IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE 2014 RADIOSHACK ERISA LITIGATION	§	
	§	
	§	
	§	**Master File No. 4:14-cv-959-O**
THIS DOCUMENT RELATED TO: ALL ACTIONS	§	
	§	
	§	
	§	

ORDER

Before the Court are Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Class Action Complaint and to Strike Jury Demand (ECF No. 171), filed March 7, 2016; Brief in Support (ECF No. 172), filed March 7, 2016; and Appendix in Support (ECF No. 173), filed March 7, 2016; Plaintiffs' Response (ECF No. 177), filed March 28, 2016; and Appendix in Support (ECF No. 178), filed March 28, 2016; and Defendants' Reply (ECF No. 179), filed April 11, 2016. Having considered the motion, related briefing, and applicable law, the Court finds Defendants' Motion to Dismiss should be and is hereby **GRANTED in part and DENIED in part**.[1]

I. BACKGROUND

[1] Since Plaintiffs submitted an amended complaint, the remaining parties in this case who were participants in or beneficiaries of the RadioShack Puerto Rico 1165(e) Plan settled (the "Puerto Rico Plan Settlement") and the Court entered an Order approving the final class action settlement, award for attorneys' fees, reimbursement of expenses, and case contribution awarded to named Plaintiffs for which the parties agreed. *See* ECF Nos. 193–94. Accordingly, the remaining claims at issue relate only to holders of the RadioShack 401K Stock Plan. All claims against Defendants in regards to the Puerto Rico Plans are **DISMISSED with prejudice**. Furthermore, based on the Puerto Rico Plan Settlement, and because the Court grants Defendants' Motion to Dismiss (ECF No. 171) in its entirety, Plaintiffs' Motion to Certify Class (ECF No. 114) is **DENIED as moot.**

This is the second Motion to Dismiss the Court will address as the Court previously dismissed Plaintiffs' case and allowed them leave to re-plead their claims. *See* ECF No. 153. Thus, the Court assumes the parties familiarity with the facts in this case and will not reiterate them in detail here, except those facts which are relevant to the current motion.

Plaintiffs filed this stock drop suit on behalf of themselves, the RadioShack 401(k) Plan, corresponding Puerto Rico 401(k) Plan (collectively, the "401(k) Plans" or the "Plans"), and a class of similarly situated participants and beneficiaries of the 40l(k) Plans, alleging that Defendants breached their fiduciary duties by keeping their employee stock ownership plan ("ESOPs") invested in RadioShack ("RadioShack" or "Company") stock despite its decline into bankruptcy. In their Second Amended Complaint, Plaintiffs allege that a series of special circumstances existed which permits their breach of prudence claims to advance past the motion to dismiss stage based on public information. Plaintiffs also allege certain Defendants made a series of incriminating statements that attempted to downplay the Company's systematic digression into bankruptcy. Plaintiffs also argue that Defendants had inside information that allowed them to take alternative actions to prevent the Company stock plans from losing its value and Plaintiffs from losing a significant value of their investments.

According to Plaintiffs, because the RadioShack Defendants knew or should have known that the Company was heading for bankruptcy based on public information, as ERISA fiduciaries they should have prevented the ESOPs from being invested in RadioShack stock. Plaintiffs originally argued that Defendants should have abided by the Plans' governing documents and forced the Plans to sell their holdings in RadioShack stock. Plaintiffs alleged Defendants' decision was imprudent under ERISA. Their live complaint is based primarily on public information about

RadioShack's prolonged declining circumstances from 2011 until 2014, when RadioShack declared bankruptcy, and when Plaintiffs allege they lost the bulk of their money. As stated in its January 25, 2016, Order, the Court granted Plaintiffs "the right to re-plead their breach of fiduciary duty and dependent claims to allege any special circumstances which existed in regards to RadioShack's stock price and the market's reliance on that price[.]" *See* Order 21, ECF No. 153. The parties have fully briefed the issues and Defendants' Motion is ripe for review.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 does not require detailed factual allegations, but "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). If a plaintiff fails to satisfy Rule 8(a), the defendant may file a motion to dismiss the plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6).

To defeat a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely

consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The Court is not bound to accept legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678-79. When there are well-pleaded factual allegations, the Court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.*

"Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (citations omitted); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). A court may also consider documents that a defendant attaches to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to the plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

III. ANALYSIS

A. Plaintiffs Have Shown Good Cause For The Court to Consider the Additional Claims in Their Second Amended Complaint

Plaintiffs added additional claims to their Second Amended Complaint. Specifically, Plaintiffs seeks to include a claim of breach of fiduciary duty based on inside information. *See generally* 2d Am. Compl., ECF No. 177. Plaintiffs argue that their Second Amended Complaint

is consistent with the Court's opinion because their "inside-information" claim is "based on the identical facts comprising the 'special circumstances' allegations which even Defendants cannot dispute the Court's Opinion clearly permitted Plaintiffs to add to the Complaint." Resp. 2d Mot. Dismiss 5–6, ECF No. 177. Plaintiffs also contend that they did not waive their claims based on inside information. *Id.* at 6. According to Plaintiffs, the "[n]ew facts discovered during the pendency of the litigation reveal that Plaintiffs have colorable claims based on non-public information, separate and apart from the so—called public information claim." *Id.* They argue that "[t]he bulk of this inside information allegations were made public in the amended UCC complaint filed on October 29, 2015—two months after the deadline to file motions to amend pleadings in this action." *Id.* at 6 (citing 2d Am. Compl. ¶ 262, ECF No. 167). Plaintiffs claim they announced their intention to obtain additional discovery to support these claims, but the Court filed its decision on the motion to dismiss before that could be completed. *Id.*

Additionally, Plaintiffs argue that even "[a]ssuming *arguendo* that the Court's Opinion did not contemplate the scope of the new inside information claim pled in the Complaint[,]" it serves the Court's and parties' best interests to have the Court adjudicate all issues now, and "good cause exits for the Court to consider the new claim" because "courts often permit plaintiffs to add additional facts and claims after the deadline for amendment has passed." *Id.* at 6–7. Plaintiffs cite to *Mailing and Shipping Systems, Inc. v. Neopost USA, Inc. d/b/a Hasler*, 292 F.R.D. 369, 373–76 (W.D. Tex. 2013) for the proposition that courts have found good cause for leave to amend pleadings several months after the deadline passed, "[e]ven though it found plaintiff[s] should have been aware of facts forming the basis of plaintiff[s'] new claims 'long before the Court's deadline to amend pleadings." *Id.* at 7.

Plaintiffs rely on *Neopost* as proof that courts may allow a plaintiff to amend its complaint when "only after gathering additional information did plaintiff conclude that it had a ripe claim" and the plaintiff would have been precluded from raising the claim at a later date. *Id.* at 7 (quoting *Neopost*, 292 F.R.D. at 373–75).[2] Plaintiffs also allege that Defendants would not be prejudiced by the addition of its new claims, especially since the matter was stayed with over two months left in discovery and trial scheduled for October 24, 2016. *Id*. at 8.

Defendants contend that the Court need not consider Plaintiffs' new inside information claims because they go beyond the Court's Order allowing Plaintiffs the opportunity to re-plead their claims solely to allege any special circumstances which exist in regard to RadioShack's stock price and the market's reliance on that price. Mem. Supp. 2d Mot. Dismiss 5–6, ECF No. 172. Specifically, Defendants argue "[P]laintiffs waived any new claim based upon inside information" because "[a]rmed with essentially the same facts they now invoke, [P]laintiffs made the tactical choice to pursue only a public-information claim . . . during the fifteen months this case has been pending." *Id.* at 8 (citing Plaintiffs' Pleadings ECF No. 32 at 2 ("Neither do these claims allege that the market was overvaluing company stock.")); ECF No. 111 at 11 (quoting Plaintiffs' statement that, "Plaintiffs do not allege Company stock was imprudent due to an 'inflated' price.")).

Because the deadline to amend the pleadings passed on August 27, 2015, Defendants aver, "[P]laintiffs should not be allowed to now pursue theories based upon information always available to them." *Id*. at 8–9. Defendants maintain that Plaintiffs cannot rely on their argument that their

[2] Plaintiffs also cite to *Hoffman v. L&M Arts*, No. 10-CV-953, 2012 WL 4321739, at * 2 (N.D. Tex. Sept. 21, 2012) (Fitzwater, J.), in which the plaintiff showed that she became aware of certain facts that supported her existing breach of contract claim and fraudulent inducement claim after the deadline passed.

new claims based on inside information were discovered after the pleadings deadline lapsed because they "[knew] about that action since it was filed on September 3, 2015" and "[i]n fact, [P]laintiffs' counsel emailed the original UCC complaint to Defendants' counsel on September 4, 2015, the day after it was filed." *Id.* at 9 (emphasis removed). Defendants conclude, "if [P]lainiffs believe the UCC's allegations 'revealed' a new basis for their ERISA claims [as stated in the Amended Complaint ¶ 262], it was incumbent upon them to seek to add those claims promptly, rather than allow more than five months to go by before trying to do so—and only after the Court rejected their original theories." *Id.* Finally, Defendants allege that Plaintiffs could not show "good cause" for leave to amend. Mem. Supp. 2d Mot. Dismiss 9 n.8 (citing *Sw. Bell Tele. Co. v. City of El Paso*, 346 F.3d 541, 546–47 (5th Cir. 2003); Fed. R. Civ. P. 16(b)(4)).

Generally, courts freely grant leave to amend pleadings when justice so requires. *See* Fed. R. Civ. P. 15(2). However, Rule 16(b) of the Federal Rules of Civil Procedure governs amendment of the pleadings after a scheduling order deadline has expired. *S&W Enters., LLC v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 536 (5th Cir. 2003); Fed. R. Civ. P. 16(b). "To meet the good cause standard, the party must show that, despite her diligence, she could not reasonably have met the scheduling order deadline." *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2012 WL 4321739, at *2 (N.D. Tex. Sept. 21, 2012) (Fitzwater, J.); *S&W Enters.*, 315 F.3d at 536. If the party satisfies the Rule 16(b)(4) requirements, a court then decides if Rule 15(a)(2) applies. Fed. R. Civ. P. 15(a)(2); *Hoffman*, 2012 WL 4321739, at *2; *see also S&W Enters.*, 315 F.3d at 536; *Am. Tourmaline Fields v. Int'l Paper Co.*, 1998 WL 874825, at * 1 (N.D. Tex. 1998) (Fitzwater, J.).

Courts consider four factors in deciding whether to grant an untimely motion for leave to amend under Rule 16(b)(4): "(1) the explanation for the failure to timely move for leave to amend;

(2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *S&W Enters.*, 315 F.3d at 536. No single factor is dispositive, as the Court considers the factors holistically. *Hoffman*, 2012 WL 4321739, at *3. Since Plaintiffs' Second Amended Complaint with new claims was filed after the expiration of the deadline for amendment of the pleadings, the factual and legal arguments can only be amended if Plaintiffs demonstrate good cause to do so.

As to the first factor, even if the Court assumes Plaintiffs' allegation as true, the facts indicate that Plaintiffs had access to enough information by the amended pleadings deadline to incorporate claims based on inside information. Although Plaintiffs contend that they uncovered the information on their inside information claims during the pendency of this case and those claims are based on an amended UCC complaint filed on October 29, 2015, which was two months after the deadline to file motions to amend pleadings, Plaintiffs were involved with the bankruptcy proceedings in *RSH Liquid. Trust v. Magnacca*, No. 4:15-cv-ap-04076 (Bankr. N.D. Tex.) ("UCC Complaint"). Plaintiffs' reliance on the original August 31, 2015, UCC complaint and general knowledge of the statements made by RadioShack representatives in regards to the oral prospects of a successful turnaround of the Company made to the public also suggest Plaintiffs had information on their inside-information claims. *See* Pls.' Expedited Stay 2–3, ECF No. 161; Defs.' Reply 2 n.1–3, ECF No. 179; Mot. Dismiss App. 1 ("Brian T. Ortelere Decl.") ¶ 1, ECF No. 173 (declaring that an attorney for Plaintiffs, Edward W. Ciolko, sent an electronic copy of the original UCC Complaint on September 4, 2015). Thus, the first factor weighs against Plaintiffs' request because it appears that Plaintiffs were at least aware of the facts which concern their new inside information allegations.

The second factor considers the importance of the amendment. *Hoffman*, 2012 WL 4321739, at *3. This amendment is significant to Plaintiffs' claims on the motion to replead since the Court has already dismissed those claims and Plaintiffs risk a second dismissal with prejudice. Thus, the amendment is an important one. *Id.* This factors weighs in Plaintiffs' favor.

The third factor considers the potential prejudice in allowing the amendment. *Id.* at *4. Plaintiffs argue that Defendants "can claim no prejudice, especially considering that this matter was stayed with over two months left in fact discovery" and trial is set for October 24, 2016. Resp. Mot. Dismiss 8, ECF No. 177. Defendants counter that they have completed a litany of litigation activities defending against Plaintiffs' public-information claims including, "investigated plaintiffs' public-information allegations; engaged in written discovery and meet-and-confers; deposed the names plaintiffs; fully briefed one motion to dismiss (and have now completed a second) . . . ." Reply 3, ECF No. 179.

Although Defendants arguments of past preparations are reasonable, they have not shown that they will suffer future prejudices, especially considering that they have already provided substantive briefing to combat Plaintiffs' new claims in their Second Motion to Dismiss. Thus, any prejudice against Defendants is cured by this fact. *Hoffman*, 2012 WL 4321739, at *4 (finding that the defendants would not suffer prejudice from untimely amended complaint arguments because the court could "cure [them] by reopening [] discovery for certain limited purposes and permitting defendants to file a second summary judgment motion."). This factor weighs in favor of Plaintiffs' good cause argument.

The fourth factor considers the availability of a continuance to cure any prejudice. *Hoffman*, 2012 WL 4321739, at *4. Trial is currently set for October 24, 2016. If necessary, the

Court could continue the trial to cure any prejudice. But as previously stated, because the parties have fully briefed the relevant issues at the motion to dismiss stage, such a continuance is not warranted. Thus, this factor weighs in favor of Plaintiffs.

Considering the four factors "holistically," the Court finds that Plaintiffs have met the good cause standard for admitting the new arguments because even though the facts indicate that Plaintiffs may have been aware of the facts sufficient to allege the inside information claims before the deadline, considering the *Hoffman* factors here, Plaintiffs should be granted leave to amend under Rule 16(b)(4) 16(b)(4).

The Court also finds that the Rule 15(a) standard for leave to amend is met. *See S&W Enters.*, 315 F.3d at 536. Although granting leave to amend "is by no means automatic," the Court may consider factors such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudices to the opposing party, and futility of amendment. *Hoffman*, 2012 WL 4321739, at *4 (citing *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) (citing cases). Defendants do not address whether Rule 15(a) applies and Plaintiffs cite *Neopost*, 292 F.R.D. at 377 for support that where "there is insufficient evidence of delay, dilatory conduct, ineffective previous amendments, prejudice, or the amendments' futility for the Court to deny Plaintiff's Motion under Rule 15(a)," it should be freely given. Resp. 2d Mot. Dismiss 8 n.16, ECF No. 177 (quoting *Neopost*, 292 F.R.D. at 377. The Court agrees, and finding no evidence of such actions by Plaintiffs here, the Court finds that Rule 15(a) is satisfied.

Accordingly, the Court **DENIES** Defendants' Motion to Dismiss on this issue and finds good cause exists to consider Plaintiffs' claim based on inside information. The Court now addresses the remaining claims in Defendants' Motion to Dismiss.

B. Plaintiffs' Breach of Prudence Claims

At the outset, Plaintiffs argue that a special circumstance existed pursuant to *Dudenhoeffer*, for the following reasons: (1) Defendants withheld material information from the market; (2) RadioShack itself believes it stock to have no value; (3) derivative and equity markets predicted RadioShack would default, thus making the Company stock price unreliable; (4) RadioShack stock suffered from a heavy debt load; and (5) Defendants failed to properly investigate the continued prudence of RadioShack stock and or employ a reasoned decisionmaking process in evaluating the Company stock. 2d Am. Compl. 73–92, ECF No. 167.

According to Plaintiffs, the crux of their new argument, however, is that "withholding the truth regarding RadioShack's turnaround plans deprived the market of accurately assessing the value of RadioShack Stock." Resp. 2d Mot. Dismiss 9, ECF No. 177. Plaintiffs continue to assert that *Dudenhoeffer* does not specifically state what a special circumstance is, and that by withholding such information, the Company's stock price was skewed and the market was affected. *Id*. at 12–15.

Defendants state that Plaintiffs' Second Amended Complaint fails to cure the deficiencies that led the Court to dismiss their claims the first time because they do not allege special circumstances existed based on material public information. 2d Mot. Dismiss 3, ECF No. 171. Defendants argue that Plaintiffs' inside-information claims should be dismissed because "[a]side from reiterating the array of public information upon which their claims are based . . . [Plaintiffs

are] injecting allegations that certain unnamed members of the RadioShack Board of Directors . . . , but not *any* members of the fiduciary committees with direct control over the Plans' investments options, had material, *nonpublic* information." *Id.* Likewise Defendants contend that Plaintiffs "implausibly allege that a few cautiously optimistic, non-fiduciary statements by RadioShack executives somehow "buoy[ed]' RadioShack's stock price in the months before RadioShack's ultimate bankruptcy." *Id.*

Defendants also allege that this new inside information theory fails to state a viable claim under *Dudenhoeffer* that Defendants should have taken some action: "(1) that would have been 'consistent with the securities laws,' and (2) that a prudent fiduciary 'could have concluded' would 'do more harm than good' to [Company stock] participants." 2d Mot. Dismiss 4, ECF No. 171 (citing *Amgen Inc. v. Harris*, 136 S. Ct. 758, 759 (2016); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2472–73 (2014)).

Plaintiffs' allegations appear to conflate the analysis required of the separate legal standards to allege viable claims based on inside information and claims based on public knowledge. As stated in *Dudenhoeffer*, there are two specific standards required for alleging imprudence claims, and such claims depend on whether the breach alleged is based on public information or inside information. *Dudenhoeffer*, 134 S. Ct. at 2471–72. Thus, the Court addresses these issues separately.

1. Breach of Prudence Claims Based on Public Information

The Court considers Plaintiffs' prudence claims based on public information to show that a special circumstance existed. Specifically, Plaintiffs argue that: (1) the derivative and equity markets predicted RadioShack would default and such information made the Company stock price

unreliable; (2) RadioShack stock suffered from a "crushing" debt load; and (3) Defendants failed to properly investigate the continued prudence of RadioShack stock and or employ a reasoned decision-making process in evaluating the Company stock. Am. Compl. 87–92, ECF No. 167. Defendants argue that Plaintiffs' renewed claims have had "no impact on the reliability of RadioShack's stock price and thus are not 'special' under *Dudenhoeffer*." Reply 6, ECF No. 179.

For the reasons articulated in the Court's previous January 25, 2016 Order dismissing Plaintiffs' claims based on the public information, here again, Plaintiffs fail to state a plausible claim because Plaintiffs' complaint does not allege a special circumstance which affected the reliability of RadioShack's market price as required by *Dudenhoeffer*. Order 8, January 25, 2016, ECF No. 153. As stated in that Order, "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over-or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." *Id.* at 12 (citing *Dudenhoeffer*, 134 S. Ct. at 2471). Although *Dudenhoeffer* does not give examples as to what a special circumstance entails, this Court previously cited a myriad of district court cases which provide examples of special circumstances. *Id.* at 13 ("[V]arious courts have found special circumstances to be akin to accounting irregularities, misappropriations of insider information, or another action which affects the market's reliability of a stock's market price.") (citing *In re Citigroup ERISA Litig.*, 2015 WL 4071893, at *3 (S.D.N.Y. 2015); *In re Lehman Brothers Sec. & ERISA Litig.*, 2015 WL 4139978, at *8 (S.D.N.Y. 2015); *Smith v. Delta Air Lines, Inc.*, 619 F. App'x. 874, 876 (11th Cir. 2015); *In re UBS ERISA Litig.*, No. 08-CV-6696 RJS, 2014 WL 4812387, at *8 n.11 (S.D.N.Y. 2014), *aff'd sub nom.*, *Taveras v. UBS AG*, 612 F. App'x 27 (2d Cir. 2015); *In re BP P.L.C. Sec. Litig.*, No. 10-MD-2185, 2015 WL 1781727, at *10

(S.D. Tex. Mar. 4, 2015), *overruled on other grounds by Whitley v. BP, P.L.C.*, No. 15-20282, 2016 WL 5387678, at *4 (5th Cir. Sept. 26, 2016) ("[T]he [*In re BP* plaintiffs] do not specifically allege, for each proposed alternative, that a *prudent fiduciary* could not have concluded that the alternative would do more harm than good, nor do they offer facts that would support such an allegation.").

This Court cited other cases which noted that a special circumstance may be shown by alleging other instances which would render reliance on the market price imprudent such as "fraud, improper accounting, illegal conduct or other actions" that would cause a company's stock to trade at an inflated price. *Id.* at 14 (quoting *Smith*, 619 F. App'x at 876 (11th Cir. 2015)).

Here, Plaintiffs' Second Amended Complaint fails to allege the type of instances that would be considered a special circumstance. As to Plaintiffs' first argument that the derivative and equity markets predicted RadioShack would default and such information made the Company stock price unreliable, Plaintiffs make no viable allegations in their complaint that accounting irregularities, fraud, improper accounting, illegal conduct or other actions affected the reliability of a stock's market price in the bond market. *In re Citigroup*, 2015 WL 4071893, at *3; *In re Lehman Brothers Sec. & ERISA Litig.*, 2015 WL 4139978, at *8. Instead Plaintiffs simply state that the "5-year credit default swap transactions spiked, reflecting the bond market's perception that RadioShack had an extremely high probability of defaulting" and "its stock price would collapse." Resp. 2d Mot. Dismiss 16, ECF No. 177. As previously stated, the fact that a market predicted the Company's decline is not a special circumstance. Order, January 25, 2016, ECF No. 153. Thus, Plaintiffs' claim that a special circumstance existed in the bond market fails.

Plaintiffs' second argument appears to recast Plaintiffs' excessive risk argument from their First Amended Complaint (ECF No. 66), in which Plaintiffs argued RadioShack stock suffered from a heavy debt load and was excessively risky. *Compare* Am. Compl. ¶¶ ECF No. 66 *with* 2d Am. Compl. ¶¶ 311–13, ECF No. 167. Plaintiffs do, however, make an additional argument in their Response (ECF No. 177) that the Company's debt load could be a special circumstance because "large amounts of debt can make a stock imprudent." Resp. 2d Mot. Dismiss 16 (citing *Dalton v. Greatbanc Trust Co.*, No. 15-cv-3053, 2015 WL 5821772, at * 3 (N.D. Ill. 2015). Plaintiffs' reliance on *Dalton* is misplaced because *Dalton* simply makes a statement in passing from *Neil v. Greatbanc Trust Company*, 677 F. Supp. 3d 1010, 1018 (N.D. Ill. 2009). *Dalton* stated that,"[t]he key part of that holding was a special circumstance, the great amount of debt [Tribune] took on in its ESOP deal, a fact well-pleaded in the complaint." *Dalton*, 2015 WL 5821772, at * 3. In analyzing *Neil*, it is clear that the facts are not analogous to Plaintiffs' case because the company at issue in *Neil* was troubled by a sudden, ill-fated deal which stacked the company with debt and lead to its demise and the evisceration of the ESOP plan. 677 F. Supp. 3d at 1018. RadioShack did not suffer such a feat, thus, the Court does not rely on Plaintiffs' argument in this regard.

Plaintiffs' third argument that Defendants failed to properly investigate the continued prudence of RadioShack stock also fails to allege a special circumstance. Plaintiffs improperly conflate its breach of prudence claims with its duty to monitor claims, which this Court previously dismissed. Order 8–9, January 25, 2016, ECF No. 153. The Court stated that "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones" and "[t]his continuing duty [to monitor investments] exists separate and apart from the [fiduciaries'] duty to

exercise prudence in selecting investments at the outset." *Id.* at 11 (quoting *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015)). This Court also stated that "the scope of that duty of responsibility is unclear" as it pertains to the duty to continually monitor investments. *Id.*

Furthermore, the parties have not cited, and the Court has not found, any case law to support Plaintiffs' characterization of the duty to monitor as a special circumstance in a breach of prudence claim based on public information. Even assuming *arguendo* that the Court could consider this claim, Plaintiffs still fail to allege how that incident had an impact on the "reliability of the market price." Thus, this claim also fails.[3]

Accordingly, the Court finds that Defendants' motion to dismiss Plaintiffs' breach of prudence claims based on public information should be and is hereby **GRANTED.**

2. Breach of Prudence Claim Based on Inside Information

Plaintiffs' remaining breach of prudence claims are based on material inside information. Specifically, they state that Defendants withheld material information from the market and made misleading statements of its unrealistic turn-around abilities even though Defendants believed its RadioShack stock had no value. Plaintiffs allege that this affected RadioShack's stock price. 2d Am. Compl. 73–87, ECF No. 167; Resp. Mot. Dismiss 12–15, ECF No. 177. Plaintiffs also allege that Defendants could have taken alternative prudent actions such as freezing contributions to the Company Stock Fund or providing full disclosure of material non-public information regarding the Company. 2d Am. Compl. 73–87, ECF No. 167. Plaintiffs contend "none of these steps (a)

[3] The remainder of Plaintiffs' arguments regarding their claims is the same as those presented in Plaintiffs' previous complaint. *Compare* Am. Compl. 97–99, 103–10, ECF No. 66 *with* 2d Am. Compl. 104–17, ECF No. 167. The Court dismisses them for the same reasons articulated in its previous January 25, 2016 Order. Order 19–20, ECF No. 153.

would have violated securities laws or any other laws, or (b) would not have been more likely to harm the Company Stock Fund than to help it," pursuant to the Supreme Court's instructions on inside information in *Dudenhoeffer*. *Id.* at 100; Resp. 2d Mot. Dismiss 18–23, ECF No. 177.

Defendants address both arguments. They argue that none of the statements made by Defendant Magnacca, the CEO during the Company's attempted turn around, were false or material. Mem. Supp. Mot. Dismiss 13, ECF No. 172. According to Defendants, such statements are "corporate optimism" or "puffery," both of which are allowed pursuant to securities laws. *Id.* Defendants also characterize the statements at issue as "generalized, positive statements about the company's competitive strengths, experienced management, and future prospects[,]" which are consistent with the securities laws. *Id.*

In regards to Plaintiffs' claims that Defendants could have taken alternative actions based on inside information consistent with the Federal Securities laws, Defendants argue that no such alternative measures were at their disposal because they would have run afoul of the federal securities laws based on insider trading and corporate disclosure requirements. Mem. Supp. Mot. Dismiss 18–19, ECF No. 172. Furthermore, Defendants argue, Plaintiffs have not plausibly alleged that "a prudent fiduciary in the defendant's position could not have concluded that stopping purchases . . . or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and concomitant drop in the value of the stock already held in the fund." *Id.* at 20 (quoting *Amgen*, 136 S. Ct. at 759–60; *Dudenhoeffer*, 134 S. Ct. at 2473). The Court addresses each issue in turn.

a. RadioShack Defendants' Public Statements

According to Plaintiffs, "[t]he Company and certain of its officers, in particular Defendant Magnacca, made several statements during the Class Period indicating that a turnaround plan for RadioShack would work" when the Director Defendants had no reason to believe that the plan would work. 2d Am. Compl. 74 , ECF No. 167. Plaintiffs allege that Defendants "made these bald statements anyway and/or failed to correct them- in an attempt to buoy the Company Stock price for as long as possible." *Id.* at 73. Plaintiffs also take particular notice of other statements they claim show that Defendants possessed material inside information which contradicted these optimistic statements, especially when RadioShack hired Magnacca as the new CEO. 2d Am. Compl. 74, ECF No. 167.

Plaintiffs stated that these statements were made as early as 2011 on certain earning conference calls and in Security Exchange Commission filings. *Id.* In one instance, a RadioShack News Release dated February 21, 2012, Plaintiffs contend that Defendant Gooch stated, "[w]e have a strong balance sheet, are making progress in our mobility business, and expect to advance our business improvement initiatives in 2012." *Id.* Plaintiffs claim that other statements made on a conference call on April 23, 2013, where Magnacca stated, "[I] have been assessing the Business from a number of angles and identifying gaps and opportunities, both short-term and, very importantly, where I want to move this Company in the long term . . . . I have distilled several key learnings that have led me to focus on an initial set of priorities to begin driving our turnaround—building the right management team, reinvigorating the store experience, and jump starting our powerful brand." *Id*. at 73 (citing *RSH-Q1 2013 RadioShack Corporation Earnings Conference Call*, Apr. 23, 2013). On another occasion, after the Company reported a net loss of $53.1 million ($0.53 per share) in the second quarter of 2013, Plaintiffs allege that Magnacca made another

misleading statement by saying: "Our profitability was not where we would have liked . . . . Looking ahead, we expect the turnaround to take several quarters, and during that time our results may vary from quarter to quarter as we make strategic changes to improve our long-term financial performance." 2d Am. Compl. 75, ECF No. 167 (quoting RadioShack News Release, July 23, 2013). Plaintiffs continue to cite numerous instances between 2012 and 2014 in which various RadioShack Defendants made statements that Plaintiffs allege were "false and misleading" because "despite years of consistent and predictable losses," the statements focused on the Company successfully executing a turnaround to save the fledging business. *Id.* at 74–80.

Defendants counter that "[t]ypically, statements of corporate optimism (or 'puffery') are not actionable as a matter of law, as 'generalized, positive statements about the company's competitive strengths, experienced management, and future prospects are . . . immaterial." Mem. Supp. Mot. Dismiss 13, ECF No. 172.

Although not explicitly stated, by citing amicus briefs in the appeal of *Whitley v. BP, P.L.C.*, No. 10-CV-4214, (S.D. Tex.), Plaintiffs seem to allege that Defendants' statements were materially misleading and required Defendants to make corrective disclosures. *See* Resp. 2d Mot. Dismiss 18–20, ECF No. 177 ("The SEC confirms that an ESOP fiduciary who is aware of the employer's fraud would not violate the securities laws by making a corrective disclosure to plan participants and the public. . . . The SEC observes that the 'securities law duty to make a corrective disclosure arises at the time that previous statements would be materially misleading absent correction.'").[4] Plaintiffs conflate the standard necessary to prove that Defendants had alternative

[4] Plaintiffs also seem to allege that such public statements had an effect on the reliability of the stock price since it was public information. ("Defendants' contention that facts alleged in the Complaint show that the market did not fall for Defendants' alleged deception, i.e., the market was fully aware of the risks of the

actions to act consistent with Federal Securities laws under *Dudenhoeffer* with the standard to allege material misrepresentations which required corrective statements and disclosures pursuant to Federal Securities laws.[5]

As previously stated, to state a claim for breach of the duty of prudence on the basis of inside information, "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Dudenhoeffer*, 134 S. Ct. at 2472; *Amgen*, 136 S. Ct. at 759. Plaintiffs have failed to meet this standard in their allegations regarding Defendants' statements concerning the Company's performance. Furthermore, the Fifth Circuit has previously stated that statements like those at issue here, are not actionable and are allowed by the federal securities laws. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003) ("The generalized, positive statements about the company's competitive strengths, experienced management, and future prospects are not actionable because they are immaterial. . . . [A] 'company's expressions of confidence in its management or business are not actionable . . . ."). The Fifth Circuit characterized company statements about its projections and positive business considerations to the public as "obviously immaterial puffery." *Id.* at 870 (quoting *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir.

turnaround plan, fails as well. Where corrective disclosures occur cumulatively, the stock price can still remain overvalued even as it is declining due to the piecemeal disclosure . . . because the whole truth does not emerge until the disclosure are complete.") Resp. 14, ECF No. 177. Plaintiffs' allegations, however, stop short of characterizing Defendants' public statements and disclosures as a special circumstance based on public information.

[5]"To state a cause of action under § 10(b) and Rule 10b–5, a plaintiff must allege a (1) misstatement or omission (2) of material fact (3) in connection with the purchase or sale of a security, which was made (4) with scienter, and upon which (5) plaintiff justifiably relied, (6) proximately causing injury to the plaintiff. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 865 (5th Cir. 2003) (quoting *Rubinstein v. Collins*, 20 F.3d 160, 166 (5th Cir. 1994)).

1993) ("Analysts and arbitragers rely on facts in determining the value of a security, not mere expressions of optimism of company spokesmen.")

Accordingly, the Court declines to extend Plaintiffs' interpretation of the Defendants' statements as a breach of prudence claim based on material inside information. Defendants' motion to dismiss is **GRANTED** as to this claim.

b. Inside Information and Alternative Actions Under Dudenhoeffer

As previously stated, Plaintiffs allege that Defendants could have taken alternative prudent actions such as freezing contributions to the Company Stock Fund or providing full disclosure of material non-public information regarding the Company, and "none of these steps (a) would have violated securities laws or any other laws, or (b) would not have been more likely to harm the Company Stock Fund than to help it," pursuant to the Supreme Court's instruction on inside information in *Dudenhoeffer*. *Id.* at 100; Resp. Mot. Dismiss 18–23, ECF No. 177. Plaintiffs argue that Defendants could have "closed the Company Stock Fund itself to further contributions and directed that contributions be diverted from the Company Stock Fund into other (prudent) investment options based upon Participants' instructions or, if there were no such instructions, the Plans' default investment option." 2d Am. Compl. 121–22, ECF No. 167. Additionally, Plaintiffs argue that Defendants could have: (1) "sought guidance from the Department or Labor ("DOL") or SEC as what it should have done"; (2) "resigned as Plan fiduciaries to the extent they could not act loyally and prudently"; or (3) "retained outside experts to serve either as advisors or as independent fiduciaries specifically for the RadioShack Stock Fund." *Id.* at 101.

Defendants contend "the Supreme Court flatly refused any claim that ERISA required the Plan fiduciaries to *divest* the entire Stock Fund based on material, nonpublic information, [as

Plaintiffs argued it should have], because such insider trading would violate federal securities laws." Mem. Supp. Mot. Dismiss 18, ECF No. 172 (citing *Dudenhoeffer*, 134 S. Ct. at 2471). Defendants argue that since they already decided by July 2014 to freeze the Company Stock Fund by September 15, 2014, "the only alternative left for those Defendants who [P]laintiffs allege had inside information in mid-2014 to early 2015 would have been to *divest* the Plans remaining holdings based on inside information, something *Dudenhoeffer* forecloses." *Id.* at 18 n.15. Defendants further argue that "absent some disclosure to the market, freezing the Stock Fund to 'protect' Plan participants from an allegedly overvalued investment based upon insider information would give those participants an advantage over the rest of the market," and this would run afoul of "a primary objective of the securities laws [] to establish a 'level playing field' for all investors." *Id.* at 19 (citing *SEC Final Rule: Selective Disclosure and Insider Trading*, 17 C.F.R. §§ 240, 243, 249, Release Nos. 33–7881, 3443154, at *2 (Aug. 15, 2000); *SEC v. Talbot*, 530 F.3d 1085, 1097 (9th Cir. 2008)).

Defendants also contend that Federal Securities laws have "explicit and detailed limitations on the content and timing of public disclosures" and that "[i]mposing a duty for ERISA fiduciaries to make competing disclosures would conflict with the disclosure regime under securities laws and undermine the 'objectives of those laws'—exactly what *Dudenhoeffer* instructed lower courts to avoid." *Id*. at 19.

Defendants also claim that according to Defendants, "a prudent fiduciary in the defendant's position *could not have concluded* that stopping purchases . . . or publicly disclosing negative information *would do more harm than good to the fund* by causing a drop in the stock price and

concomitant drop in the value of the stock already held in the fund." *Id.* at 20 (quoting *Amgen*, 136 S. Ct. at 759–60).

Defendants argue that "Plaintiffs have not plausibly alleged that Defendants could have simultaneously disclosed the alleged inside information and then prevented Plan participants from investing any new money in the Company Stock Fund without triggering an immediate and significant stock-price decline." *Id.* Even if Plaintiffs had argued as much, Defendants assert, "[P]laintiffs have not even plausibly alleged any Defendant actually *possessed* material non-public information" which would trigger *Dudenhoeffer*. *Id.* at 22; Reply 7, ECF No. 179 ("[Plaintiffs] continue[] to use broad, generic allegations that do not specify *what* information was withheld, *who* had that information, *when* that person acquired it, or, most importantly, *how* that information would have altered the market's overall assessment of RadioShack's value."); *Id.* at 8, ECF No. 179 ("Plaintiffs have not plausibly alleged that any of the amorphous 'inside information' upon which they rely was material or proximately caused any economic loss.").

The Court analyzes Defendants' claim that Plaintiffs have not met their burden pursuant to *Dudenhoeffer*.[6] Besides the public statements Plaintiffs allege that Defendants made concerning the future prospects of the Company, Plaintiffs never allege that Defendants withheld inside information which would trigger the *Dudenhoeffer* analysis. *In re BP P.L.C. Sec. Litig.*, 2015 WL 1781727, at *10 ("First, Plaintiffs must plausibly allege that Defendants had knowledge of the relevant insider information which would indicate that the stock price is distorted. Second,

[6] Having previously dismissed Plaintiffs' duty of loyalty in the previous Order, and finding no case law that supports Plaintiffs assertion that Defendants should have sought DOL or SEC guidance in this situation to satisfy the *Dudenhoeffer* standard, the Court addresses only whether Plaintiffs' complaint is based on inside information and whether Defendants should have closed contributions to the Company stock plan. *See* Order 19–20, ECF No. 153.

Plaintiffs must plausibly allege that Defendants had a viable, prudent alternative course of action available to them, as outlined by the Supreme Court in *Dudenhoeffer*.").[7] In *BP*, the district court analyzed allegations by Plaintiffs that that BP corporate individuals breached their duties of prudence and loyalty by allowing Plan participants to invest in the BP stock fund, misrepresenting or omitting information relevant to participants' decisions to invest in BP's stock fund, and failing to monitor other fiduciaries who also breached their fiduciary duties after the Deepwater Horizon explosion and subsequent oil spill. *Id.* at * 1. The court reconsidered Plaintiffs' amended claims in light of the Supreme Court's ruling in *Dudenhoeffer*, and analyzed Plaintiffs' breach of prudence claims according to the new Supreme Court standard. *Id.* at * 2.

Plaintiffs alleged that four BP America executives, Anthony Hayward,[8] Lamar McKay,[9] Neil Shaw,[10] and James Dupree,[11] knew that contractor sites had not implemented BP's new Operating Management System ("OMS") and Baker Panel recommendations—which were supposed to correct many of BP's systematic safety issues—despite assurances to the public that the company had changed its safety policies. *Id. at * 11.* The court assessed each executive's case and determined whether they had insider knowledge which put them on notice that the company had not installed the safety protocols in certain locations despite informing the public that it had.

[7] While the Fifth Circuit's recent decision in *Whitley* reversed the district court's finding that the BP plaintiffs sufficiently stated a plausible claim for inside information based on *Dudenhoeffer*, it did not alter the district court's finding that the stockholders plausibly alleged the defendants had inside information. *Id.* at * 1, 4.

[8] Anthony Hayward was the Group Chief Executive of BP p.l.c., where he served as the BP Group Operations Risk Committee ("GORC") Chairman. *Id.* at *11–12.

[9] Lamar McKay was Chairman and President of BP America. *Id.* at *12.

[10] Neil Shaw was the Senior Vice-President ("VP") and Strategic Performance Unit ("SPU") Leader in charge of the Gulf of Mexico and Chief Operating Officer of Developments in the executive office of Global Exploration. *Id. at* *12.

[11] James Dupree succeeded Shaw in the same position as Senior VP and SPU Leader of the Gulf of Mexico by November 2009. *Id.* at *13.

Only after this did the court discuss whether alternative options were available pursuant to *Dudenhoeffer*. *Id*. at 11—14.[12] [13] [14]

Here, however, the Court is not able to conduct such an inquiry because Plaintiffs have not proffered such insider information. The actions Plaintiffs allege Defendants should have taken as alternatives cannot survive the motion to dismiss stage without at least alleging that Defendants possessed such information. *In re BP P.L.C. Sec. Litig.*, 2015 WL 1781727, at *10. Thus, Plaintiffs claim fails.

Even assuming Plaintiffs were able to meet this burden, Plaintiffs overlook important considerations by the Supreme Court in *Dudenhoeffer*, namely, "the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements" and the Supreme Court's instruction that "lower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary . . . could not have concluded that stopping purchases—which the market might take as

[12] The court found Hayward had access to inside information. *Id.* at *12 ("He was aware that OMS was not in place on contractor-owned sites such as the Deepwater Horizon, and that implementation of OMS was not complete as of the date of the explosion . . . . Given that Mr. Hayward is simultaneously accused of violating the securities laws—which require materiality, scienter, and loss causation—he is adequately alleged to have had the type of insider information which would implicate the ERISA duty of prudence.").
[13] McKay "admitted that he was aware that OMS was not in place on contractor-owned sites such as Deepwater Horizon." *Id. at *12*. Plaintiffs also successfully alleged that Shaw had knowledge of the OMS public misrepresentations and other inside information. *Id*.
[14] Unlike the other executives, Plaintiffs made only ambiguous claims that Dupree possessed insider information. Thus the court did not allow Plaintiffs' breach of prudence claims against him but gave them leave to amend the claims. *Id. at * 13* ("The Court cannot discern, on the face of the CAC, whether Mr. Dupree is alleged to have been privy to insider information in the pre-explosion period, the post-explosion period, or both . . . . [T]o the extent Plaintiffs contend that Mr. Dupree knew or should have known that the public statements regarding BP's internal spill rate estimates were inaccurate, based upon his role on the post-explosion response team, they must include specific allegations to that effect in their amended pleading.").

a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." 134 S. Ct. at 2459; *Id. at* 2472 ("First, in deciding whether the complaint states a claim upon which relief can be granted, courts must bear in mind that the duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law. . . . Federal securities laws 'are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information.'") (internal citations omitted) (collecting cases).

Accordingly, because Plaintiffs fail to show that Defendants had internal information for which to base their claims, Defendants' motion to dismiss should be and is hereby **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is hereby **GRANTED in part and DENIED in part**. Defendant's Motion to Dismiss is **DENIED** as to allowing Plaintiffs leave to amend their complaint to include claims based on inside information. Defendants' Motion to Dismiss is **GRANTED** as to the remainder of the claims. Because the Court reaches this conclusion, Plaintiffs request for jury demand is **DENIED as moot**. Furthermore, because the Court dismisses Plaintiffs' claims for the second time, it is **FURTHER ORDRED** that Plaintiffs claims be **DISMISSED with prejudice.**

SO ORDERED on this **29th day** of **September, 2016**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE