12/11/03

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AOL TIME WARNER INC.
SECURITIES & "ERISA" LITIGATION

MDL Docket No. 1500 (SWK)
02 Civ. 8853 (SWK)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED ERISA COMPLAINT

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Corporate defendants AOL Time Warner Inc.[1] ("Time Warner" or "the Company") and Time Warner Entertainment Company, L.P. ("TWE"); committee defendants AOL Time Warner Savings Plan Administrative Committee, AOL Time Warner Thrift Plan Administrative Committee, TWC Savings Plan Administrative Committee and AOL Time Warner Investment Committee; and individual defendants[2] (collectively, "Defendants") respectfully submit this reply memorandum of law in support of their motion to dismiss the Consolidated ERISA Complaint (the "Complaint").

Preliminary Statement

Defendants' opening brief demonstrates that plaintiffs' ERISA claims should be dismissed in their entirety because the Complaint fails adequately to allege a breach of fiduciary duty by any corporate, committee or individual defendant. In response, plaintiffs accuse Defendants of engaging in a "shell game" designed to "shuffle fiduciary responsibility between different entities so that in the end, nobody is responsible". (Opp. at 15, 42-43.[3]) This

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[1] On October 16, 2003, defendant AOL Time Warner Inc. changed its name to Time Warner Inc.

[2] The individual defendants are Daniel F. Akerson, James L. Barksdale, Christopher P. Bogart, Stephen F. Bollenbach, Richard J. Bressler, Glenn A. Britt, Ann L. Burr, Stephen M. Case, Frank J. Caufield, Pascal Desroches, Charles W. Ellis, Shelly D. Fischel, Miles R. Gilburne, Peter R. Haje, Thomas J. Harris, Carla A. Hills, Landel C. Hobbs, Derek Q. Johnson, J. Michael Kelly, John A. LaBarca, Gerald M. Levin, Reuben Mark, Carolyn K. McCandless, Michael A. Miles, Raymond G. Murphy, Kenneth J. Novack, Wayne H. Pace, Richard D. Parsons, Robert W. Pittman, Franklin D. Raines, Joseph A. Ripp, Thomas M. Rutledge, Robert E. Turner, Francis T. Vincent, Jr., Mark A. Wainger, Beth A. Wann and Frederick C. Yeager. Although the Complaint originally named Mackereth Ruckman, Andra D. Sanders and Paul D. Williams as defendants, those individuals have since been dismissed voluntarily from the case by Stipulation and Order dated November 17, 2003.

[3] "Opp." refers to plaintiffs' memorandum in opposition to Defendants' motion to dismiss.

accusation is both untrue[4] and disingenuous; it is plaintiffs who are playing a game by indiscriminately asserting generalized ERISA claims against all Defendants as if they were a single entity rather than 47 separate entities with distinct roles and obligations under three separate plans.

Plaintiffs' game consists of four principal tactics.

First, plaintiffs blatantly and repeatedly mischaracterize the relevant case law. They also rely upon precedent that plainly is inapposite.

Second, plaintiffs refuse to be bound by the allegations of their own Complaint. Defendants' opening brief identified numerous pleading deficiencies. Rather than acknowledge these deficiencies, plaintiffs attempt to cure them by alleging new theories of liability for the first time in their response brief. Not only are plaintiffs' attempts to amend the Complaint through a response brief procedurally improper, but they also highlight the insubstantiality of plaintiffs' Complaint -- here, a moving target against which Defendants are being asked to defend.

Third, in calling Defendants' clear showing that "nobody is responsible" a "shell game", plaintiffs implicitly assume that ERISA is an insurance policy against any drop in the value of plan assets. There is no basis for this assumption. Plaintiffs cite no case -- and Defendants could find no case -- which holds that each time the value of an ERISA plan declines someone must be held liable to plan participants. To the contrary, courts routinely dismiss

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[4] In fact, Defendants identified in their opening brief each Plan's fiduciaries and set forth at great length their respective duties under each Plan. (Br. at 6-10.) Plaintiffs simply ignore the fact that ERISA permits plans to allocate duties among plan fiduciaries and to limit each fiduciary's liability accordingly.

ERISA actions at the pleadings stage, even where plan participants allege damages based upon a decline in the value of plan assets.

Moreover, Defendants have not claimed -- and do not claim -- that "nobody is responsible" to Plan participants generally. (Indeed, Defendants' opening brief clearly sets forth the named fiduciaries under each Plan and the duties with which they are charged. (Br. at 6-10.)) Instead, Defendants argue (and establish) that the Complaint fails to identify any Defendant who has breached the particular fiduciary duty for which he, she or it is responsible. ERISA is a uniquely precise statute that imposes liability only upon fiduciaries who, while acting in the particular fiduciary capacity that has been allocated to them by the sponsor, fail to uphold their fiduciary duty. Defendants' shotgun approach -- charging all 47 Defendants with the same violations regardless of their fiduciary status or obligations -- thus ignores the most fundamental precepts of ERISA.

Fourth, plaintiffs selectively (and self-servingly) ignore the arguments set forth in Defendants' opening brief. For example, plaintiffs assert that the Complaint meets the pleading requirements of Federal Rule of Civil Procedure 8(a) because, among other things, "Defendants do not contend that they do not have notice of the claims against them". (Opp. at 12.) This is simply wrong. Defendants' opening brief includes three explicit references to the Complaint's failure to provide adequate notice of plaintiffs' claims. (See Br. at 2-3 ("The Complaint . . . makes generalized allegations against all defendants but fails to provide notice to each defendant of the conduct for which plaintiffs seek to hold them liable under ERISA."); id. at 26 ("Claim 2 should be dismissed because the Complaint's allegations are too generalized to put any Defendant on notice of how he or she might have been acting in a fiduciary capacity or in what way he or she purportedly breached any fiduciary duty."); id. at 28-29 ("Thus, the Complaint's

generalized allegations fail 'to put the various defendants on notice of the allegations against them' and should be dismissed." (quoting In re Providian Fin. Corp. ERISA Litig., No. C 01-05027, 2002 WL 31785044, at *1 (N.D. Cal. Nov. 14, 2002)).)[5]

Stated succinctly, it is plaintiffs -- not Defendants -- who are playing a game, and it is not one countenanced by ERISA. For this reason, and for the additional reasons set forth below, plaintiffs' arguments in response to Defendants' opening brief are without merit and should be disregarded by this Court.

Argument

I. EVEN UNDER THE LIBERAL PLEADING STANDARD OF RULE 8(a), COURTS ROUTINELY DISMISS ERISA ACTIONS AT THE MOTION TO DISMISS STAGE.

As a threshold matter, plaintiffs argue that ERISA actions cannot be dismissed at the pleadings stage, both because they are governed by the liberal pleading standard of Rule 8(a) (Opp. at 9-12), and because they involve issues of fact that are not appropriate for resolution on a motion to dismiss (id. at 15-16). Plaintiffs are mistaken. Courts routinely dismiss ERISA actions at the pleadings stage, even applying the Rule 8(a) standard, particularly where -- as here -- the Complaint fails to provide a defendant with "'fair notice'" of the claims asserted against it. See, e.g., In re Providian, 2002 WL 31785044, at *1 (ordering plaintiffs to file an amended complaint because they "have lumped the various classes of defendants into an undifferentiated mass and alleged that all of them violated all of the asserted fiduciary duties"); In re McKesson HBOC, Inc. ERISA Litig., No. C00-20030RMW, 2002 WL 31431588, at *3 (N.D. Cal. Sept. 30, 2002) (dismissing ERISA complaint that was "replete with overly general

[5] Plaintiffs' discussion of Rule 8(a) is also wrong on the law. (See infra Part I.)

allegations pursuant to which nearly all defendants are generally alleged to be liable for all breaches of fiduciary duty, all while failing to identify specific defendants who are liable for specific breaches of specific fiduciary duties.").[6]

II. TIME WARNER, TWE, BOGART AND BRESSLER ARE NOT FIDUCIARIES UNDER THE PLANS.

To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege that the defendant was (i) a fiduciary of an ERISA plan, (ii) who, while acting within that fiduciary capacity, (iii) engaged in conduct constituting a breach of the attendant fiduciary duty. See ERISA § 409; 29 U.S.C. § 1109; see also In re WorldCom, Inc., ERISA Litig., 263 F. Supp. 2d 745, 758-59 (S.D.N.Y. 2003). Persons or entities may become ERISA fiduciaries by being named as a fiduciary in the plan documents (a "named fiduciary"), or by exercising discretionary authority or actual control over certain plan management or administrative functions (a "de facto fiduciary"). ERISA § 3(21)(A); 29 U.S.C. § 1002(21)(A).

As set forth in Defendants' opening brief, plaintiffs have failed to establish that defendants Time Warner, TWE, Bogart or Bressler are named fiduciaries or de facto fiduciaries. (Br. at 14-16.) Therefore, the Complaint must be dismissed, as a matter of law, in its entirety with respect to these Defendants.

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[6] Plaintiffs argue, based on Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002), that "[c]onclusory allegations are sufficient" to state a claim for relief under Rule 8(a). (See Opp. at 9.) Plaintiffs are wrong. The Swierkiewicz Court only addressed the pleading standard for a Title VII complaint. It did not hold that under Rule 8(a) plaintiffs may survive dismissal through wholly conclusory allegations. See Twombly v. Bell Atl. Corp., No. 02 Civ. 10220, 2003 WL 22304824, at *5-*6 (S.D.N.Y. Oct. 8, 2003) (noting that Swierkiewicz "did not change the law of pleading").

A. Time Warner Is Not a Fiduciary.

The Complaint contains a single allegation which claims that Time Warner is a de facto plan fiduciary: "[Time Warner] itself controlled all the fiduciary functions of the Plans, except for those effectively delegated to the Trustee." (Compl. ¶ 92.)[7] The opening brief demonstrates that this allegation is legally insufficient to plead an ERISA claim against the Company. (Br. at 14-15.) Among other things, the allegation is too vague to satisfy the notice requirements of Rule 8(a) because it fails to assert even a single fiduciary act engaged in by Time Warner, or that Time Warner actually exercised control over the Plans' assets.

In response, plaintiffs do not even attempt to defend the sufficiency of the Complaint's sole allegation against Time Warner. Instead, plaintiffs set forth new allegations that purport to demonstrate Time Warner's status as a de facto plan fiduciary. (Opp. at 16.)[8] These new allegations fail as both a procedural and substantive matter.

As a procedural matter, plaintiffs' attempt to cure the Complaint's deficiencies by alleging new facts and theories in its response brief is improper: "[I]t is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss". Deep South Pepsi-Cola Bottling Co. v. Pepsico, Inc., No. 88 Civ. 6243, 1989 WL 48400, at *6 (S.D.N.Y. May 2, 1989); see also Lazaro v. Good Samaritan Hosp., 54 F. Supp. 2d 180, 184 (S.D.N.Y. 1999) (same). At minimum, plaintiffs should be required to replead their claims against Time Warner in an amended complaint (following dismissal of the instant Complaint).

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[7] The Complaint does not (and cannot) allege that Time Warner is a named fiduciary.

[8] Plaintiffs also make the bizarre claim that "Defendants do not directly challenge Plaintiffs' allegation that [Time Warner] was a de facto fiduciary". (Opp. at 16.) This is just another example of plaintiffs' selective reading of Defendants' opening brief, which not only challenges plaintiffs' allegation that Time Warner was a de facto fiduciary, but does so under a bold heading. (Br. at 14 ("**A. [Time Warner] and TWE Are Not *De Facto* Fiduciaries.**").)

As a substantive matter, even if this Court chooses to consider plaintiffs' new allegations, those allegations are still legally insufficient and compel dismissal.

First, plaintiffs argue that Time Warner is a fiduciary because it made allegedly false representations in SEC filings that were incorporated by reference into the Summary Plan Description ("SPD") and Form S-8 registration statements. (Opp. at 18-20.) This claim is baseless. SEC filings, including Form S-8 registration statements, are corporate statements made on behalf of a company in order to comply with federal securities laws; they are not fiduciary statements. (Br. at 30-31.) Moreover, directors and officers who sign SEC filings do so in their corporate capacities, and not as plan fiduciaries. Id. The fact that a Form S-8 registration statement is used to register securities that an issuer offers to an employee benefit plan does not transform this SEC filing into a fiduciary communication. WorldCom, 263 F. Supp. 2d at 760.

Notwithstanding plaintiffs' efforts to distinguish WorldCom, Judge Cote's decision is directly on point. In WorldCom, the plaintiffs argued that certain directors were de facto fiduciaries because they signed SEC filings that were incorporated into WorldCom's SPD and Form S-8 registration statements. Id. Judge Cote rejected plaintiffs' argument and dismissed the complaint against the directors as follows: "SEC filings are documents that directors must execute to comply with a corporation's obligations under federal securities laws. Although the SPD incorporates SEC filings by reference and is part of the Section 10(a) prospectus, those connections are insufficient to transform those documents into a basis for ERISA claims against their signatories." Id. Similarly, Time Warner's corporate SEC filings do not transform Time Warner into an ERISA fiduciary simply because they are incorporated into the SPD and Form S-8 registration statements. See Crowley v. Corning, Inc., 234 F. Supp. 2d 222, 228 (W.D.N.Y. 2002) (dismissing claim against defendant Corning based on alleged

material misrepresentations because "such statements, regardless of truth or falsity, were not made by Corning in any fiduciary capacity regarding the Plan"); In re Williams Cos. ERISA Litig., 271 F. Supp. 2d 1328, 1338 (N.D. Okla. 2003) (same).

Second, Plaintiffs claim that an April 1, 2002 letter -- in which Time Warner notified the participants in the Savings and Thrift Plans that the Plans had been amended to allow participants to transfer Company matching contributions from the Stock Fund to other investment options -- establishes Time Warner as a de facto Plan fiduciary. (Opp. at 17-18.) Plaintiffs' argument is without merit. The April 1 letter was sent by Time Warner as the sponsor of the Plans to inform participants of an amendment to the Plans. Plan sponsors are not fiduciaries, and amending a plan is not a fiduciary act. See Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries"); WorldCom, 263 F. Supp. 2d at 758 ("An employer's or plan sponsor's decision to adopt, modify, or terminate a benefit plan . . . is not a fiduciary act since the statute's defined functions of a fiduciary do not include plan design."). Accordingly, the April 1, 2002 letter -- sent by Time Warner in a nonfiduciary capacity passing along information about a nonfiduciary act -- cannot transform Time Warner into a de facto fiduciary.[9]

The Supreme Court's decision in Varity Corp. v. Howe, 516 U.S. 489 (1996), upon which plaintiffs rely (Opp. at 18, 20), is inapposite. In Varity, the defendant employer (Varity) was the plan's administrator. Id. at 492, 498. Varity held a meeting during which it persuaded approximately 1,500 employees to transfer their benefits to a new subsidiary by intentionally misrepresenting the subsidiary's financial well-being and claiming that the

[9] Notably, plaintiffs do not allege that the April 1 letter contains any material misstatement or omission.

employees' benefits would be secure. Id. at 492-94. Shortly after the meeting, the new subsidiary collapsed and the employees lost their benefits. Relying on Varity's fiduciary status as plan administrator, the Supreme Court held that Varity was liable under ERISA for intentionally misleading its employees about the future of their plan benefits. Id. at 505.

Here, Time Warner is not the Plan administrator, but the Plan sponsor. Moreover, Varity offers absolutely no support for plaintiffs' claim that a letter sent by a nonfiduciary sponsor and containing information about a nonfiduciary act (plan amendment) is sufficient to transform the nonfiduciary sponsor into a de facto fiduciary under ERISA.[10]

Third, plaintiffs argue that Time Warner is a de facto fiduciary because it has the authority to set the "cash target range" and can therefore determine the proportion of cash to stock in the Stock Fund. That argument is flawed because the Trust Agreement does not provide Time Warner with any authority to set the cash target range. Indeed, under the Trust Agreement, the cash target number is dictated by the needs (for transfers and payments) of the Stock Fund -- not by Time Warner. (Rachal Decl. Ex. 1 § 4(e) (stating that the Stock Fund shall consist of

[10] Plaintiffs' reliance on Tittle v. Enron Corp., 284 F. Supp. 2d 511 (S.D. Tex. 2003), is similarly misplaced. (See Opp. at 18.) Like the Varity plaintiffs, the Enron plaintiffs alleged that certain named fiduciaries induced employees to attend meetings at which the employees were reassured that their 401(k) benefits were safe, and that they should maintain their investments in Enron stock. 284 F. Supp. 2d at 561. Thus, Enron has no bearing here where Time Warner is not a named fiduciary and the April 1 letter contained no representations regarding the future performance of plaintiffs' investments.

company securities and short-term liquid investments "necessary to satisfy the [Stock Fund's] cash needs for transfers and payments").)[11]

Fourth, plaintiffs argue that Time Warner is a fiduciary because its officers and employees manage and administer the Plans. (Opp. at 21.) However, courts routinely have rejected attempts to impose liability on corporations simply because their employees act as the plan fiduciaries. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985) ("Although employees of Pertec serve on the Employee Benefits Committee and the Committee has a fiduciary responsibility in determining claims, this does not make the employer a fiduciary with respect to the Committee's acts. ERISA anticipates that employees will serve on fiduciary committees but the statute imposes liability on the employer only when and to the extent that the employer himself exercises the fiduciary responsibility allegedly breached."); Williams, 271 F. Supp. 2d at 1337, 1338 (rejecting plaintiffs' claim that the Williams Companies were liable under ERISA for conduct by Board members who served as plan fiduciaries); see also Crowley, 234 F. Supp. 2d at 228 (dismissing claims against nonfiduciary corporation whose employees serve as plan fiduciaries); Walsh v. Emerson, Civ. Nos. 88-952-DA, 88-1367-DA, 1990 WL 47319, at *2-*3 (D. Or. Jan. 19, 1990) (same).

The two authorities cited by plaintiffs -- Enron and Leigh v. Engel, 727 F.2d 113 (7th Cir. 1984) -- do not support plaintiffs' expansive reading of the ERISA statute. In Enron,

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[11] Plaintiffs cite section 4(e) of the Trust Agreement, which provides that "[a] cash target range shall be maintained in the [Stock Fund]" and that "[s]uch target range shall be set forth in a separate letter executed by the Trustee and the Company". (Opp. at 17; Rachal Decl. Ex. 1.) Based only on this provision, plaintiffs claim that Time Warner "determined the proportion of Fund assets to be invested in AOLTW stock". (Opp. at 17.) Plaintiffs' argument is belied by the plain language of the Trust Agreement, which states only that the Company shall sign the letter that sets forth the cash target range -- a task that does not imbue Time Warner with any discretionary or actual authority over the management or administration of Plan assets.

the court sustained claims against Enron because the plan documents had in fact named Enron as the plan administrator. 284 F. Supp. 2d at 653, 657, 659. Likewise, in Leigh, the court sustained claims against defendants because they were in fact designated plan fiduciaries responsible for the appointment and removal of the plan's administrators. See Leigh, 727 F.2d at 134-35. Neither case addresses (let alone stands for) the proposition that a nonfiduciary employer becomes a de facto fiduciary simply by virtue of the fact that its employees are plan fiduciaries.

B. The Complaint Fails to Allege that TWE Is a Fiduciary.

Like Time Warner, the Complaint contains only a single allegation with respect to TWE (a corporate partnership subsidiary of Time Warner), namely that TWE is the TWC Plan sponsor. (Br. at 14-15.) Because plan sponsors are not ERISA fiduciaries (unless specifically designated as such in the plans, which is not the case here), the Complaint must be dismissed as a matter of law as against TWE. (Id.)

In their opening brief, Defendants acknowledged that under the TWC Plan, TWE is responsible for the appointment and removal of the Trustee and members of the Administrative and Investment Committees, and that the exercise of such authority may be a fiduciary act. See id. at 14 n.11. Defendants noted, however, that TWE's appointment and removal authority was irrelevant in this case because the Complaint does not allege that TWE breached any fiduciary duty arising out of the appointment of the Trustee or the members of any Committee. See id.

Plaintiffs' response once again ignores the allegations of the Complaint. Plaintiffs argue -- citing Claim 3 of the Complaint (¶¶ 173-74) -- that the Complaint alleges that TWE breached its fiduciary duties "by appointing unqualified committee members and failing to convey information to committee members needed to perform their fiduciary obligations". (Opp.

at 22.) But Claim 3 is asserted against the Board Defendants only; it is not asserted against TWE. (Compl. ¶¶ 173-74.) TWE's liability cannot be premised upon a claim in which it is not even named, and therefore the Complaint must be dismissed as against TWE.[12]

C. Bogart and Bressler Are Not Fiduciaries.

The Complaint's sole allegation against defendant Bressler is that he formerly served as an executive of Time Warner. (Compl. ¶ 31.) The allegations against defendant Bogart are equally sparse; the Complaint alleges that he is a former Time Warner executive, and that he signed a "January 29, 2003" Form S-8 statement. (Id. ¶ 30.)

Defendants' opening brief demonstrates that defendants Bressler and Bogart cannot be liable as de facto fiduciaries simply because they were executives of Time Warner. (See Br. at 15); see also WorldCom, 263 F. Supp. 2d at 757 ("[A]n individual cannot be liable as an ERISA fiduciary solely by virtue of [his] position as a corporate officer, shareholder or manager"). Defendants also established that Bogart did not sign the January 29, 2003 Form S-8 statement as alleged in the Complaint. (Br. at 15 n.12; Wolf Decl. Ex. H.)

In response, plaintiffs resort to their tactic of amendment by opposition brief. They argue (for the first time) that defendants Bogart and Bressler are fiduciaries because they signed an entirely different Form S-8 registration statement -- now one dated "January 11, 2001". Plaintiffs' post-hoc amendment, even if proper (which it is not), is insufficient to plead that defendants Bogart and Bressler are de facto fiduciaries; as set forth above, a Form S-8 statement is a corporate communication made pursuant to federal securities laws, and the signing of an SEC filing by an officer cannot transform that officer into an ERISA fiduciary as a matter of law.

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[12] Moreover, any claim against TWE for "appointing unqualified committee members and failing to convey information to committee members needed to perform their fiduciary obligations" fails for the reasons set forth with respect to the Board Defendants infra Part VII.

See WorldCom, 263 F. Supp. 2d at 760 ("Those who prepare and sign SEC filings do not become ERISA fiduciaries through these acts, and consequently, do not violate ERISA if the filings contain misrepresentations.").

III. THE BOARD DEFENDANTS ARE NOT FIDUCIARIES WITH RESPECT TO THE TWC PLAN.

By failing to rebut or even to address Defendants' argument that the Board Defendants are not fiduciaries with respect to the TWC Plan (Br. at 16), plaintiffs necessarily concede the point. Accordingly, all of plaintiffs' claims arising out of the TWC Plan should be dismissed as against the Board Defendants.

IV. ERISA DOES NOT PROVIDE FOR *RESPONDEAT SUPERIOR* LIABILITY.

The Complaint alleges that Time Warner should nonetheless be maintained as a defendant because it may be held liable for the acts of its employees pursuant to the doctrine of *respondeat superior*. (Compl. ¶ 92 (a), (b), (c).) In their opening brief, Defendants demonstrate (i) that ERISA does not itself provide for *respondeat superior* liability; and (ii) that courts have declined to recognize such liability under facts similar to those alleged in this case. (Br. at 16-17.)

Plaintiffs respond by claiming that "virtually all of the courts to consider whether *respondeat superior* applies to ERISA actions have determined that it does". (Opp. at 25.) This claim is remarkable because although plaintiffs purport to rely upon five cases as authority, only one of those five cases actually supports this proposition, permitting an ERISA action to proceed on a *respondeat superior* theory. In contrast, Defendants' opening brief cites at least four cases -- including Judge Cote's recent decision in WorldCom -- that reject the imposition of *respondeat superior* liability under ERISA. (Br. at 17-18.)

As an initial matter, four of the five cases cited by plaintiffs[13] rely in turn upon the Fifth Circuit's opinion in American Federation of Unions v. Equitable Life Assurance Society, 841 F.2d 658 (5th Cir. 1988). As set forth in Defendants' opening brief, however, American Federation does not stand for the proposition that ERISA recognizes *respondeat superior* liability, as that doctrine is commonly understood. (Br. at 18 n.14.)

In American Federation, the court stated that "[t]he doctrine of *respondeat superior* can be a source of liability in ERISA cases", but went on to reject the imposition of such liability against defendant Equitable Life Assurance because "Equitable never actively and knowingly participated in [defendant] Holden's breach of duty to the Fund, as is required for a finding of *respondeat superior* liability". Id. at 665. Active and knowing participation in a breach of duty is not part of the *respondeat superior* doctrine, which holds an employer liable for the torts of its employees, "regardless of what [it] knew or should have known or did or should have done". Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990). Therefore, although the American Federation court used the term "*respondeat superior* liability", it did not actually describe *respondeat superior* liability but direct liability. See Hamilton v. Carell, 243 F.3d 992, 1002 (6th Cir. 2002) (cited by plaintiffs at page 26 of their response and noting that "in American Federation, the court used the term '*respondeat superior*' -- a doctrine which requires no fault on the part of the principal -- when it seemed to be referring to direct liability"); see also Walsh, 1990 WL 47319, at *3 & n.1 (same).

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[13] Bannistor v. Ullman, 287 F.3d 394, 408 (5th Cir. 2002); Hamilton v. Carell, 243 F.3d 992, 1002 (6th Cir. 2002); National Football Scouting Inc. v. Cont'l Assurance Co., 931 F.2d 646, 648 (10th Cir. 1991); Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544, 563-64 (D. Md. 2003). (See also Opp. at 25-26.)

Not only are four of the cases cited by plaintiffs based upon an inapposite precedent, three of those cases are themselves inapposite because they find ERISA liability on other grounds. See Bannistor, 287 F.3d at 408 (holding defendants directly liable as fiduciaries and stating that the court does "not rest [defendants'] liability on a theory of *respondeat superior* liability"); Hamilton, 243 F.3d at 1002 (declining to recognize the doctrine of *respondeat superior* in cases alleging a breach of fiduciary duty under ERISA); Meyer, 250 F. Supp. 2d at 544 (finding investment company directly liable under ERISA as a plan fiduciary but stating, in dicta, that if the Fourth Circuit were to hold that the doctrine of *respondeat superior* applies in the ERISA context, the investment company might be liable derivatively as well).[14]

In contrast to the precedent relied upon by plaintiffs, which is dubious at best, the cases set forth in Defendants' opening brief clearly hold that *respondeat superior* liability is inconsistent with ERISA. See Gelardi, 761 F.2d at 1325 ("ERISA anticipates that employees will serve on fiduciary committees but the statute imposes liability on the employer only when and to the extent that the employer himself exercises the fiduciary responsibility allegedly breached."); WorldCom, 263 F. Supp. 2d at 761 (ERISA "does not purport to make supervisors of fiduciaries also fiduciaries"); Crowley, 234 F. Supp. 2d at 228 (rejecting imposition of *respondeat superior* liability and dismissing complaint against Corning); Walsh, 1990 WL 47319, at *3 (holding that corporation "cannot be held liable under ERISA on a non-fiduciary

[14] The only case cited by plaintiffs that does not rely upon American Federation and that upholds *respondeat superior* liability under ERISA is Stanton v. Shearson Lehman/American Express, 631 F. Supp. 100 (N.D. Ga. 1986). However, one case does not constitute "virtually all the courts to consider" the issue, as plaintiffs disingenuously claim. (Opp. at 25; see also id. at 27 (claiming that the "great weight of authority" recognizes *respondeat superior* liability under ERISA).) In addition, as set forth above, the many cases that reject the imposition of *respondeat superior* liability under ERISA (including Judge Cote's opinion in WorldCom) are persuasive. This Court should adopt the reasoning of those cases and disregard Stanton, which is not controlling precedent in any event.

respondeat superior basis"). Plaintiffs' attempts to distinguish Defendants' cases are unavailing. For example, plaintiffs' claim that WorldCom "had nothing to do with respondeat superior liability" is simply wrong. (Opp. at 27-28.) As set forth above, WorldCom explicitly states that ERISA "does not purport to make supervisors of fiduciaries also fiduciaries". 263 F. Supp. 2d at 760. Holding supervisors of fiduciaries liable as fiduciaries is the *sine qua non* of the *respondeat superior* doctrine.[15]

Finally, plaintiffs' lengthy discussion of general agency law principles (Opp. at 23-26) is entirely irrelevant where, as here, Congress has expressly limited the manner in which persons and entities may be held liable under ERISA. As set forth in Defendants' opening brief (Br. at 13, 17), ERISA imposes liability only upon named fiduciaries and de facto fiduciaries who exercise actual discretionary control or authority over the management or disposition of plan assets. ERISA § 3(21)(A); 29 U.S.C. § 1002(21)(A). Under the plain language of the statute, persons who are neither named nor de facto fiduciaries cannot be held liable pursuant to ERISA.[16]

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[15] There is also no basis for plaintiffs' claim that the Gelardi court addressed *respondeat superior* liability only in dicta. (Opp. at 27.) The Gelardi court first held that the defendant employer was not directly liable as a plan fiduciary, and then held that the defendant employer was not subject to indirect liability -- that is, *respondeat superior* liability. 761 F.3d at 1325.

[16] Moreover, the doctrine of *respondeat superior* liability is antithetical to a plan fiduciary's duties under ERISA. ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries". ERISA § 404(a)(1); 29 U.S.C. § 1104(a)(1) (emphasis added). Thus, when a plan fiduciary acts, it does so on behalf of an ERISA plan and the plan beneficiaries, not on behalf of an employer. See Taylor v. Peoples Natural Gas Co., 49 F.3d 982, 988 (3d Cir. 1995) (holding that employee, who communicated to plan participants on behalf of the plan administrators, was acting as an agent of the plan administrators and not his employer).

V. CLAIM 1 SHOULD BE DISMISSED BECAUSE DEFENDANTS LACKED DISCRETION TO ELIMINATE THE STOCK FUND.

Claim 1 of the Complaint asserts that all 47 Defendants breached a fiduciary duty under ERISA by failing to eliminate the Stock Fund as an investment option. However, the opening brief demonstrates that none of the Defendants, regardless of whether they were fiduciaries, had the discretion to do this. (See Br. at 18-23.) Accordingly, Claim 1 must be dismissed in its entirety as a matter of law.[17]

A. The Savings and Thrift Plans Require That the Stock Fund Be Offered as an Investment Option.

The Savings and Thrift Plans explicitly provide that among the investment funds offered, "[o]ne such Investment Fund shall be designated the Time Warner, Inc. Stock Fund and shall be invested in Employer Securities". (Savings Plan § 6.2 (emphasis added); Thrift Plan § 6.2 (emphasis added).) Because the Stock Fund is part of the Savings and Thrift Plans' design, it can be eliminated only through an amendment to those Plans. As set forth above and in Defendants' opening brief (at pages 19-20), matters of plan design, including plan amendment, are not subject to challenge under ERISA.

Although plaintiffs concede that matters of plan design are outside the scope of ERISA (Opp. at 30), they argue that the Savings and Thrift Plans do not, in fact, require that the Stock Fund be offered as an investment option (Opp. at 30-31). In making this argument, plaintiffs ignore the language of the Savings and Thrift Plans, which states that the Stock Fund "shall" be offered to Plan participants. Instead, plaintiffs rely solely upon language in the TWC Plan. The TWC Plan, however, does not (and cannot) define the scope of fiduciary authority

[17] Claim 1 also should be dismissed because plaintiffs have failed to allege at what point in time Defendants should have sold the Plans' Stock Fund assets.

under the Savings and Thrift Plans, particularly where (as here) that authority is clearly set forth in the Plan documents.[18]

Plaintiffs alternatively argue that even if a Stock Fund option was mandated under the Savings and Thrift Plans, ERISA required Defendants to ignore the Plan documents and to terminate the Stock Fund once it became an allegedly imprudent investment. (Opp. at 32-33.) Plaintiffs' argument is baseless.

ERISA fiduciaries must discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]". ERISA § 404(a)(1)(D); 29 U.S.C. § 1104(a)(1)(D). By arguing that Defendants were required to ignore Plan documents when the Stock Fund declined in value, however, plaintiffs effectively read the phrase "consistent with the provisions of [ERISA]" to mean "consistent with an increase in Plan assets".

As a policy matter, plaintiffs' reading of § 404(a)(1)(D), if accepted by this Court, would transform ERISA into an insurance policy and place plan fiduciaries in an impossible Catch-22 situation. Under plaintiffs' theory, as long as plan assets increase in value, a fiduciary is bound by the plan documents. However, if plan assets decrease in value, then a fiduciary must discard the plan documents as inconsistent with ERISA.

One problem (among many) with this theory is that the value of plan assets fluctuates on an annual, monthly and daily basis, and fiduciaries rarely can predict in what direction or by how much. Plan fiduciaries would be continuously faced with a Hobson's

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[18] Plaintiffs also argue that even if the Savings and Thrift Plans require the Stock Fund for purposes of matching contributions, the Plans do not require the Stock Fund for purposes of voluntary contributions. (Opp. at 32.) Plaintiffs cite no authority either within or outside the Plans for this assertion. Section 6.2 of the Plans provides that the Stock Fund "shall" be an investment option under the Plans -- without limitation.

choice. If they disregard plan documents and the value of the plan assets subsequently decreases, they are open to attack. If they abide by plan documents and the value of the assets subsequently decreases, they are also open to attack. In addition, once a fiduciary discards the plan documents as inconsistent with ERISA, it is left without any guidance from the sponsor as to the sponsor's intention under the plan. And, having chosen to disregard the intentions of the plan sponsor in designing the plan, as manifested by the plan's language, a fiduciary cannot protect itself if the value of the plan assets continues to decrease.

Not surprisingly plaintiffs fail to cite a single case -- and Defendants could find no case -- which requires a plan fiduciary to disregard plan documents simply because the value of the plan assets drops. Indeed, the only cases in which a court has held that a fiduciary may be liable for failure to ignore plan documents and eliminate a company stock fund -- and the only cases cited by plaintiffs in support of their argument -- are cases in which a company enters or is about to enter bankruptcy, thus rendering its stock (and any plan assets invested in its stock) virtually worthless. In such cases, a fiduciary may have a duty to ignore the express provisions of an ERISA plan. See Rankin v. Rots, 278 F. Supp. 2d 853, 878 (E.D. Mich. 2003); Enron, 284 F. Supp. 2d at 669-70. In the instant case, however, Time Warner was and is a viable company with valuable stock, and therefore Defendants had no duty to ignore the express provisions of the Plans (even assuming such a duty exists, which Defendants do not concede). See Lalonde v. Textron, Inc., 270 F. Supp. 2d 272, 280 (D.R.I. 2003) (holding that fiduciary of an ESOP plan was not required to ignore plan documents and eliminate the company stock fund as an investment option absent "evidence that the company is on the brink of collapse or undergoing

serious mismanagement"); In re Duke Energy ERISA Litig., 281 F. Supp. 2d 786 (W.D.N.C. 2003) (same).[19]

Put simply, ERISA liability is not tied to the value of plan assets, and plan fiduciaries cannot be held liable for following plan documents (which ERISA requires) where, as here, the plan provisions are entirely consistent with ERISA.[20]

B. The TWC Plan Requires That the Stock Fund Be Offered as an Investment Option.

Although the language is less explicit, the TWC Plan also requires that the Stock Fund be offered as an investment option. (Br. at 21 n.18.) Moreover, the Board Defendants cannot be held liable for any damages allegedly suffered by TWC Plan participants because the Board Defendants are not fiduciaries under the TWC Plan. (See infra Part III.) Similarly, the TWC Plan does not provide the Administrative Committee Defendants with any authority over investment policy. Therefore, the Administrative Committee cannot be held liable for any alleged damages arising out of a failure to eliminate the Stock Fund as an investment option under the TWC Plan. (See Br. at 22 n.19.)

C. Defendants Have No Discretion to Sell the Stock Fund Assets or to Prevent the Plans from Purchasing Additional Stock.

Defendants' opening brief demonstrates that the federal securities laws precluded Defendants from selling the Plans' Stock Fund assets based on alleged inside information. (Br.

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[19] Plaintiffs also rely on WorldCom, 263 F. Supp. 2d at 764, as support for their claim that § 404(a)(1)(D) required Defendants to disregard the Plan documents. WorldCom does not, however, address ERISA § 404(a)(1)(D). Moreover, WorldCom, like Enron and Rankin and unlike the instant case, involves a bankrupt company.

[20] Of course, offering a company stock fund, such as the Stock Fund at issue in this case, as an investment option is entirely consistent with ERISA, and plaintiffs do not claim otherwise.

at 23-25.) In response, plaintiffs argue that Defendants should have refused participants' investment decisions to purchase additional Stock Fund assets.

By refusing to purchase additional Stock Fund assets on behalf of participants who elected to make such a purchase, Defendants effectively would be terminating -- or "eliminating" -- the Stock Fund itself. Accordingly, plaintiffs' new argument must fail because it is simply another way of saying that Defendants should have eliminated the Stock Fund as an investment option. As discussed supra Part V.A, the only way to eliminate the Stock Fund as an investment option is to amend the Plans, and plan amendment is not a fiduciary act subject to ERISA liability.

D. The Complaint Fails to State a Claim for Breach of Co-Fiduciary Liability.

Plaintiffs do not address Defendants' argument that the Complaint fails adequately to assert a claim for breach of co-fiduciary liability. (Br. at 25-26.) They therefore concede the point.

VI. CLAIM 2 MUST BE DISMISSED FOR FAILURE ADEQUATELY TO ALLEGE FIDUCIARY COMMUNICATIONS.

Claim 2 of the Complaint alleges that all 47 defendants breached a fiduciary duty under ERISA by making negligent misrepresentations to Plan participants. Defendants' opening brief demonstrates that the Complaint fails to allege that any misstatement was made by any Defendant acting in a fiduciary capacity. (Br. at 26-29.) It also demonstrates that the allegations of the Complaint are too generalized to put Defendants on notice of their alleged misconduct under Claim 2. (Id.)

Under ERISA, fiduciary status "is not an 'all or nothing concept. . . .[A] court must ask whether a person is a fiduciary with respect to the particular activity in question'".

Rankin, 278 F. Supp. 2d at 870 (quoting Maniace v. Commerce Bank of Kansas City, N.A., 40 F.3d 264, 267 (8th Cir. 1994)).

In the instant case, the Plan documents allocate specific duties among different fiduciaries and provide that "[n]o Fiduciary shall be liable for any act or omission of another person in carrying out any fiduciary responsibility where such fiduciary responsibility is allocated to such other person by or pursuant to the Plan". (Savings Plan § 14.14(b); Thrift Plan § 14.14(b); TWC Plan § 12.5.) Of relevance here, the Board Defendants and the Investment Committee Defendants are not fiduciaries with respect to Plan communications, and therefore they cannot be liable under Claim 2.[21] See Crowley, 234 F. Supp. 2d at 229-30 (dismissing claim that Board made material misrepresentations and nondisclosures "since the Board was not charged under the Plan with the duty of communicating information to the Plan participants or beneficiaries").

Ignoring well-settled ERISA law and the plain language of the Plan documents, plaintiffs argue that the Board Defendants and the Investment Committee Defendants are fiduciaries with respect to Plan communications because they signed SEC filings, including Form S-8 registration statements. (Opp. at 40-43.) This is wrong for at least two reasons.

First, the Complaint does not allege that any Investment Committee Defendant signed an SEC filing. (See Compl. ¶¶ 51-56.) Second, SEC filings, including Form S-8

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[21] As noted in the opening brief, the Administrative Committee Defendants are responsible for communications under all three Plans. (Br. at 8, 9, 10.) Nevertheless, the Complaint's vague and generic assertions that all Defendants, including the Administrative Committee Defendants, "knew" or "should have known" the underlying facts concerning the alleged accounting improprieties at Time Warner are insufficient to state a claim. (Id. at 29-30.) Indeed, it is difficult to understand how the Administrative Committee Defendants, which include employees of Time Warner Cable, Inc., were aware of alleged accounting problems at the Company's AOL division.

registration statements, are not fiduciary communications and therefore cannot serve as the basis for ERISA liability. See supra Part II.A.; WorldCom, 263 F. Supp. 2d at 760; Crowley, 234 F. Supp. 2d at 226, 228; see also Williams, 2003 WL 21513207, at *8.

VII. CLAIM 3 SHOULD BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ADEQUATELY ALLEGE ANY BREACH OF FIDUCIARY DUTY BY THE BOARD DEFENDANTS.

Claim 3 alleges that the Board Defendants are liable for failure to appoint, monitor and properly inform Plan fiduciaries. As set forth in Defendants' opening brief, Claim 3 should be dismissed because the Complaint fails to allege facts demonstrating that the Savings and Thrift Plans' Committee members were unqualified to serve as Plan fiduciaries. (Br. at 32-33.) Likewise, the Complaint does not adequately allege that the Board Defendants failed to communicate material information to the Savings and Thrift Plans' Administrative and Investment Committees. (Id. at 33.)[22]

In response, plaintiffs attempt to recast Claim 3 as a claim for "failure to monitor", asserting that the Board Defendants breached their fiduciary duties by neglecting to "perform[] a proper review of their appointees' activities". (Opp. at 46.) However, courts have held that ERISA does not impose upon fiduciaries who appoint other fiduciaries a continuing duty to monitor the daily activities of its appointees, particularly where (as here) there was no compelling reason to do so. See In re Williams Cos. ERISA Litig., No. 02-CV-153-H(M), 02-CV-159-H(M), 02-CV-258-H(M), 02-CV-289-H(M), 2003 WL 22794417, at *1, n.1 (N.D. Okla.

[22] As discussed above (supra Part III) and in the opening brief (at 32 n.26), the Board Defendants are not fiduciaries under the TWC Plan and they are not authorized under that Plan to appoint or remove its Committee members. Accordingly, the Board Defendants cannot be held liable under ERISA for any claims under the TWC Plan, including claims arising out of the failure to appoint or monitor members of the TWC Plan Committees.

Oct. 27, 2003) (rejecting claim for failure to monitor because "the only power the Board had under the Plan was to appoint, retain, or remove members of the Benefits Committee").[23]

VIII. DEFENDANTS ARE NOT LIABLE UNDER ERISA FOR SALES OF PERSONALLY-HELD STOCK.

Plaintiffs argue that the Selling Defendants breached a fiduciary duty of loyalty by selling shares of Time Warner stock held in a personal capacity. As demonstrated in Defendants' opening brief, the sale of personally-held securities is not an act of plan administration or management and cannot give rise to ERISA liability. (Br. at 33.) Plaintiffs, in response, cite no authority in support of their claim that the Selling Defendants' sale of their Time Warner securities is a fiduciary act that subjects them to ERISA liability. Claim 4 must therefore be dismissed.

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[23] Although some courts have held that the duty to appoint fiduciaries includes a duty to monitor the appointees (see Opp. at 46), Defendants urge this court to adopt the reasoning of Williams, which is both persuasive and in keeping with the fundamental principles of ERISA. See In re Williams Cos. ERISA Litig., No. 02-CV-153-H(M), 02-CV-159-H(M), 02-CV-258-H(M), 02-CV-289-H(M), 2003 WL 22794417, at *1, n.1 (N.D. Okla. Oct. 27, 2003) ("The Court finds that this expansion of responsibility [to monitoring fiduciary appointees] is not warranted by the statute and would be inconsistent with the body of law that requires measuring the scope of any plan fiduciary's duties by the terms of the plan itself."); see also Crowley, 234 F. Supp. 2d at 229 (because "[t]he only power the Board had under the Plan was to appoint, retain, or remove members of the Committee . . . the Board's fiduciary obligations can extend only as to those acts").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the opening brief, Defendants respectfully request that the Court grant its Motion to Dismiss the Consolidated ERISA Complaint.

December 11, 2003

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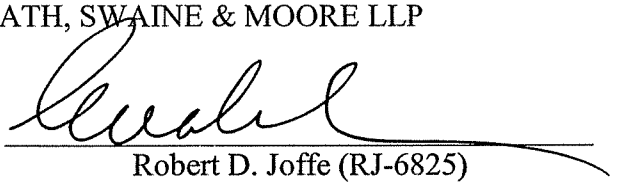
By 

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