UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MATTHEW T. ZILHAVER, Individually and On Behalf of All Others Similarly Situated, Plaintiff, --and-- SASCHA LINN, Intervenor-Plaintiff, vs. UNITEDHEALTH GROUP INC., L. ROBERT DAPPER, JAMES A. JOHNSON, WILLIAM G. SPEARS, MARY O. MUNDINGER, WILLIAM W. McGUIRE, and STEPHEN J. HEMSLEY, Defendants.	X : : X	06-CV-2237 (JMR/FLN)

Plaintiffs' Notice of Supplemental Authority

Plaintiffs Matthew Zilhaver and Sascha Linn ("Plaintiffs") respectfully submit this Notice of Supplemental Authority to call to the Court's attention, in connection with Defendants' pending dispositive motions, the decisions of the United States District Court for the Central District of California in *Alvidres v. Countrywide Financial Corp., CV 07-05810-RGK(CTx),* dated March 18, 2008 and March 17, 2008, respectively. The March 18, 2008 decision (Exhibit A hereto) denies the motion to dismiss brought by Countrywide Financial Corp., and is relevant to the pending motions here in its discussion of the so-called Moench

[*Moench v. Robertson,* 62 F. 3rd 553 (3rd Cir. 1995)] presumption and the duty to provide information under ERISA. The decision denying the motion to dismiss brought by Countrywide's Directors dated March 17, 2008 (Exhibit B hereto) is relevant to the duties of corporate directors under ERISA as to disclosure and the monitoring of their appointees.

Accordingly, Plaintiffs ask the Court to consider in connection with Defendants' dispositive motions the two rulings in the *Countrywide ERISA* case which are annexed hereto as A and B, respectively.

Dated: March 19, 2008

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Exhibit A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-05810-RGK (CTx)	Date	March 18, 2008
Title	VINCENT ALVIDRES, et al. v. COUNTRYWIDE FINANCIAL CORP, et al.		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS)** DEFENDANT COUNTRYWIDE FINANCIAL CORPORATION'S MOTION TO DISMISS (DE 66)

I. FACTUAL BACKGROUND

Plaintiff Vincent Alvidres brought this proposed class action lawsuit against Countrywide Financial Corporation ("Countrywide") and individual defendants under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. The Complaint alleges that Defendants breached various fiduciary duties owed to Plan participants under ERISA by imprudently allowing the investment of the Plan's assets in Countrywide stock. Plaintiff alleges that such investment was unduly risky given the company's involvement in marketing and extending subprime mortgage loans on a "low documentation" basis.

Plaintiff's lawsuit asserts five causes of action under ERISA: (1) Failure to Prudently and Loyally Manage the Plan and Assets of the Plan; (2) Failure to Monitor Fiduciaries; (3) Failure to Provide Complete and Accurate Information to the Plan's Participants and Beneficiaries; (4) Co-fiduciary Liability; (5) Knowing Participation in a Breach of Fiduciary Duty.

Presently before the Court is a Motion to Dismiss by Countrywide. For the following reasons, the Court denies Countrywide's motion.

II. JUDICIAL STANDARD

In deciding a 12(b)(6) motion, the court must assume the plaintiff's allegations to be true and construe the complaint in the light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981). Therefore, a motion to dismiss pursuant to Fed. Rule Civ. Proc. 12(b)(6) will not be granted unless "it is clear that no relief could be granted under any set of facts that could be proved *consistent with the allegations*." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (emphasis added).

However, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal statements set forth in the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Also, the court will not assume that the plaintiff can prove facts which have not been alleged in the complaint. *Associated Gen. Contractors of Cal,. Inc. v. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

III. DISCUSSION

Countrywide contends that Plaintiff's Complaint fails to state a claim for: (1) Breach of a Duty of Prudence and (2) Breach of a Duty of Disclosure. Countrywide further asserts that, because those claims fail, the remaining derivative claims must also fail. The Court disagrees.

A. Breach of a Duty of Prudence

Countrywide attacks Plaintiff's first cause of action on two grounds. First, because the Plan was an Eligible Individual Account Plan ("EIAP"), Countrywide had no duty of diversification or prudence with respect to the investments in employer stock. Second, the Complaint fails to rebut the *Moench* presumption, wherein investments in employer stock are presumed to be prudent.

1. *Duty of Diversification*

As to its first point, Countrywide correctly states that Congress expressly exempts fiduciaries of EIAPs from any duty to diversify with respect to investments in employer stock. *See* 29 U.S.C. § 1104(a)(2); *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097-98 (9th Cir. 2004). Congress further exempts such fiduciaries from any duty of prudence, *but only to the extent it requires diversification*. *Id.* (emphasis added).

In his Complaint, Plaintiff alleges that Countrywide breached its duty of prudence by, among other things, (1) not exercising its discretion to suspend both offering employer stock as a Plan investment and matching in the stock (SAC, ¶ 218); (2) failing to have in place a regular, systematic procedure for evaluating the prudence of investment in employer stock (SAC, ¶ 219); (3) failing to conduct an appropriate investigation of the merits of continued investment in the stock (SAC, ¶ 220); (4) failing to engage independent advisors who could make independent judgments concerning the Plan's investments (SAC, ¶ 227); and (5) failing to take other steps necessary to ensure that the participants' interests were loyally and prudently served (SAC, ¶ 227).

The allegations stated above clearly indicate that Plaintiff's claim is based on allegations, such as mismanagement, that extend well beyond any stated duty of Countrywide to diversify its Plan investments. Therefore, the Court finds this argument unavailing.

2. Moench *Presumption*

In *Moench v. Robertson*, the Third Circuit held that "an employee stock ownership plan fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with [ERISA]." 62 F.3d 553, 571 (3d Cir. 1995). Countrywide argues that Plaintiff has failed to plead enough facts to overcome this presumption that it complied with its duties. However, at this stage of litigation, the Court need not conduct such analysis. Assuming the *Moench* presumption applies in this case, the determination of whether Plaintiff can overcome this presumption is properly made at the evidentiary stage of litigation, not at the pleading stage. Therefore, the Court also finds this argument unavailing.

B. Breach of a Duty of Disclosure

Countrywide attacks Plaintiff's third cause of action on the following grounds: (1) Plaintiff fails to plead this claim with the particularity requisite to a fraud claim; (2) Plaintiff fails to identify any statements made in a fiduciary capacity; and (3) ERISA does not create a duty to provide information about an employer's financial condition.

1. *Pleading with Particularity*

Countrywide argues that, in ERISA cases, claims alleging failure to disclose adequate information constitute fraud claims, to which Fed. R. Civ. P. 9(b) ("Rule 9") applies. Countrywide contends that Plaintiff fails to satisfy the specificity and particularity requirements of Rule 9. The Court disagrees.

In the SAC, Plaintiff alleges,

> Defendants failed to provide the Plan's participants with complete and accurate information regarding Countrywide's serious mismanagement, improper business practices and potentially unlawful conduct, including, among other practices: (a) marketing and extending subprime mortgage loans . . . without adequate consideration of the borrower's ability ro repay . . .;(b) intentionally marking subprime loans with high risk of default . . .; (f) operating with inadequate liquidity in relation to the volatility of Countrywide's business lines and assets . . . (i) insider self-dealing through improper insider sales of Countrywide stock.

(SAC, ¶ 182.) The complaint further states that even through Defendant knew or should have known of these facts, Defendant intentionally failed to inform the Plan participants, or take any meaningful action to protect them. (SAC, ¶¶177-183.)

Such allegations clearly satisfy the pleading standard set forth in Rule 9, as they allege specific facts showing that Countrywide knew material misstatements and omissions were being made.

2. *Statements Made in a Fiduciary Capacity*

Countrywide further argues that, even if Plaintiff's complaint satisfies the Rule 9 requirement, the claim still fails because Countrywide did not make the allegedly false and misleading statements in a fiduciary capacity. Again, the Court disagrees.

As Countrywide correctly states, in claiming breach of fiduciary duty, the threshold question is whether the person taking the action subject to complaint did so while acting as a fiduciary. *See Pegram v. Herdich*, 530 U.S. 211, 225-26 (2000). According to the SAC, in 2006 and 2007, Countrywide made a series of misleading statements regarding the financial circumstances of the company. (SAC, ¶¶ 124-139.) Such statements included misleading statements regarding the company's strong operational results as compared to the slowing mortgage loan production market. *Id*. Countrywide made these statements in the form of press releases, embodied in SEC filings.

Countrywide cites to a Northern District of California opinion, and asserts that general statements made in press releases are not acts of plan administration, and cannot give rise to ERISA liability. *See In re Calpine Corp, ERISA Litig.*, 2005 U.S. Dist.LEXIS 34452 *26 (N.D. Cal. Dec. 5, 2005). However, in his complaint, Plaintiff clearly alleges that the Plan's Summary Plan Description "incorporated by reference Countrywide's SEC filings, thus converting such materials into fiduciary

communications." (SAC, ¶ 59.) As held by the U.S. Supreme Court, ERISA liability may be implicated if the defendant intentionally connects its statements about the company's financial health to statements it makes about the future of plan benefits. *See Varity v. Howe*, 516 U.S. 489 (1996). As such, Plaintiff's allegations are sufficient to survive attack at the pleading stage.

3. *Duty to Provide Information*

Finally, Countrywide argues that, contrary to Plaintiff's suggestion, ERISA does not impose a duty to provide additional information about its financial condition to Plan participants. The Court remains unconvinced by Countrywide's stretch of an argument. Plaintiff does not simply allege that Countrywide should have provided additional information expanding on what it had already provided. In fact, Plaintiff alleges that Countrywide actively omitted material information and made material misrepresentations as to its financial status and outlook.

It is well-established that under ERISA, fiduciaries have a duty to not actively misinform. *See Wayne v. Pacific Bell*, 238 F. 3d 1048, 1055 (9th Cir. 2001). It is also well-established that fiduciaries have an affirmative duty to provide participants with information material to the participants' circumstances, even when the participant has not specifically asked for the information. *See Baker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (citing *Bixler v. Central Pa. Teamsters Health & Welfare Fund,* 12 F.3d 1292, 1300 (3d Cir. 1993)). As discussed above, Plaintiff has adequately pleaded facts to state a claim for the breach of those duties.

C. Remaining Claims

Countrywide argues that, because the first and third claims do not adequately state a claim for relief, the Court should dismiss the remaining derivative claims. Based on the Court's findings above, Countrywide's attack on the remaining claims fail.

IV. CONCLUSION

In light of the foregoing, the Court **denies** Countrywide's Motion to Dismiss.

IT IS SO ORDERED.

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Exhibit B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-05810-RGK (CTx)	Date	March 17, 2008
Title	VINCENT ALVIDRES, et al. v. COUNTRYWIDE FINANCIAL CORP, et al.		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS)** DEFENDANTS BECKY BAILEY, ET AL's MOTION TO DISMISS (DE 66)

I. FACTUAL BACKGROUND

Plaintiff Vincent Alvidres brought this proposed class action lawsuit against Countrywide Financial Corporation ("Countrywide") and individual defendants under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. The Complaint alleges that Defendants breached various fiduciary duties owed to Plan participants under ERISA by imprudently allowing the investment of the Plan's assets in Countrywide stock. Plaintiff alleges that such investment was unduly risky given the company's involvement in marketing and extending subprime mortgage loans on a "low documentation" basis.

Plaintiff's lawsuit asserts five causes of action under ERISA: (1) Failure to Prudently and Loyally Manage the Plan and Assets of the Plan; (2) Failure to Monitor Fiduciaries; (3) Failure to Provide Complete and Accurate Information to the Plan's Participants and Beneficiaries; (4) Co-fiduciary Liability; (5) Knowing Participation in a Breach of Fiduciary Duty.

Plaintiff's lawsuit includes the following directors: (1) Director Defendants who never served on the Compensation Committee – Messrs. Enis, Jurland, Melone, and Mozilo (the "Non-Compensation Committee Directors"); (2) Director Defendants who served (at some time) on the Compensation Committee – Messrs. Cisneros, Cunningham, Donato, Heller, Parry, Robertson, Russell, and Snyder (the "Compensation Committee Directors"); and (3) current and former members of the Administrative Committee for Employee Benefits or Investment Committee for Employee Benefits – Ms. Bailey, Mr. Couch, Mr. Gates, Ms. Goren, Mr. Gee, Mr. Kripalani, Mr. Quon, Mr. Saletta, Ms. Sandefur, Mr. Scrivener, and Mr. Speakes (the "Plan Committee Defendants")(collectively, the "Individual Defendants").

Presently before the Court is a Motion to Dismiss by the Individual Defendants. For the following reasons, the Court denies the Individual Defendants' motion.

II. JUDICIAL STANDARD

In deciding a 12(b)(6) motion, the court must assume the plaintiff's allegations to be true and construe the complaint in the light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981). Therefore, a motion to dismiss pursuant to Fed. Rule Civ. Proc. 12(b)(6) will not be granted unless "it is clear that no relief could be granted under any set of facts that could be proved *consistent with the allegations*." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (emphasis added).

However, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal statements set forth in the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Also, the court will not assume that the plaintiff can prove facts which have not been alleged in the complaint. *Associated Gen. Contractors of Cal,. Inc. v. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

The court's review of a 12(b)(6) must be limited to the contents of the complaint, but the court may also review additional materials which are properly submitted as part of the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). "A copy of a written instrument that is an exhibit to a pleading is a part of a pleading *for all purposes*." Fed. Rule Civ. Proc. 10(c) (emphasis added). Moreover, the court need not accept as true allegations that contradict documents that are attached as exhibits. *Sprewell*, 266 F.3d, at 988.

III. DISCUSSION

The Individual Defendants seek dismissal under 12(b)(6) on the grounds that they lacked a fiduciary role over the ERISA stocks in dispute. Defendants organize their argument by categories of defendant as follows: (1) non-Compensation Committee directors should be dismissed for failure to allege they exercised any discretionary control or authority over the Plan; (2) Compensation Committee members, tasked with appointing and monitoring members of the Plan Committees, should be dismissed for failure to allege breach of the duty to monitor; (3) Plan Committee defendants, tasked with managing Plan assets, should be dismissed absent any allegation suggesting they misled anyone or acted imprudently; (4) the individual defendants who ceased having responsibility before the drop in Countrywide's stock should be dismissed; and (5) the Complaint fails to allege facts supporting co-fiduciary liability.[1]

The Court denies Defendants' motion in its entirety. As to the Non-Compensation Committee Directors, the Complaint adequately alleges a duty to monitor Plan assets, albeit indirectly in the Board's role monitoring the Compensation Committee (which, in turn, monitors the Plan committee). Compl. ¶ 67 (citing Compensation Committee Charter, which requires the Compensation Committee to "make regular reports to the Board.")

As to the Compensation Committee members, the Complaint alleges that the Directors "failed to monitor their appointees, to evaluate their performance or to have any system in place for doing so . . . ." *Id.* ¶ 237. Moreover, the Complaint further alleges that the Monitoring Committee members had "actual knowledge of the facts that rendered Countrywide stock an imprudent retirement investment." *Id.* ¶ 260.

[1]Because the Court rejects Defendants' first four arguments, and therefore denies the Motion to Dismiss in its entirety, it need not reach the allegations of co-fiduciary liability.

These allegations are sufficient to overcome a Motion to Dismiss. *See, e.g.*, *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 477 (S.D.N.Y. 2005).

As to the Plan Defendants, the Complaint alleges, with adequate factual support, that the Plan Defendants knew or should have known about Countrywide's deteriorating financial condition, yet failed to investigate the merits of each investment. Compl. ¶ 166-75; 177-83 (describing why sub-prime investments were unduly risky, and how this risk should have become apparent upon adequate investigation). As such, Plaintiff's Complaint withstands the Plan Defendants' Motion to Dismiss. *See Donovan v. Mazzola*, 716 F.2d 1226, 1232 9th Circ. (1983)(recognizing that fiduciaries must employ the appropriate methods to investigate the merits of the investment).[2]

Finally, the Court rejects Defendants' argument that individuals whose fiduciary responsibilities ceased prior to the drop in Countrywide's stock should be dismissed for lack of causation. Here, Plaintiff alleges that these Defendants knew or should have known of the company's risky investments, yet failed to protect the Plan's assets. Whether the resulting harm occurred before or after these Defendants left their fiduciary positions is irrelevant. *See id.* at 1235-36 (holding fiduciaries liable for losses after their departure).

IV. CONCLUSION

For the reasons explained above, the Court **denies** the Individual Defendants' Motion to Dismiss.

IT IS SO ORDERED.

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[2]Because the Court finds sufficient allegations of a failure to investigate, it need not address whether Plaintiff's remaining allegations amount to "fraud," and therefore are subject to Federal Rule 9(b)'s heightened pleading requirements.