* Three factors have been used to determine if a plan or changes have come under "serious consideration": (1) following initial steps of gathering information, developing strategies and analyzing options, a specific proposal is prepared; (2) practicalities of putting it into effect are being discussed; (3) and the discussion is by senior officials with the authority to effect the change. *Fischer v. Phila. Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996); *basically in accord, McAuley v. IBM Corp.*, 165 F.3d 1038, 1043-45 (6th Cir. 1999); *Hockett*, 109 F.3d at 1523; *Vartanian v. Monsanto Co. ("Vartanian II")*, 131 F.3d 264, 268 (1st Cir. 2003).

The Second Circuit considers "serious consideration" as one factor in determining materiality, but not a determinative one; it has adopted "the simple view that when a plan administrator speaks, it must speak truthfully, regardless of how seriously any changes are being considered." *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 120, 122-24 (2d Cir. 1997)(holding that an employer can be liable for misrepresentation regarding a potential future retirement enhancement program even if it was not under serious consideration; the employer's statements about future benefits "are material if they would induce reasonable reliance"). Turning to securities law for guidance on the issue of the materiality of the employer's alleged misrepresentations, the Second Circuit identified the following as some specific factors:

> how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes; the special relationship of trust and confidence between the plan fiduciary and beneficiary; whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware taking into consideration the broad trust responsibilities owed by the plan administrator to the employee and the employee's reliance on the plan administrator for truthful information; and the specificity of the assurance. Whereas mere mispredictions are not actionable, false statements about future benefits may be material if couched as a guarantee, especially where, as alleged here, the guarantee is supported by specific statements of fact.

Id. at 125 (citations omitted). In *Wayne v. Pacific Bell*, 238 F.3d 1048, 150-51, 1055 (9th Cir. 2001), *cert. denied*, 534 U.S. 814 (2001), the Ninth Circuit adopted the Second Circuit's approach.

Others have rejected the idea of an affirmative duty to disclose potential plan changes absent an inquiry from a plan participant. *See, e.g., Bins v. Exxon Co. U.S.A.*, 220 F.3d at 1048-49 (holding that plan amendment is not plan management or administration, that "an employer's serious consideration of a change to a plan does not, in and of itself, implicate ERISA fiduciary duties," but that "when an employer communicates with its employees about a plan, fiduciary responsibilities come into play"). Nevertheless, the Ninth Circuit *en banc* indicated that outside of plan modification, it would still find "the existence of other 'affirmative' disclosure duties of an employer-fiduciary." *Id.* at 1053, n. 10, *citing inter alia Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1403 (9^{th} Cir. 1995)('holding that an ERISA fiduciary has a duty to investigate suspicions he has with respect to plan funding and maintenance, and that failing to convey information concerning those suspicions when responding to participants' inquiries can be construed as an affirmative misrepresentation").

In the recently issued *Schlumberger*, 338 F.3d at 416-25, the Fifth Circuit provided a lengthy and detailed review of the development of the serious consideration test. The Fifth Circuit, citing *Varity Corp.*, opined that

> when an employer chooses, in its discretion, to communicate about future plan benefits, it does so as an ERISA fiduciary. In speaking it is exercising discretionary authority in administration of the plan, a specifically enumerated fiduciary function under ERISA. . . . When an ERISA plan administrator speaks in its fiduciary capacity concerning a material aspect of the plan, it must speak truthfully.

Id. at 424-25. The panel flatly rejected the serious consideration test and concluded,

> [W]e cannot agree that misrepresentations are actionable only after the company has seriously considered the plan change. *Varity* does not suggest that the obligation not to misrepresent materializes near the end of a progression, but rather implies that whenever an employer exercises a fiduciary function, it must speak truthfully. Nor do we find a safe harbor for predictions of the future. When an employer speaks to the future of a plan, employees are justified in concluding that it is backed by the authority of a plan administrator, and should therefore be entitled to trust in those representations.

Id. at 425 ("we reject the view that the duty to speak truthfully only arises once the employer begins seriously considering a plan"). Instead the Fifth Circuit adopted "a fact-specific approach akin to that promulgated by the Second Circuit in *Ballone* and followed by the Ninth Circuit in *Wayne*. *Id.* at 428. The

The *Tittle* Plaintiffs complain not only of general material misrepresentations regarding Enron's financial condition and the inducement to purchase or hold Enron stock, but also of particular employee meetings held in which certain Defendants urged plan participants to continue their employment and purchase or hold Enron stock as part of Defendants' larger scheme to enrich themselves. Indeed, among the "predicate acts" alleged under their RICO claims, as factual support for their interstate transportation of persons and property in order to defraud, Plaintiffs claim that the Enron Insider Defendants, Arthur Andersen Defendants, and some Investment Banking Defendants conspired to induce Enron employees "to travel . . . in the execution of the wrongful scheme alleged herein, . . . to Houston, Texas, to attend meetings conducted by the Enron Insider Defendants at which ECSP participants were reassured that their 401(k) funds were safely invested and that they should hold and maintain their investments in Enron stock." (Complaint at 281-82, ¶796). The facts and holding in *Varity Corp.* have relevance here.

Mindful of Congress' balanced intent in enacting ERISA "'to offer employees enhanced protection for their benefits, on the

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overarching question in such an analysis is whether there is a substantial likelihood that a reasonable person in the plaintiffs' position would have considered the information an employer-administrator allegedly misrepresented important in making a decision to retire." *Id.* at 428. It did note that "the more seriously a plan is being considered, the more likely a representation about the plan is material." *Id.* Nevertheless, the Fifth Circuit has held that otherwise an employer has no affirmative duty to disclose that it is considering amending its plan. *Id.*

one hand, and, on the other, . . . not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place," in *Schlumberger*, 338 F.3d at 413-16, the Fifth Circuit discussed *Varity Corp. v. Howe*, 516 U.S. 489, in some detail in the context of an employer/administrator/fiduciary's duty to disclose to plan participants future changes to their ERISA plan.

According to the Fifth Circuit, in *Varity Corp.*, former employees of Varity Corporation's subsidiary Massey-Ferguson, Inc. sued Varity, alleging that "Varity Corporation had affirmatively represented to them that their benefits would remain secure if they transferred to a new subsidiary, Massey Combines." *Schlumberger*, 338 F.3d at 414, *citing Varity*, 516 U.S. at 492-93. In fact Varity created Massey Combines in order to transfer Massey-Ferguson's money-losing divisions, including its benefit plans, and other debts to Massey Combines with the expectation that Massey Combines would fail. In order to convince the plan beneficiaries to switch to Massey Combines, Varity had a special meeting with the employees and promised that their benefits would remain secure if they transferred, even though Varity knew the result would be quite different. Approximately 1500 employees relied on these promises and made the transfer; Massey Combines went into receivership within a couple of years and those employees lost their benefits. *Id.* at 414, *citing id.* at 494. Although Varity argued that it was wearing its settlor/employer hat when it urged Massey-Ferguson's employees to switch to Massey Combines, the Supreme Court concluded otherwise and found that when Varity convened the meeting to represent that the transfer would not threaten their benefits, it was acting in its fiduciary capacity as a plan administrator. *Id.* at 415, *citing id.* at 501-02. The high court opined that "'Varity was exercising 'discretionary authority' respecting the plan's 'management' or 'administration' when it made these misrepresentations'" and that "'[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose.'" *Id.* at 415, *citing id.* at 498, 502. Emphasizing that fiduciary duties primarily constrain the exercise of discretionary authority operating beyond duties laid out in the express terms of plan instruments, the Supreme Court emphasized the ERISA fiduciary's duty of loyalty and concluded that Varity had breached that duty in "'participat[ing] knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense'" and lying to the employee participants. *Id.* at 415-16, *citing id.* at 506.

Although the facts in *Varity Corp.* are not precisely on point with those in the instant suit, there are sufficient parallels with the *Tittle* Plaintiffs' allegations to state a claim for breach of fiduciary duty in their representations to employees in these meetings.

This Court concludes that in light of the fiduciary's duties of loyalty and of care, skill, prudence, and diligence, the *Tittle* plaintiffs have stated a claim generally for breach of a fiduciary duty to disclose based on material information in various ERISA counts, implied or express; they have asserted that Defendants breached their fiduciary duty regarding Enron's alleged fraudulent accounting, concealment of its deceitful business practices and of the company's precarious, swiftly deteriorating financial condition, and Defendants' alleged representations knowingly intended to induce the plan participants' continued participation in pension plans' purchase and holding of Enron stock, which were known or should have been known to plan fiduciaries. They have alleged with supporting facts that disclosure was essential to protect the interests (retirement assets) of plan participants and beneficiaries from the threat of substantial depletion. Plaintiffs have specifically alleged that Lay, Olson, the Compensation Committee, the Enron ERISA Defendants, and Enron breached their fiduciary duty under ERISA by failing to disclose information about Enron's dangerous financial condition that they knew or should have known[64] to plan participants, the

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[64] According to the complaint, not only did Sherron Watkins inform both Lay and Olson personally about what she saw as dangerous accounting irregularities that might result in catastrophe for the company, but Olson purportedly learned that Fastow wanted to fire Watkins for her disclosures and ordered that Watkins' computer be seized. Despite her fiduciary duties, Olson did nothing. Plaintiffs' Memorandum in Opposition, #315 at 38, quotes Judge Cardoza in *Globe Woolen Co. v. Utica Gas and Electric Co.*, 224 N.Y. 483, ____, 121 N.E. 378, 380 (N.Y. 1918): "The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practiced eye."

Furthermore among the red flags, Plaintiffs assert that had the fiduciaries cared to investigate, as was their fiduciary duty, regulatory filings would have revealed that Enron was in deep trouble. *See, e.g.*, "Enron Short Seller Spotted Trouble Ahead of

Administrative Committee, or plan counsel, while these Defendants were individually selling large amounts of their own Enron holdings.

Certain Committee and Outside Directors ("Compensation Committee") Defendants[65] have argued that if these Defendants met

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the Crowd," *The Wall Street Journal*, November 6, 2001 (detailing how one analyst had discovered from a careful review of Enron's regulatory filings that Enron was a "hedge fund in disguise" whose stock price would ultimately tumble). #315 at 37. Administrative Committee members owe "the highest duty known in the law." *Bierwirth*, 680 F.2d at 272. Plaintiffs scoff at Defendants' contention that they are "no different" from Plaintiffs and are also "victims" of the scheme like the defrauded shareholders, employees, and the market; Plaintiffs insist Defendants are not like Plaintiffs because Defendants had, but failed to discharge, their duties as Plan fiduciaries loyally and prudently.

In their Memorandum in Opposition, #315 at 39-40, referencing a memorandum from Defendant Max Hendrick, III of Vinson & Elkins following his August 29, 2001 interview of Defendant Paula Rieker, Plaintiffs state that they have recently learned that Rieker, who was Enron's Managing Director of Investor Relations, learned as early as 1999 of issues relating to Fastow's conflicted role in the LJM partnerships, Whitewing, and other related party transactions that were utilized to hide Enron's actual financial condition. The memorandum also reflects that Rieker, through Vinson & Elkins' investigation, learned of Watkins' allegations of specific accounting improprieties involving Raptor and other related party transactions and thus by the end of August 2001 knew of Watkins' allegations, like Olson and Lay. Plaintiffs have also learned that Defendant Lindholm, an Enron Accounting executive, signed off on the "LJM Approval Sheet" that approved Enron's participation in transactions involving LJM1 and LJM2, entities used to defraud investors about Enron's precarious and illicit financial practices. The complaint charges these fiduciaries generally with failure to discharge their fiduciary duties to participants; while the new, specific allegations are not currently included in the consolidated complaint, as in *Newby*, in the interests of justice, this Court will permit *Tittle* Plaintiffs to replead to include them.

[65] "Certain Committee Defendants" are the members of the Administrative Committees for Enron pension plans: Philip J. Bazelides, Keith Crane, Rod Hayslett, Mary K. Joyce, Shiela Knudsen, Tod A. Lindholm, James S. Prentice, Paula Rieker, and David Shields. As noted previously, the four Outside Directors against whom Plaintiffs assert ERISA claims are Blake, Duncan, Jaedicke and LeMaistre, all members of the Compensation and

their duty of loyalty by selectively disclosing only to the plan participants non-public information about material accounting irregularities and financial improprieties, so that the participants could make an informed decision not to purchase additional shares or to sell their currently held shares of Enron stock before the market and the public found out and the price plunged, Defendants would be violating insider trading laws under the federal securities laws.[66]

Rule 10b-5, 17 C.F.R. § 240.10b-5, requires that a corporate insider, because he owes a fiduciary duty to shareholders, either disclose material non-public information publicly or abstain from trading his own shares for personal gain. *See, e.g., Chiarella v. United States*, 445 U.S. 222, 226-29

Management Development Committee of the Enron Board of Directors.

[66] As will be discussed in greater detail later, under 29 U.S.C. § 1104(c), where a plan allows participants to control and manage their plan assets and meets certain requirements that qualify it as a "§ 404(c) plan," the directing participant will not be deemed a fiduciary and neither the participant nor the trustee/plan administrator would be liable for any loss that results from the plan participant's exercise of that control over the assets in his individual account. The statute is regulated by 29 C.F.R. § 2550.404c-1; subsection (c)(2) of the regulation provides that a participant's control of his investment decisions does not meet the requisite element of independence to qualify as a § 404(c) plan if a "plan fiduciary has concealed material non-public facts regarding the investment from the participant," unless disclosure would violate federal or state law that is not preempted by ERISA, such as the securities laws. As will be discussed subsequently, Plaintiffs have raised material issues of fact as to whether the Savings Plan would qualify as a § 404(c) plan. But assuming for this purpose that it does, and that the alleged material nondisclosure by Defendants were true, the issue is whether disclosure of the alleged material, non-public facts by Defendants about Enron's business practices and accounting fraud would necessarily violate insider trading laws under § 10b and Rule 10b-5. If so, Defendants would not be liable.

(1980). *See, generally*, #1269 at 8-12 in *Newby*, H-01-3624. Furthermore, if a plan fiduciary were to tell plan participants of Enron's actual financial condition so they could sell at a high price based on this nonpublic information, he would also be violating insider trading laws and he, the plan participants as "tippees," and the Administrative Committee might be found liable of securities law violations. *See* 15 U.S.C. § 78u-1(a)(1)(B)(imposing civil penalties for insider trading against a person who directly or indirectly controlled a person who sold a security while in possession of such material, nonpublic information or violated the law in communicating such information) & (b)(1)(A)(imposing controlling person liability where the "controlling person knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred").

As authority for their argument, these Defendants cite two unpublished opinions, *Hull v. Policy Management Systems Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286 (D.S.C. Feb. 9, 2001), and *In re McKesson HBOC, Inc. ERISA Litigation*, No. C00-2003RMW, 2002 WL 31431588, *6 (N.D. Cal. Sept. 30, 2002). In *Hull* the court *inter alia* dismissed a claim against corporate-defendant administrative committee members for failing to provide correct, adverse information about the actual value of the corporation and failing to act on it and sell the stock in the trust fund to protect the interests of the plan participants. The district court opined that the plaintiffs' standard of care for the corporation's stock was illegal and impractical because it

> would put the Committee in the untenable position of choosing one of the three unacceptable (and in some instances illegal) courses of action; (1) obtain "inside" information and then make stock purchase and retention decisions based on this "inside" information; (2) make the disclosures of "inside" information itself before acting on the discovered information, overstepping its role and, in any case, likely causing the stock price to drop; or (3) breach its fiduciary duty by not obtaining and acting on "inside" information.

2001 WL 1836286, at *9. In the same vein, in *In re McKesson* the district court concluded, "Fiduciaries are not obligated to violate the securities laws in order to satisfy their fiduciary duties." 2002 WL 31431588 at *6. The district court opined, moreover, that had there been public disclosure by ERISA Enron fiduciaries in an efficient market, there would have been a swift adjustment in market price and the plan participants would have been unable to sell the stock at artificially high prices so the court dismissed claims against a number of defendants under Rule 12(b)(6). See instruments #504 and 513 in *Tittle*.

First, the Court notes that the holding in *McKesson*, that ERISA fiduciaries must comply with the prohibition on selective disclosure under the securities laws for the fiduciaries' or their beneficiaries' personal gain, is limited to ESOP plans, which by their nature are generally excepted from the duty to diversify, and on its face does not apply to 401(k) plans. Second, and more significant, the Court finds that the *McKesson* court's rationale is misguided for the following reasons.

Defendants' argument that despite the duty of loyalty, a fiduciary should make no disclosure to the plan participants, because under the securities laws he cannot selectively disclose nonpublic information, translates in essence into an argument that the fiduciary should both breach his duty under ERISA and, in violation of the securities laws, become part of the alleged fraudulent scheme to conceal Enron's financial condition to the continuing detriment of current and prospective Enron shareholders, which include his plan's participants. This Court does not believe that Congress, ERISA or the federal securities statutes sanction such conduct or such a solution, i.e., violating all the statutes and conning the public. As a matter of public policy, the statutes should be interpreted to require that persons *follow* the laws, not undermine them. They should be construed not to cancel out the disclosure obligations under both statutes or to mandate concealment, which would only serve to make the harm more widespread; the statutes should be construed to require, as they do, disclosure by Enron officials and plan fiduciaries of Enron's concealed, material financial status to the investing public generally, including plan participants, whether "impractical" or not, because continued silence and deceit would only encourage the alleged fraud and increase the extent of injury.

At the same time, a fiduciary's duty of loyalty should also not be construed to require him to enable and encourage plan participants to violate the law, i.e., to sell their stock at artificially high prices to make a profit or avoid loss *before* disclosure of Enron's financial condition was made public. Nor would selective disclosure of that information by the fiduciary to plan participants protect any lawful financial interests of the plan participants and beneficiaries. Like any other investor, plan participants have no lawful right, before anyone else is informed of Enron's negative financial picture, to profit from fraudulently inflated stock prices or to avoid financial loss by selling early before public disclosure. If the material information about Enron's precarious financial status had been made public by Enron officials and plan fiduciaries in accordance with their legal obligations and the prices of the stock dropped before the plan participants could make a profit or reduce a substantial loss, the damage to the plan participants would not be the fault of the plan fiduciary but of the underlying alleged fraudulent Ponzi scheme and the corporate officials who participated in it, concealed it, and against whom the plan would have a cause of action. A trustee has no duty to violate the law to serve his beneficiaries. Restatement (Second) Trusts § 166, cmt. a. Nor is an ERISA fiduciary an insurer of the value of plan assets, even where that price is the result of fraud or manipulation; he has, instead, an ongoing obligation to satisfy the prudent man rule, which, if he performs the necessary investigations and provides accurate information in accordance with it, relieves him of personal liability regardless of the financial success or failure of the purchased assets, even if he does not discover the fraud. If he does not meet the requirements of the prudent man standard, then the plan fiduciary is personally liable to the plan for monetary damages under ERISA. Similarly if Enron directors fail to meet their duties of disclosure but continue to conceal or materially misrepresent Enron's financial condition, they are subject to liability under the securities laws. Thus under either scenario the plan and/or plan participants and beneficiaries who invest in Enron stock because of material misrepresentations or omissions of corporate officers/fiduciaries have a remedy against those who violate the law and injure them.

"The Department of Labor, the agency responsible for interpreting and enforcing ERISA, flatly rejects the *McKesson* court's position on the interaction between ERISA and the securities laws." Secretary of Labor's Amended *Amicus Curiae* Brief (#1024 at 7). The Court finds that the Secretary's brief appropriately addresses the issue and suggests practical ways to resolve the alleged tension between ERISA and the federal securities statutes so that both can be followed:

> Defendants' duty to "disclose or abstain" under the securities laws does not immunize them from a claim that they failed in their conduct as ERISA fiduciaries. To the contrary, while their Securities Act and ERISA duties may conflict in some respects, they are congruent in others, and there are certain steps that could have been taken that would have satisfied both duties to the benefit of the plans. First and foremost, nothing in the securities laws would have prohibited them from disclosing the information to other shareholders and the public at large, or from forcing Enron to do so. *See Cady v. Roberts*, 1961 WL 60638, at *3. The duty to disclose the relevant information to the plan participants and beneficiaries, which the Plaintiffs assert these Defendants owed as ERISA fiduciaries, is entirely consistent with the premise of the insider trading rules: that corporate insiders owe a fiduciary duty to disclose material nonpublic information to the shareholders and trading public. *See id.*

> (incorporating common law rule that insiders should reveal material inside information before trading) . . . .
>
> Second it would have been consistent with the securities law for the Committee to have eliminated Enron stock as a participant option and as the employer match under the Savings Plan. . . . The securities rules do not require an individual never to make any decision based on insider information. To the contrary, the insider trading rules require corporate insiders to refrain from buying (or selling) stock if they have material, nonpublic information about the stock. Thus, the "disclose or abstain" securities law rule is entirely consistent with, and indeed contemplates a decision not to purchase a particular stock. See Condus v. Howard Sav. Bank, 781 F. Supp. 1052, 1056 (D.N.J. 1992)(it is perfectly legal to retain stock based on inside information; violation of insider trading requires buying or selling of stock). It would have been entirely consistent with securities laws for the fiduciaries to have eliminated Enron stock as a participant option and the employer match. . . . Finally, another option would have been to alert the appropriate regulatory agencies, such as the SEC and the Department of Labor, to the misstatements.

Id., #1024 at 26-27.[67]

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[67] Plaintiffs in response to Defendants' argument based on the holding of *McKesson*, cite another unpublished opinion, *Vivien v. WorldCom, Inc.*, No. C 02-01329-WHA, 2002 WL 31640557 at *7-8 (N.D. Cal. July 26, 2002). Copy attached to Plaintiffs' Response, #514. In *Vivien*, another California district court, reviewing a Rule 12(b)(6) motion and *Hull*, noted that the *Hull* judge "did not dismiss the complaint as a matter of law by concluding that the claim there was 'nothing more than an ineffective attempt to recast the securities action as an ERISA action.'" *Id.* at *7. Instead, the judge determined that the corporate defendants (the employer and the CEO) in that suit did not act in a fiduciary capacity with respect to the alleged breach of fiduciary duties owed to the pension plan because these defendants' fiduciary duties were expressly limited by the plan's governing written instrument and did not reach the asserted misconduct. Furthermore he concluded that the challenged duties to provide accurate information were "not based on the duties owed by an ERISA fiduciary to a plan and its participants, but the general duties of disclosure owed by a corporation and its officers

f. Personal Liability of Corporate Employees

Courts are divided about if and under what circumstances the officers or employees of a corporation that is the named fiduciary in plan instruments may be personally liable for a breach of their fiduciary duty. In light of the traditional rule that the

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to the corporation's shareholders." *Id.* at *8. The judge in *Vivien* distinguished the facts in its case because the plaintiff had alleged that the Plan administrator had the duty and responsibility "as one of its duties in administering the Plans," to distribute to the plan participants and beneficiaries information about the plans. *Id.* More important, the judge in *Vivien* decided, "It is impossible to rule out as a matter of law any and all ERISA recovery at the pleadings stage simply because federal securities law may provide overlapping relief." *Vivien* at 8; #514 at 7.

Moreover, Plaintiffs in their Memorandum in Opposition, #315 at 39 n. 18, also argue ways the tension between the two statutes can be resolved without violating either:

> The Complaint alleges that as a matter of fact there were any number of things that Olson could have done consistent with her fiduciary duties, without running afoul of the securities law, to protect the Plans, including but not limited to making or causing Enron to make immediate disclosure of the substance of Watkins' allegations to the market, and (along with other Committee Members) discontinuing further purchases of Enron stock by the Plans. ¶¶678-91, 780. Olson does not dispute that she had, and breached, the duty to disclose what she knew from Watkins and about Fastow's behavior to her fellow-fiduciaries on the Committee. *See, e.g., Glaziers v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1180-82 (3d Cir. 1996)(one fiduciary can be held liable for failing to make disclosure to another fiduciary to permit that second fiduciary to protect the plan and its beneficiaries even where the information to be disclosed is beyond the scope of fiduciary authority of the inappropriately silent fiduciary.) Exactly what she and the Plans' fiduciaries could and should have done, and how much they could and should have saved the Plans is an issue for another day.

employees of a corporation acting within the course and scope of their employment cannot be personally liable for their actions, some courts have held that the individual corporate employee must have a individual discretionary role in the plan administration to be liable as a fiduciary under ERISA. To shield themselves from liability, Defendants rely heavily on *Confer v. Custom Engineering Co.*, 952 F.2d 34, 37 (3d Cir. 1991), holding "that when an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of the corporation are not fiduciaries within the meaning of section 3(21)(A)(iii) unless it can be shown that these officers have *individual* discretionary roles as to plan administration."[68] *See also Torre v. Federated Mutual Ins. Co.*,

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[68] The *Confer* panel explained,

> Although section 3(21)(A) by itself may give rise to fiduciary status when a designated fiduciary is not chargeable with a particular discretionary role, section 3(21)(A) does not extend the fiduciary status of a corporation to its officers. Where no designation is made or implied, the corporation remains the fiduciary. A Department of Labor bulletin makes clear that the officers of a corporation that sponsors an employee benefit plan are *not* fiduciaries solely by reason of holding office. 29 C.F.R. § 2509.75-8 at D-5 (1991). The bulletin further states that "persons who perform one or more of the functions described in section 3(21)(A) of the Act . . . are fiduciaries." *Id.* at D-2. When a corporation is a "person" who performs the fiduciary functions, however, the officer who controls the corporate action is not *also* the person who performs the fiduciary function. Because a corporation always exercises discretionary authority, control, or responsibility through its employees, section 3(21)(A) must be read to impute to the corporation some decisions by its employees. Otherwise, the fictional "person" of a corporation could never be a

Civ. A. No. 91-425-DES, 1993 WL 545237, *3 (D. Kan. Dec. 3, 1993); *Eyler v. C.I.R., T.C. Memo 1995-123*, No. 16247-92, 1995 WL 127907 [page references unavailable] (U.S. Tax Ct. Mar. 23, 1995)(following *Confer*), *aff'd*, 88 F.3d 445 (7th Cir. 1996); *Professional Helicopter Pilots Ass'n v. Denison*, 804 F. Supp. 1447, 1451 (M.D. Ala. 1992).

Other courts, stressing the functional definition of a fiduciary under ERISA, have held that the individuals within the corporations who actually exercised the fiduciary discretionary control or authority in their official capacity may also be personally liable, depending on the facts of the particular case. *See, e.g., Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1459-61 (9th Cir. 1995)(Because fiduciary status under ERISA depends upon an individual's functional role rather than title, as exemplified by Department of Labor interpretations, and because of ERISA's underlying, broadly based liability policy, the Ninth Circuit "reject[s] the Third Circuit's interpretation in *Confer* that an officer who acts on behalf of a named fiduciary corporation cannot be a fiduciary if he acts within his official capacity and if no fiduciary duties are delegated to him individually."), *cert. denied*, 516 U.S. 914 (1995). Such a rule would allow a corporation to "shield its decision-makers from personal liability merely by

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> fiduciary because a corporation could never meet the statute's requirement of "having discretion." We cannot read section 3(21)(A) in a way that abrogates a use of corporate structure clearly permitted by ERISA.

952 F.2d at 37.

stating in the plan documents that all their actions are taken on behalf of the company and not in a fiduciary capacity."[69] *Id.* at 1461. *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1156 (9th Cir. 2000)("where, as here, a committee or entity is named as the plan fiduciary, the corporate officers or trustees who carry out the fiduciary functions are themselves fiduciaries and cannot be shielded from liability by the company"), *cert. denied*, 531 U.S. 1074 (2002); *Landry v. Air Line Pilots Ass'n Inter. AFL-CIO*, 901 F.2d 404, 418 (5th Cir. 1990)(Members of the board of directors of an employer that maintains an employee benefit plan will be viewed as fiduciaries for the plan maintained by that employer only "to the extent" that they have the responsibility for functions listed in § 3(21)(A) of ERISA, such as selection and retention of plan fiduciaries, over which they necessarily would exercise "discretionary authority or discretionary control respecting management of such plan."), *cert. denied*, 498 U.S. 895 (1990); *Martin v. Schwab*, No. CIV. A. 91-5059-CVSW-1, 1992 WL 296531, at *5 (W.D. Mo. 1992)("Defendants' contention they have no individual exposure as fiduciaries [because

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[69] The Ninth Circuit also points to 29 U.S.C. § 1110, which states, "[A]ny provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under this part shall be void against public policy." 51 F.3d at 1460. Moreover, that provision also permits insurance of fiduciaries for potential liability, but not a shield from liability. *Id.* Therefore, concluded the Ninth Circuit, the argument by a corporate party, which the Court finds functionally meets the definition of a fiduciary, that it relied on a statement in the Plan that its officers were not acting as fiduciaries, but only on behalf of the corporation, is void against public policy because it "purports to relieve the officers from fiduciary responsibility or liability, under § 1110." *Id.*

they were members of the Board of Directors] is clearly at odds with the language of the statute[70] . . . . Congress 'conferred fiduciary status on persons and entities by activity and not by label.'"); *Kay v. Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co.*, 780 F. Supp. 1447, 1461 (E.D. Pa. 1991)(holding liable the company and the company employees personally involved in a plan decision that was determined to be a breach of fiduciary duty); *Eaton v. D'Amato*, 581 F. Supp. 743, 747 (D.D.C. 1980)(where a corporation's "key officials exercised far more than ministerial powers[,] [t]heir status as administrator may well qualify them automatically as fiduciaries"); *Freund v. Marshall Illsley Bank*, 485 F. Supp. 629, 641 (W.D. Wis. 1979)("While it is indeed contemplated under ERISA that a corporation, as an entity, may be a plan fiduciary, the analysis does not end there. Individuals within the corporation who exercise the type of authority or control described in section 3(21)(A) of ERISA will themselves be fiduciaries with respect to the Plan.").

This year the Fifth Circuit emphasized that in last year's opinion in *Bannistor v. Ullman*, 287 F.3d 394, 403-06 (5th Cir. 2002)(holding that corporate officers were liable as fiduciaries since they exercised control over plan assets, approved a new health plan, and had check-signing authority for their

[70] Section 409(a) of ERISA, 29 U.S.C. § 1109(a)("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan.").

employer corporation), it had demonstrated that it has adopted the functional approach of the Ninth Circuit in *Kayes* and holds corporate officers personally responsible for the role they played in the management of plan assets, while it clearly rejected *Confer. Musmeci v. Schwegmann Giant Super Markets, Inc.*, 332 F.3d 339, 350 & n. 7 (5th Cir. 2003). One district court in the Fifth Circuit had previously held corporate officials personally liable when acting within the scope of their employment on behalf of the corporation. *Brock v. Self*, 632 F. Supp. 1509, 1523-24 (W.D. La. 1986)("While the . . . Company, as an entity, is properly held to be a fiduciary, it cannot shield its officers and employees from liability for their fiduciary breaches under the express terms of ERISA, which provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities imposed upon fiduciaries . . . *shall be personally liable* to make good to such plan any losses to the plan resulting from each such breach . . . [emphasis added by court]."), *quoting* 29 U.S.C. § 1109(a).

In view of the broad language, the functional and flexible definition of "fiduciary," and the expansive liability policy of the statute, as well as the holding in *Musmeci*, this Court agrees with those courts which reject a *per se* rule of nonliability for corporate officers acting on behalf of the corporation and instead make a functional, fact-specific inquiry to assess "the extent of responsibility and control exercised by the individual with respect to the Plan" to determine if a corporate employee, and thus also the corporation, has exercised sufficient discretionary authority and control to be deemed an ERISA fiduciary and thus personally liable for a fiduciary breach. *Bell v. Executive Committee of United Food and Commercial Workers Pension Plan for Employees*, 191 F. Supp. 2d 10, 15 (D.D.C. 2002); *Musmeci*, 332 F.3d at 350 & n.7.

g. Professional Liability

Even where a person exercises some control over the plan's operations or assets, if he is providing only traditional professional services to the plan, he is not a "fiduciary" for such services and is not subject to an ERISA suit for breach of fiduciary duties. "[A]n attorney rendering legal and consulting advice to a plan" will not be considered to be a fiduciary unless he exercises authority over the plan "in a manner other than by usual professional functions" and thus cannot be sued for breach of fiduciary duty under ERISA for pursuing a lawyer's traditional services. *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1220 (*quoting Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988)), *amended and superseded on other grounds*, 208 F.3d 1170 (9th Cir.), *cert. denied*, 531 U.S. 992 (2000). The same is true for providers of other professional services, including accountants and banks. *Rutledge*, 201 F.3d at 1220; *Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1150 (3d Cir. 1989); *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1990); *O'Toole v. Arlington Trust Co.*, 681 F.2d 94, 96 (1st Cir. 1982). The Department of Labor's guidelines for interpreting ERISA's definition of "fiduciary" in 29 U.S.C. 1002(21)(A) note that "attorneys, accountants, actuaries, and consultants will ordinarily not be considered fiduciaries." Interpretive Bulletin 75-5, 29 C.F.R. § 2509.75-5 (1987).

ERISA does not permit a civil action for legal damages against a non-fiduciary charged with knowing participation in a fiduciary breach. *Reich v. Rowe*, 20 F.3d 25, 26, 28 (1st Cir. 1994), *citing Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). As an alternative to fiduciary liability, a nonfiduciary may be liable as a "party in interest," but only for "appropriate equitable relief," including injunctions and equitable restitution, in civil actions brought by plan participants under 29 U.S.C. § 1132(a)(3).[71] *See also Useden v. Acker*, 947 F.2d 1563, 1581-82 (11th Cir. 1991), *cert. denied sub nom. Useden v. Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel*, 508 U.S. 959 (1993). A "party in interest" of an employee benefit plan is defined in 29 U.S.C. § 1002(14) and includes *inter alia* any fiduciary (administrator, officer, trustee, custodian, etc.), a person that provides services to the plan (such as an accountant, attorney), an employer of any employees covered by the plan and an employee organization including any members covered by the plan. Such non-fiduciaries may be held liable for such "appropriate equitable relief" if they are "parties in interest" and, with actual or constructive knowledge, they participate in a fiduciary's breach of its duties

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[71] Section 502(a)(3), 29 U.S.C. § 1132(a)(3), which will be discussed in more detail under the section of this memorandum and order entitled "Standing and Remedies," allows suits by a plan participant, beneficiary or fiduciary "(A) to enjoin any act or practice which violates any provision of this subchapter or terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan."

in transactions between the plan and a party in interest that are expressly prohibited under § 406(a) of ERISA, 29 U.S.C. § 1106(a).

Section 406(a) bars a plan fiduciary from entering into certain kinds of transactions that he "knows or should know" are transactions with a party in interest to the injury of the participants of the plan. These include purchases of assets, loans and extensions of credit, payments and transfers of assets to the party in interest, and payments for furnishing services. Section 406(b) bars a fiduciary from dealing with plan assets for his own interest. *See, e.g., Donovan v. Cunningham*, 716 F.2d at 1464-65 ("[T]he object of section 406 was to make illegal per se the types of transactions that experience had shown to entail a high potential for abuse."). *See also Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241, 248 (2000)(unanimous op.); *McDannold v. Star Bank, N.A.*, 261 F.3d 478, 485-86 (6th Cir. 2001); *Whitfield v. Lindemann*, 853 F.2d 1298, 1303 (5th Cir.)(holding attorney liable as a nonfiduciary), *cert. denied sub nom. Klepak v. Dole*, 490 U.S. 1089 (1998).[72] When a plaintiff shows that a fiduciary "caused the plan to engage in an allegedly unlawful transaction" listed in § 406(a)(1), 29 U.S.C. § 1106(a)(1), the fiduciary, in contrast to the participating

[72] The Ninth Circuit has held that the prohibited transactions under §§ 406(a) and 408(b) include receipt of excessive compensation by a law firm for legal services provided to an ERISA plan. *Concha v. London*, 62 F.3d 1493, 1504 (9th Cir. 1995), *cert. dismissed*, 517 U.S. 1183 (1996); *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1998). *But see Useden v. Acker*, 947 F.2d at 1578 (rejecting Ninth Circuit's rationale because it permits "anyone performing services for an ERISA plan-be it an attorney, a security guard or a janitor" to be deemed a fiduciary.

interested party, may be held personally responsible for monetary damages under § 409(a), 29 U.S.C. § 1109(a), "for any losses incurred by the plan, any ill-gotten profits, and other equitable and remedial relief deemed appropriate by the court." *Lockheed Corp. v. Spink*, 517 U.S. at 888.

Although the claim against the party in interest in *Harris Trust* was brought under § 406 for participation in designated prohibited transactions, the Supreme Court's broad language indicated that ERISA § 502(a)(3) authorizes a private cause of action for "appropriate equitable relief" to redress any violations of ERISA's Title I, which would include violations of § 404's fiduciary duties. In its ruling, the high court stated that § 502(a)(3) "admits of no limit on the universe of possible defendants" and "the focus . . . is on redressing the *fact or practice* which violates any provision of [ERISA Title I]." *Harris Trust*, 530 U.S. at 246-47 (contrasting the fact that § 503(a) "makes no mention at all of which parties may be proper defendants" while other provisions "do expressly address who may be a defendant."). Thus it would appear that a party-in-interest's liability under *Harris Trust* applies beyond prohibited transactions with the plan under § 406 to a knowing participation in a fiduciary's breach of fiduciary duties under § 404(a). *See Rudowski v. Sheet Metal Workers Intern. Ass'n, Local Union Number 24*, 113 F. Supp. 2d 1176 (S.D. Ohio 2000)(holding that a nonfiduciary union may be liable for participating in a fiduciary breach of § 404 in a suit brought under § 502(a)(3)); *L.I. Head Start Child Dev. Serv., Inc. v. Frank*, 165 F. Supp. 2d 367

(E.D.N.Y. 2001) (attorneys alleged to have knowingly participated in a breach of duty could be liable to return legal fees received in that improper transaction). Plaintiffs have alleged that Arthur Andersen, while not a plan fiduciary, was a knowing participant in the fiduciary breaches by other Defendants by actively concealing from the plans' fiduciaries and participants Enron's actual financial condition and the imprudence of investing in its stock.[73] Moreover, they assert that the accounting firm received large fees

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[73] Disagreeing with this expansive construction of the potential liability of a party in interest beyond violations of § 406 to reach breaches of fiduciary duty under § 404, the First Circuit, refusing to add to the remedies (including money damages and other forms of liability) expressly provided by ERISA's comprehensive regulatory scheme and acknowledging Congress' decision to balance the competing goals of protecting employees' interests and containing pension costs, explains that

> nonfiduciary participation in a fiduciary breach is most likely to involve . . . service providers and other nonfiduciary professionals who provide advice or expertise to ERISA fiduciaries. The advice and expertise provided by these individuals--whether actuaries, lawyers, accountants, or consultants--is vital for the successful operation of ERISA plans which must function in a highly complex and regulated environment. . . . We do not mean to countenance the action of someone who advises a fiduciary to break the law, but we are concerned that extending the threat of liability over the heads of those who only lend professional services to a plan without exercising any control over, or transacting with, plan assets will deter such individuals from helping fiduciaries navigate the intricate financial and legal thicket of ERISA.

Reich v. Rowe, 20 F.3d 25, 26, 32 (1st Cir. 1994) (holding that ERISA does not authorize suits against nonfiduciaries charged solely with participating in a fiduciary breach). To impose liability on professionals that regularly offer advice to ERISA plans would result in high insurance costs to them and ultimately to the plans. *Id.*

that included assets belonging to the plan for Arthur Andersen's provision of these services that purportedly constituted a knowing participation in the breach of fiduciary duty. Thus Plaintiffs seek to have the court impose a constructive trust on plan assets or proceeds traceable to such assets, and ultimately conveyance of those assets or profits derived from them to the plan, i.e., equitable restitution.

Even though generally a lawyer or accountant providing services to a plan is a party in interest and not a fiduciary, it has been recognized that at times a professional consultant or advisor may go beyond his normal, traditional advisory function and, because of his special expertise and influence, in effect exercise the discretionary authority or control over the management or administration of an ERISA plan to the point that he has assumed the fiduciary obligations and has transmuted into a fiduciary as defined under ERISA, 29 U.S.C. § 1102(21)(A). *Mertens*, 508 U.S. at 262 ("professional service providers . . . become liable for damages only when they cross the line from advisor to fiduciary"). *See also Schloegel v. Boswell*, 994 F.2d 266, 271 (5th Cir. 1993), *cert. denied*, 510 U.S. 964 (1993); *Reich v. Lancaster*, 55 F.3d 1034, 1047-49 (5th Cir. 1995); *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992)(finding that two partners in an accounting firm who recommended a complex series of transactions, structured deals, provided advice, and had expertise not shared among other corporate insiders exercised effective control over the plan's assets and were ERISA fiduciaries), *cert. denied*, 506 U.S. 1054 (1993); *Carpenters' Local Union No. 964 Pension Fund v. Silverman*, No. 93

CIV. 8787 (RPP), 1995 WL 378539 (S.D.N.Y. June 26, 1995)(finding a law firm was a fiduciary under ERISA where plan trustees depended on lawyers' expertise for a real estate investment, lawyers played a role in investment decisions, and one partner was a plan trustee). . To meet the "authority or control" element under 29 U.S.C. § 1002(21)(A)(i), a plaintiff must show that the consultant or advisor did not merely influence the plan fiduciary, but "caused [the] trustee . . . to relinquish his independent discretion in investing the plan's funds and follow the course prescribed" by the consultant. *Schloegel*, 994 F.2d at 271-72, *citing Sommers Drug Stores Co. Employee Profit Sharing Trust*, 793 F.2d at 1460. Alternatively, the rendering of investment advice for a fee on a regular basis pursuant to an agreement or understanding between the consultant and the plan where the agreement indicates that the consultant's advice will be the primary basis for the plan's investment decisions and the consultant will provide individualized investment advice according to the plan's individual needs may also impose fiduciary liability on a professional consultant. *Schloegel*, 994 F.2d at 273.

There is no *per se* rule regarding the rendering of professional advice and the point at which a professional may become subject to fiduciary liability. *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537-38 (7th Cir. 1991)(the legislative history "seems to . . . contemplate[] . . . a fact intensive inquiry that looks at whether the professional transceneded her 'ordinary functions'"); *Mertens*, 508 U.S. at 262 ("professional service providers . . . become liable for damages only when they cross the line from advisor to fiduciary"). A fact intensive examination of the extent of the discretion and control assumed by the administrator is required. *Pappas*, 923 F.2d at 538; *Reich*, 55 F.3d at 1047. For instance, where pre-existing policies, practices and procedures sufficiently limit an entity that assumes discretionary authority or control over plan management and/or assets, that entity will not be viewed as a fiduciary. *Reich*, 55 F.3d at 1047. The performance of ministerial duties or mere processing of claims will not impose fiduciary liability; however, if the administrator has the authority to grant, deny or review claims or has the sole authority to determine the benefits to which the insured plan participant is entitled, the administrator may be a fiduciary under ERISA. *Id.* (and cases cited therein); *Arizona State Carpenters Pension Trust Fund*, 125 F.3d at 721-22 ("A person or entity who performs only ministerial services or administrative functions within a framework of policies, rules and procedures established by others is not an ERISA fiduciary. To become a fiduciary, the person or entity must have control respecting the management of the plan or its assets, give investment advice for a fee, or have discretionary responsibility in the administration of the plan."). The statute "'defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties--and to damages--under § [1109(a)].'" *Id.* at 1048, *quoting Kayes v. Pacific Lumber Co.*, 51 F.3d at 1459, and §

1002(21)(A). *See also* 29 C.F.R. § 2510.3-21(c).[74] Courts have

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[74] Section 2510.3-21(c), which defines "fiduciary," states,

> (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of [ERISA] and this paragraph, only if
>
> (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) Such person either directly or indirectly (e.g., through or togther with any affiliate)-
>
> (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
>
> (B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.
>
> (2) A person who is a fiduciary with respect to a plan by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary

analyzed the extent of authority and control exercised by attorneys and accountants over plan investment decisions to determine whether they crossed the line and became fiduciaries of the plan. *See, e.g., Martin v. Feilen*, 965 F.2d 660, 669 (8th Cir. 1992) (finding that accountants who provided professional accounting services to an ESOP and also recommended transactions, structured deals, and provided investment advice to the point that they exercised effective control over the plan's assets and utilized their positions of trust and confidence as corporate insiders to involve the plan in transactions in which they had a personal interest were fiduciaries of the ESOP), *cert. denied sub nom. Henss v. Martin*, 506 U.S. 1054 (1993); *Useden v. Acker*, 947 F.2d 1563, 1577-78 (11th Cir. 1991) (finding that a law firm providing advice on a number of concerns but not beyond the usual professional function of attorneys and otherwise controlling the plan did not become a fiduciary), *cert. denied sub nom. Useden v. Greenberg, Taurig, Hoffman, Lipoff, Rosen & Quentel*, 508 U.S. 959 (1993).

h. Section 404(c) Plans

Generally ERISA imposes liability for resulting losses on fiduciaries who commit breaches of their duties. 29 U.S.C. § 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties

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> authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1)of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice . . . .

imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . ."). Section 404(c) of ERISA, 29 U.S.C. § 1104(c), however, provides that a plan fiduciary is not liable if (1) the plan is an "individual account plan", (2) the plan participants can exercise control over the assets allocated to their accounts, and (3) the plan participants actually do exercise control over their accounts in a manner proscribed under the regulations.[75] Under § 404(c), the plan participants that exercise such control over their accounts will not be treated as fiduciaries, and neither the plan participants nor the other plan fiduciaries will be liable for any loss or breach that results from the plan participants' exercise of control over the plan

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[75] The Secretary of Labor has interpreted 29 U.S.C. § 1104(c) as inapplicable to ESOPs because it applies only to plans that give the participants a wide range of investments from which to select. 29 C.F.R. § 2550.404c-1.

Many 401(k) plans are established to qualify as § 404(c) plans. Plaintiffs argue that the Savings Plan does not qualify as a §404(c) plan because under article XV.3, it imposes a duty to diversify on all Plan fiduciaries unless it would be prudent under the circumstances not to do so. Moreover the regulations require that the fiduciaries provide participants with "complete and accurate information" about investment alternatives, a range of investments, procedures to permit transfers and to deal with conflicts of interest, as well as notice that the plan qualifies under § 404(c), none of which were met according to Plaintiffs. Furthermore, as Plaintiffs point out, the employer's matching contributions went directly into Enron stock, where it remained until the employee reached fifty years of age; the employee never had the requisite independent control over this portion of his plan assets. Under 29 C.F.R. § 2550.404(c)-1(c)(2), a plan participant also lacks independent control where he "is subjected to improper influence by a plan fiduciary or plan sponsor with respect to the transaction or where a "plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary . . . ." Plaintiffs have alleged such concealment occurred at Enron.

administration; in other words, no one is liable for the participants' loss that results from the participants' own informed investment choices. *See generally In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 443-46 (3d Cir. 1996), *cert. denied sub nom. Unisys Corp. v. Meinhardt*, 510 U.S. 810 (1996).

There is little case law regarding § 404(c) plans. The legislative history reveals that 29 U.S.C. § 1104(c) created "a special rule" for plans that permit the participant to have "independent control" over his individual account assets and provides that the participant who exercises that independent control, as well as other plan fiduciaries, is not liable for losses caused by the participant's control. *In re Unisys*, 74 F.3d at 445, *citing* H.R. Conf. Rep. No. 1280, *reprinted in* 1974 U.S.C.C.A.N. at 5085-86. A House Conference Report states,

> Therefore, if the participant instructs the plan trustee to invest the full balance of his account in, *e.g.*, a single stock, the trustee is not liable for any loss because of a failure to diversify or because the investment does not meet the prudent man standards. However, the investment must not contradict the terms of the plan, and if the plan on its face prohibits such investments, the trustee could not follow the instructions and avoid liability.

Id., *quoting* H.R. Conf. Rep. No. 1280, *reprinted in* 1974 U.S.C.C.A.N. at 5086. The legislative history also indicates that the statute requires the plan to offer "a broad range of investments." *Id.* at 446 & n. 24.

The Department of Labor issued final regulations regarding § 404(c) in 1992.[76] 29 C.F.R. § 2550.404c-1. The Court quotes below portions of the regulations that are relevant to the issues in this class action. It defines a § 404(c) plan as an individual account plan under § 3(34) of ERISA that

> (i) Provides an opportunity for a participant or beneficiary to exercise control over assets in his individual account . . .; and
>
> (ii) Provides a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which some or all of the assets in his account are invested . . . .

29 C.F.R. § 2550.404c-1(b)(1).

Regarding the requirement that an opportunity be provided to a participant or beneficiary to exercise control over his account, to qualify as a § 404(c) plan, the regulation provides:

> (A) Under the terms of the plan, the participant or beneficiary has a reasonable opportunity to give investment instructions (in writing or otherwise, with opportunity to obtain written confirmation of such instructions) to an identified plan fiduciary who is obligated to comply with such instructions except as otherwise provided in paragraph (b)(2)(ii)(B) and (d)(2)(ii).
>
> (B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of the subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless-

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[76] Because the appellate court in *In re Unisys* addressed matters that transpired before these regulations were issued, it did not address them or apply them to the case before it.

> (1) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):
>
> (i) An explanation that the plan is intended to constitute a plan described in section 404(c) of [ERISA], and title 29 of the Code of Federal Regulations Section 2550.440c-1, and the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary;
>
> (ii) A description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the designed investment alternative.

29 C.F.R. § 2550.404c-1(b)(2)(i)(A)-(B)(ii).

The regulation allows a plan to "impose reasonable restrictions on the frequency with which participants and beneficiaries may give investment instructions." 29 C.F.R. 2550.404(c)-1(b)(i)(C). To be "reasonable," the plan must, with respect to each investment alternative, allow participants and beneficiaries to provide "investment instructions with a frequency which is appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject." *Id.* Participants and beneficiaries must be permitted to give investment instructions at minimum at least once in any three-month period and to give transfer instructions as often as they are allowed to give investment instructions. *Id.*

The Department of Labor's regulation also prescribes the following guidelines for a "Broad range of investment alternatives":

> (i) A plan offers a broad range of investment alternatives only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to:
>
> (A) Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject;
>
> (B) Choose from at least three investment alternatives:
>
> (1) Each of which is diversified;
>
> (2) Each of which has materially different risk and return characteristics;
>
> (3) Which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary; and
>
> (4) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of large losses, taking into account the nature of the plan and the size of participants' or beneficiaries' accounts. In determining whether a plan provides the participant or beneficiary with a reasonable opportunity to diversify his investments, the nature of the investment alternatives offered by the plan and the size of the portion of the individual's account over which he is permitted to exercise control must be considered.

29 C.F.R. § 2550.404c-1(b)(3).

The regulation also addresses "exercise of control." 29 C.F.R. § 2550.404c-1(c). *Inter alia* it states,

> Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and the circumstances of the case. However, a participant's or beneficiary's exercise of control is not independent in fact if:
>
> (i) The participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction;
>
> (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act . . . .

29 C.F. R. § 2550.404c-1(c)(2)(i)-(ii). Plaintiffs here contend that the plan fiduciary concealed material non-public facts about Enron's financial condition from them so that under the regulation they did not, in fact, exercise independent control in making investment decisions for their individual accounts. As discussed *supra*, Defendants respond that to have provided such information only to the Savings Plan participants would have violated the federal securities laws. This Court has disagreed with Defendants and adopted the view of the Secretary of Labor.

In addition, "[a] fiduciary has no obligation . . . to provide investment advice to a participant or beneficiary under an ERISA section 404(c) plan." 29 C.F. R. § 2550.404c-1(c)(4).

Finally 29 C.F. R. § 2550.404c-1(d), in relevant part, explains

> (d) Effect of independent exercise of control-
>
> (1) Participant or beneficiary not a fiduciary. If a participant or beneficiary of