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)

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

CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Defendants AOL Time Warner Inc., Time Warner Entertainment Company, L.P., the Committee Defendants and the Individual Defendants

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Corporate defendants AOL Time Warner Inc. ("AOLTW" 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 AOLTW Investment Committee; and individual defendants[1] (collectively, "Defendants") respectfully submit this memorandum of law in support of their motion to dismiss the Consolidated ERISA Complaint (the "Complaint").

Preliminary Statement

Plaintiffs allege that they are participants in the AOL Time Warner Savings Plan ("Savings Plan") (Wolf Decl. Ex. A), the AOL Time Warner Thrift Plan ("Thrift Plan") (Wolf Decl. Ex. B) and/or the TWC Savings Plan ("TWC Plan") (Wolf Decl. Ex. C) (collectively, the "Plans").[2] Each of these Plans permits employees to invest a percentage of their eligible base pay on a tax-deferred basis into a variety of investment options, including AOLTW common stock. According to the Complaint, America Online Inc. ("AOL") and AOLTW allegedly made materially misleading statements regarding revenue recognition in filings with the Securities Exchange Commission ("SEC") from July 1, 2000 through June 30, 2002. That, in turn, allegedly had the effect of overstating AOL's and AOLTW's financial results, thereby inflating the price paid for the AOLTW common stock in the Plans. Plaintiffs, on behalf of a putative

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[1] 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, Mackereth Ruckman, Thomas M. Rutledge, Andra D. Sanders, Robert E. Turner, Francis T. Vincent, Jr., Mark A. Wainger, Beth A. Wann, Paul D. Williams and Frederick C. Yeager.

[2] The relevant Plan documents cited herein are annexed to the Declaration of Tamsin Wolf.

class, seek damages under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") for the decline in the market value of plaintiffs' AOLTW-related Plan holdings.

This ERISA action follows in the wake of a federal securities class action also pending before this Court (the "Securities Action"). In fact, the first ERISA action against AOLTW was filed nearly four months after the first securities action and is based on allegations of improper accounting and inflated revenue that are identical to those in the Securities Action. Plaintiffs here have simply recast allegations of securities fraud as ERISA violations, using as their hook the fact that AOLTW has 401(k) plans in which one of the investment options is a fund invested in AOLTW stock. This is part of a new trend in corporate litigation for every securities action to be followed by a parallel ERISA action, incorporating the same factual allegations. But the alleged injury in both cases is precisely the same. Indeed, the ERISA plaintiffs are represented by counsel who also represent plaintiffs in the Securities Action[3] and, as investors in AOLTW stock, will share in any recovery if the claims asserted in the Securities Action are successful. Thus, the only practical impact of an ERISA action such as this is (a) unnecessarily multiplying litigation over the same factual allegations and (b) perversely discouraging companies such as AOLTW from establishing employee benefits plans in which employees can make investments in company stock -- a common practice that further aligns the interests of employees and their employer.

Plaintiffs here indiscriminately assert that 47 defendants breached fiduciary duties under ERISA without providing specific allegations concerning each particular defendant. The

[3] Counsel in this ERISA action are Stull, Stull & Brody, Schatz & Nobel, P.C. and Schiffrin & Barroway, LLP. Stull, Stull & Brody represents plaintiffs Harvey Matcovsky and Earl Bennett in the Securities Action. Schatz & Nobel, P.C. represents plaintiff Earl Mikolitch in the Securities Action. Schiffrin & Barroway, LLP has filed a shareholder derivative complaint in the Delaware Chancery Court based on substantially the same allegations.

Complaint simply 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. Such generalized allegations are patently inadequate and unfair.

The ERISA Complaint should be dismissed in its entirety for several reasons. First, the Complaint fails to allege facts demonstrating that four of the named defendants--AOLTW, TWE, Christopher P. Bogart ("Bogart") and Richard J. Bressler ("Bressler")--are fiduciaries subject to ERISA liability.[4] These defendants are not named as fiduciaries in any Plan document, and are not alleged to have exercised any discretionary authority over Plan administration or management. In addition, contrary to the Complaint's allegations, AOLTW cannot be held responsible under the common law doctrine of *respondeat superior* because ERISA does not contemplate *respondeat superior* liability. Accordingly, the Complaint should be dismissed in its entirety as to defendants AOLTW, TWE, Bogart and Bressler.

Second, Claim 1, which alleges that all Defendants breached their fiduciary duties by failing to eliminate AOLTW stock as an investment option and to sell all AOLTW stock held by the Plans, should be dismissed in its entirety because none of the Defendants, acting in a fiduciary capacity, had the discretion to undertake such acts. The option of investing in AOLTW stock is an element of the Savings and Thrift Plans by plan design. The only way to eliminate that option would have been to amend those Plans. Even assuming that some of the Defendants had the discretion to amend those Plans, as a matter of law, the failure to amend a plan, and indeed, plan amendment actions generally, are not fiduciary acts and cannot give rise to ERISA liability. In addition, the federal securities laws prohibit Defendants from selling AOLTW stock based on material, non-public information (which plaintiffs allege caused Defendants to know

[4] The Complaint also contains no allegations that the Board Defendants are fiduciaries under the TWC Plan. See infra Section II.

that AOLTW stock was an imprudent investment). For this reason as well, if Defendants had such information, Defendants did not have the discretion to sell the AOLTW stock held by the Plans in the manner proposed by plaintiffs.[5]

Third, Claim 2, which alleges that all Defendants breached their fiduciary duties by negligently misrepresenting and failing to disclose material information to Plan participants, should be dismissed because plaintiffs' allegations are wholly conclusory and inadequate to put any of the Defendants on notice of the conduct for which they may be held liable. In addition, Claim 2 must be dismissed because the alleged misstatements, even if made, were made by Defendants acting in a corporate capacity, not in a fiduciary capacity. ERISA does not impose liability on fiduciaries for acts taken in their corporate capacity.

Fourth, Claim 3, which alleges that certain Board members breached their fiduciary duties by failing to appoint appropriate Plan fiduciaries, to monitor those Plan fiduciaries that were appointed and to inform the Plan fiduciaries of information "they needed to know", should be dismissed because plaintiffs fail to identify any actionable breach. The Complaint contains no factual allegations that any appointed fiduciary was unqualified or lacked sufficient knowledge to serve in such a fiduciary capacity. The mere fact that the Board appointed employees to serve as fiduciaries does not give rise to ERISA liability as plaintiffs claim. Furthermore, the Complaint does not contain sufficient allegations to support the claim that the Board failed adequately to inform the Plan Committees of material information, and therefore must be dismissed.

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[5] Defendants may have an affirmative defense to Claim 1 under ERISA § 404(c), 29 U.S.C. § 1104(c), which shields fiduciaries from liability where, as here, plan participants have discretion over their own investment options. This affirmative defense, however, may involve issues of fact and is therefore not presented on this motion to dismiss under Rule 12(b)(6).

Finally, Claim 4, which alleges that certain defendants breached their fiduciary duties of loyalty by selling personal shares of AOLTW stock, should be dismissed because a fiduciary's sale of company stock he or she owns is not a fiduciary act and cannot give rise to liability under ERISA as a matter of law.

Background

An employer is under no legal obligation to set up an employee benefit plan. Thus, although AOLTW had no obligation to establish an employee benefit plan, it chose to do so to motivate employees to take more interest in the company's success and to provide its employees with an improved lifestyle at retirement.

Once a plan is established, ERISA sets forth standards of conduct and obligations for fiduciaries of employee benefit plans. Under ERISA, an employer that establishes or maintains an employee benefit plan is a plan sponsor. See ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). A plan sponsor does not act as a fiduciary by performing functions such as deciding whether to have a plan, establishing the terms of a plan and designing the benefits employees can realize under a plan. Indeed, plan sponsors are generally free under ERISA to adopt, modify and terminate employee benefit plans without any risk of ERISA liability. These functions are simply outside the scope of any ERISA fiduciary duty.

ERISA provides that every employee benefit plan must "be established and maintained pursuant to a written instrument". See ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The written instrument must identify one or more named fiduciaries who have the authority to control and manage the operation and administration of the plan. See id. ERISA expressly permits the allocation of fiduciary obligations among named fiduciaries, and expressly limits fiduciary liability in such instances. See ERISA § 405(c), 29 U.S.C. § 1105(c). In fact, ERISA

provides that a person is a fiduciary only "to the extent" that he acts in such a specified capacity in relation to a plan. See ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

Here, AOLTW is the sponsor of the Savings Plan and the Thrift Plan, and TWE is the sponsor of the TWC Plan. See Wolf Decl. Exs. A, B and C. The Savings Plan, the Thrift Plan and the TWC Plan are designed as individual account plans within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). Under retirement plans of this type, participants have individual accounts, and their plan benefits are based solely on the value of their accounts. Id. These plans are more commonly referred to as "401(k) plans" and permit employees to invest a percentage of their eligible base pay on a tax-deferred basis. See Wolf Decl. Ex. A, Savings Plan § 3.1; Ex. B, Thrift Plan § 3.1; Ex. C, TWC Plan § 3.1. AOLTW and TWE have further designed each Plan to allocate fiduciary obligations among designated fiduciaries, as discussed in detail below.

The Savings Plan

The Savings Plan is governed by the Plan document and the Trust Agreement with Fidelity Management Trust Company ("Fidelity"). In addition, in accordance with ERISA § 102, Plan participants receive the AOL Time Warner Savings Plan Summary Plan Description ("Savings Plan SPD") (Wolf Decl. Ex. D), which comprehensively explains, albeit in simple terms, the provisions of the Plan document. The Savings Plan SPD includes an Investment Options Guide (Wolf Decl. Ex. G) and an Account Access Guide, which are designed to assist Plan participants with investment decisions and account management. See Wolf Decl. Ex. D, Savings Plan SPD at 2.

The Savings Plan permits participating employees to contribute a percentage of their income, on a tax-deferred basis, into numerous investment funds. See Wolf Decl. Ex. A,

Savings Plan § 3.1. Pursuant to the Plan, participants are responsible for making their own investment decisions with respect to their own contributions. See id., Savings Plan § 6.3. The Plan provides participants with a wide range of investment options, including various money market, bond and equity funds. See Wolf Decl. Ex. G, Investment Options Guide at 3-8. By design, one of the investment options offered under the Plan must be a fund designated the "AOL Time Warner Inc. Stock Fund" (the "Stock Fund") and invested in AOLTW stock. See Wolf Decl. Ex. A, Savings Plan § 6.2. The Plan further provides that the Company will make matching contributions to each participant's account in an amount up to a certain percentage of each participant's annual compensation. See id., Savings Plan § 4.1. Under the Plan, the Company's matching contributions generally must be invested in the Stock Fund. See id., Savings Plan § 6.4. In designing the Savings Plan, AOLTW required the Stock Fund as an investment option to provide employees with an opportunity to obtain an ownership stake in the Company, thereby aligning the interests of its employees with those of itself. Requiring a company's stock to be an investment option in an employee benefit plan is both common in 401(k) plans and is perfectly permissible under ERISA.

As the Plan sponsor, AOLTW may amend, terminate or suspend the Plan by action of the Board of Directors. See id., Savings Plan § 16.1, § 16.2. The Plan does not name AOLTW as a fiduciary, or provide AOLTW with any discretionary authority over the administration or investment policy of the Plan.

Under the Savings Plan, the Board of Directors (the "Board") is responsible for appointing a Plan Trustee, the members of an Administrative Committee and the members of an Investment Committee. See id., Savings Plan § 1.1 ("Trustee"), § 14.1, § 14.8. The Savings Plan also states that "[t]he Board shall have the authority to establish overall investment policy

for the Plan", id., Savings Plan § 14.11, but either the Board or the Investment Committee may determine the investment funds available under the Plan.[6] See id., Savings Plan § 1.1 ("Investment Funds").

The Savings Plan provides for an Administrative Committee to handle general administration matters under the Plan. See id., Savings Plan § 14.4. The Administrative Committee is a named fiduciary under the Plan, see Wolf Decl. Ex. D, Savings Plan SPD at 9, but its duties are limited to the reporting and disclosure requirements mandated by ERISA, and the responsibility to decide "all matters arising in connection with the interpretation, administration and operation of the Plan". Wolf Decl. Ex. A, Savings Plan § 14.4; ERISA §§ 101-105, 29 U.S.C. §§ 1021-1025. The Plan does not give the Administrative Committee any discretion over investment policy or investment decisions. The Plan provides that the members of the Administrative Committee serve at the pleasure of the Board and may be removed by the Board at any time. See Wolf Decl. Ex. A, Savings Plan § 14.1. Plan participants are expressly permitted to serve on the Administrative Committee. Id.

The Savings Plan provides that an Investment Committee shall be appointed by the Board. See id., Savings Plan § 14.8. The Investment Committee is a named fiduciary under the Plan, see Wolf Decl. Ex. D, Savings Plan SPD at 9, but its duties are limited to determining the investment funds available under the Plans, designating an investment manager to manage the Plan's assets, and recommending to the Board changes in the Trustee as necessary. See Wolf Decl. Ex. A, Savings Plan § 1.1 (definition of "Investment Funds"), Savings Plan § 14.11; Wolf

[6] None of these provisions establishes that the Board members are fiduciaries for purposes of the claims asserted by plaintiffs, particularly taking into account the Board's power under the Plans to delegate its ERISA responsibilities to others. See Wolf Decl. Ex. A, Savings Plan § 14.16 (noting that Board may delegate its authority); Ex. B, Thrift Plan § 14.16 (same); see also ERISA § 405(c), 29 U.S.C. § 1105(c). The Board did in fact delegate that authority here, as Defendants will later demonstrate in this proceeding.

Decl. Ex. D, Savings Plan SPD at 9. Moreover, the Plan specifically provides that the Investment Committee "shall not exercise any investment power or authority with respect to common stock of the Company". Wolf Decl. Ex. A, Savings Plan § 14.11. The Plan also provides that the members of the Investment Committee "serve at the pleasure of the Board and may be removed by the Board at any time". See id., Savings Plan § 14.8. The Plan expressly permits participants to serve as members of the Investment Committee. See id.

The Thrift Plan

The Thrift Plan is identical to the Savings Plan in all relevant respects. Like the Savings Plan, the Thrift Plan is governed by the Plan document and the Trust Agreement with Fidelity. In addition, the Plan participants receive the AOL Time Warner Thrift Plan Summary Plan Description ("Thrift Plan SPD") (Wolf Decl. Ex. E). Each of these documents contains the same provisions as the counterpart Savings Plan documents discussed above.

The TWC Plan

The TWC Plan is governed by the Plan document and the Trust Agreement with Fidelity. In addition, Plan participants receive the TWC Savings Plan Summary Plan Description ("TWC Plan SPD") (Wolf Decl. Ex. F). Like the Savings Plan and the Thrift Plan, the TWC Plan permits participating employees to contribute a percentage of their income, on a tax-deferred basis, into several investment funds. See Wolf Decl. Ex. C, TWC Plan § 3.1. In addition, the Plan provides that participants are responsible for making their own investment decisions with respect to their own contributions. See id., TWC Plan § 3.8. The Plan offers participants the same range of investment options as available under the Savings and Thrift Plans, including the option of investing in the AOLTW Stock Fund. See Wolf Decl. Ex. F, TWC Plan SPD at 10; Wolf Decl. Ex. G, Investment Options Guide at 3. The Plan further provides

that the Company will make matching contributions to each participant's account in an amount up to a certain percentage of each participant's annual compensation. See Wolf Decl. Ex. C, TWC Plan § 4.1. Under the Plan, participants may direct company matching contributions to the investment funds of their choice. See id., TWC Plan § 4.4.

As sponsor of the TWC Plan, TWE has the authority to amend or terminate the TWC Plan. See id., TWC Plan § 14.1, § 14.2. The TWC Plan provides that TWE is responsible for appointing and removing the Trustee, the members of the Administrative Committee and the members of the Investment Committee. See id., TWC Plan § 1.83, § 11.1, § 15.2. The Plan does not provide TWE with discretionary authority over the investment policy of the Plan.

Under the TWC Plan, there is an Administrative Committee, which is a named fiduciary. See Wolf Decl. Ex. F, TWC Plan SPD at 9. Like the Administrative Committees for the Savings and Thrift Plans, its duties are limited to the administration of the Plan. See Wolf Decl. Ex. C, TWC Plan § 11.2. Specifically, the TWC Plan authorizes the Administrative Committee to interpret Plan provisions, to determine and settle controversies concerning Plan benefits and to decide questions of fact arising under the Plan. See id. Under the TWC Plan, the Administrative Committee does not have any discretion over investment policy or investment decisions.

The TWC Plan also provides for an Investment Committee, which is also a named fiduciary. See Wolf Decl. Ex. F, TWC SPD at 9. Under the Plan, the Investment Committee's duties are limited to determining the investment guidelines and alternatives under the Plan. Wolf Decl. Ex. C, TWC Plan § 15.2.

The Allegations in the Complaint

Plaintiffs are alleged participants in the Savings Plan, the Thrift Plan and/or the TWC Plan. (Compl. ¶¶ 7-9.) Plaintiffs purport to bring this litigation on behalf of a class of all Participants whose individual accounts under the Plans include investments in the Stock Fund from September 30, 2000 to "the present". (Compl. ¶ 1.)

The defendants in this action include AOLTW, TWE, current and former members of the Board of Directors (the "Board Defendants")[7], the Administrative Committee of each Plan and current and former members of each Administrative Committee (the "Administrative Committee Defendants")[8], the Investment Committee of each Plan and current and former members of each Investment Committee (the "Investment Committee Defendants")[9] and Fidelity, the Trustee for each of the Plans. (Compl. ¶¶ 10-57.) The Complaint also names two former Time Warner Inc. executives, Bogart and Bressler, as defendants. (Compl. ¶¶ 30, 31.)

The Complaint broadly alleges that all 47 Defendants are ERISA fiduciaries, and asserts four claims for breach of fiduciary duty under ERISA § 404, 29 U.S.C. § 1104. Claims 1 and 2 are indiscriminately asserted against all Defendants without any distinction drawn among

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[7] The Board Defendants are Akerson, Barksdale, Bollenbach, Case, Caufield, Gilburne, Hills, Levin, Mark, Miles, Novack, Parsons, Pittman, Raines, Turner and Vincent. (Compl. ¶¶ 12-27.)

[8] Each Plan has a separate Administrative Committee, but membership overlaps in some cases. The members of the Savings Plan Administrative Committee named in the Complaint as defendants are Desroches, Fischel, Haje, Johnson and LaBarca. (Compl. ¶¶ 34-38.) The members of the Thrift Plan Administrative Committee named in the Complaint as defendants are Desroches, Fischel, Haje, Johnson, LaBarca, McCandless, Ruckman, Sanders and Williams. (Compl. ¶¶ 34-42.) The members of the TWC Savings Plan Administrative Committee named in the Complaint as defendants are Britt, Burr, Ellis, Harris, Hobbs, Rutledge and Wann. (Compl. ¶¶ 44-50.)

[9] Each Plan has a separate Investment Committee, but membership overlaps in some cases. The members of the Investment Committee named in the Complaint as defendants are Kelly, Murphy, Pace, Ripp, Ruckman, Wainger and Yeager. (Compl. ¶¶ 52-56.)

the 47 separate Defendants. In Claim 1, plaintiffs allege that every Defendant breached a fiduciary duty of prudence by failing to eliminate the Stock Fund as an investment option and selling off all its assets. (Compl. ¶ 151.) In Claim 2, plaintiffs allege that every Defendant breached a fiduciary duty by misrepresenting and/or failing to disclose material information to Plan participants. Specifically, plaintiffs contend that certain SEC filings, which allegedly contained material misstatements concerning AOL's and AOLTW's advertising revenue, were incorporated into the SPDs that were distributed to Plan participants. (Compl. ¶ 166-67.)

Plaintiffs' third claim is asserted against the Board Defendants only, and asserts that the Board Defendants allegedly breached fiduciary duties by failing to appoint and monitor knowledgeable fiduciaries to the Plans' Committees and by failing to keep them properly informed. (Compl. ¶ 173.) Finally, in Claim 4, plaintiffs allege that certain defendants (the "Selling Defendants")[10] breached their fiduciary duty of loyalty by selling personally held shares of AOLTW stock while permitting the Plan participants to continue to invest in the Stock Fund. (Compl. ¶ 176.)

Argument

For purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), well-pleaded allegations are assumed to be true, but a plaintiff cannot survive a motion to dismiss merely by stating conclusory allegations in the complaint. See Papasan v. Allain, 478 U.S. 265, 286 (1986) ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation."); In re Am. Express Co. S'holders Litig., 39 F.3d 395, 400 n.3 (2d Cir. 1994)

[10] The Selling Defendants are Akerson, Barksdale, Case, Caufield, Gilburne, Kelly, Novack, Parsons, Pittman and Turner. (Compl. ¶ 177.)

("conclusory allegations of the legal status of defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss"). For purposes of this motion, the Court may consider documents outside the Complaint that are integral to plaintiffs' claims, including the ERISA plans and SPDs. See In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745, 756 (S.D.N.Y. 2003) (considering an ERISA plan and SPD on a motion to dismiss).

To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege that (1) the defendant was a fiduciary of an ERISA plan who, (2) acting within his capacity as a fiduciary, (3) engaged in conduct constituting a breach of his fiduciary duty. See ERISA § 409, 29 U.S.C. § 1109. A person may be a fiduciary by virtue of being named as such or by acting in a fiduciary capacity with regard to an ERISA plan. See ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1); ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). A person who is not a "named fiduciary" may be subject to fiduciary liability only if "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of the plan." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Courts have employed a "functional test" in determining who is a fiduciary under ERISA. See Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) ("ERISA, however, defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan") (emphasis in original); Siskind v. Sperry Ret. Program, 47 F.3d 498, 505 (2d Cir. 1995) (applying functional test and noting that an "employer acts as a fiduciary

within the meaning of ERISA...only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration".)

I. AOLTW, TWE, BOGART AND BRESSLER ARE NOT FIDUCIARIES UNDER THE PLANS.

AOLTW, TWE, Bogart and Bressler are named as defendants in Claims 1 and 2 only. None of these defendants, however, is alleged to be a named fiduciary under any of the Plans.[11] Instead, the Complaint merely alleges that AOLTW is a *de facto* fiduciary because "AOLTW itself controlled all the fiduciary functions of the Plans, except for those effectively delegated to the Trustee". (Compl. ¶ 92.) Other than naming them as Defendants, the Complaint contains no allegations relating to defendants TWE, Bogart and Bressler. The Complaint's allegations are insufficient to confer fiduciary status or ERISA liability on AOLTW, TWE, Bogart and Bressler.

A. AOLTW and TWE Are Not *De Facto* Fiduciaries.

The Complaint does not allege facts that, if proven, would establish that AOLTW or TWE exercised discretionary authority or control over the Plans' management, disposition of assets or administration. The Complaint simply asserts that AOLTW "controlled all fiduciary functions" without specifying a single fiduciary act taken by AOLTW. The Complaint does not allege that AOLTW actually directed or exercised any control concerning the management of the Plans' assets. The Complaint is even more vague concerning TWE. In fact, the Complaint

[11] Under the TWC Plan, TWE is responsible for the appointment and removal of the Trustee, members of the Administrative Committee and members of the Investment Committee. See Wolf Decl. Ex. C, TWC Plan §§ 1.83, 11.1, 15.2. Although the exercise of such authority may be a fiduciary act, 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 Compl. ¶¶ 173-174; see also In re Williams Cos. ERISA Litig., Nos. 02-CV-153-H(M), 02-CV-159-H(M), 02-CV-285-H(M), 02-CV-289-H(C), 2003 WL 21666555, at *9 (N.D. Okla. July 14, 2003) (dismissing claims against the Board for failure to allege that the Board breached its fiduciary duty in its appointment of the members of the Benefits Committee).

contains no allegations concerning TWE other than the allegation that TWE is the TWC Plan sponsor. (Compl. ¶ 11.) The role of Plan sponsor, however, does not impose any fiduciary responsibilities on TWE, and plaintiffs do not contend otherwise. 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."). Accordingly, the Complaint fails to allege that AOLTW or TWE are fiduciaries and the claims against AOLTW and TWE should be dismissed. See In re Williams Cos. ERISA Litig., Nos. 02-CV-153-H(M), 02-CV-159-H(M), 02-CV-285-H(M), 02-CV-289-H(C), 2003 WL 21666555, at *8 (N.D. Okla. July 14, 2003) ("Because Williams is not a fiduciary, it cannot be held liable for the breaches of fiduciary duty alleged by Plaintiffs.").

B. Defendants Bogart and Bressler Are Not Fiduciaries Under the Plans.

Claims 1 and 2 for breach of fiduciary duty against Bogart and Bressler should be dismissed because neither is alleged to be a fiduciary under any of the Plans. The Complaint alleges that Bogart and Bressler served as former Time Warner Inc. executives. (Compl. ¶¶ 30, 31.) The Complaint otherwise contains no allegations with respect to Bogart or Bressler.[12] A defendant's role as an executive of the employing company is insufficient to confer fiduciary status. See 29 C.F.R. §§ 2509.75-8, D-2, D-4 and D-5 (1975); In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d at 757 (dismissing claims against officers because "an individual cannot be liable as an ERISA fiduciary solely by virtue of her position as a corporate officer, shareholder or manager") (citation omitted). Thus, even accepting all of the allegations of the Complaint as true, defendants Bogart and Bressler cannot be deemed ERISA fiduciaries.

[12] Contrary to the Complaint's allegations, see Compl. ¶ 30, Bogart did not sign the Form S-8 filed with the SEC on January 29, 2003. See Wolf Decl. Ex. H.

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

The Board Defendants cannot be held liable for breach of fiduciary duty with respect to the TWC Plan. The TWC Plan does not name the Board as a fiduciary, and does not provide the Board with discretionary authority over the administration or investment policy of the Plan. Moreover, the Complaint does not allege that the Board Defendants actually exercised any control or authority over the administration or investment policy of the TWC Plan. Accordingly, the Board Defendants cannot be held liable for any damages allegedly suffered by the TWC Plan participants. See In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d at 760-61 (dismissing complaint against director defendants where plan does not name directors as fiduciaries and directors are alleged only to have exercised fiduciary authority through the act of signing an ERISA § 10(a) prospectus); In re Williams Cos. ERISA Litig., 2003 WL 21666555, at *9 (dismissing ERISA claims against directors where directors have no authority over administration or investment policy of ERISA plan).

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

Plaintiffs allege that AOLTW may be held liable under the common law doctrine of *respondeat superior*.[13] See Compl. ¶ 92(a),(b),(c). Under the doctrine of *respondeat superior*, an employer may be held liable, despite having no fault whatsoever, for the actions of its employees taken within the scope of their employment. See Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (*Respondeat superior* "makes the employer liable, regardless of what he knew or should have know or did or should have done, for the torts that his

[13] The Complaint does not allege that TWE is liable under a theory of *respondeat superior*.

employees commit in the course of, or . . . in the furtherance of, their employment"); see also Cronin v. Hertz Corp., 818 F.2d 1064, 1068 (2d Cir. 1987).

Nothing in the ERISA statute permits a non-fiduciary such as AOLTW to be held liable for breaches of fiduciary duties by others. ERISA imposes liability only on named fiduciaries and those who exercise actual discretionary authority or control over the management or disposition of assets, or the administration of Plans. See ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). ERISA contains a provision for co-fiduciary liability, but that provision clearly confines ERISA liability to persons with fiduciary status. See ERISA § 405, 29 U.S.C. § 1105.

There is no reason for the Court to recognize an implied ERISA cause of action under the doctrine of *respondeat superior* liability. The Supreme Court has observed that, "ERISA is . . . 'a comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system". Mertens, 508 U.S. at 251 (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980)). Accordingly, the Supreme Court has expressed an "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly'". Mertens, 508 U.S. at 254 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985)) (emphasis in original); see also Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) (same).

For these reasons, courts have rejected *respondeat superior* liability under ERISA under facts similar to those alleged in this case. In Gelardi, the Ninth Circuit affirmed the district court's decision refusing to impose liability on an employer for the plan administrator's denial of benefits to the plaintiff, stating that "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." Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985) (citations omitted); see also In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d at 761 (ERISA "does not purport to make supervisors of fiduciaries also fiduciaries"); Crowley v. Corning, Inc., 234 F. Supp. 2d 222, 228 (W.D.N.Y. 2002) (finding company not liable under ERISA based on theory of *respondeat superior* liability); Walsh v. Emerson, Nos. 88-952-DA, 88-1367-DA, 1990 WL 47319, at *3 (D. Or. Jan. 19, 1990) (same).[14] Consistent with these decisions, plaintiffs' attempt to graft principles of *respondeat superior* into the ERISA statutory scheme should be rejected.

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

In Claim 1, plaintiffs assert that all 47 Defendants breached a fiduciary duty under ERISA § 404, 29 U.S.C. § 1104 by failing to eliminate the Stock Fund as an investment option and to sell all of the Plans' Stock Fund holdings. This claim should be dismissed because none of the Defendants, acting as fiduciaries, had the discretion to do this.

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[14] Some courts have found that the doctrine of *respondeat superior* applies in ERISA cases. These courts primarily rely on American Fed'n of Unions v. Equitable Life Assurance Soc. of the U.S., 841 F.2d 658 (5th Cir. 1988). There, the Fifth Circuit 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 because "Equitable never actively and knowingly participated in Holden's breach of duty to the Fund, as is required for a finding of *respondeat superior* liability". Id. at 665; see also Kral, Inc. v. Southwestern Life Ins. Co., 800 F. Supp. 1426, 1429 (N.D. Tex. 1992) (citing American Fed'n and holding that "[a]bsent active and knowing participation in the breach of fiduciary duties, a non-fiduciary cannot be held liable for the conduct of its agent"). The Fifth Circuit's reasoning has been questioned by other courts. The Sixth Circuit remarked 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". Hamilton v. Carell, 243 F.3d 992, 1002 (6th Cir. 2001); see also Walsh, 1990 WL 47319, at *3 & n.1 (same).

A. The Board Defendants Had No Discretion to Eliminate the Stock Fund as an Investment Option Under the Savings and Thrift Plans.[15]

Under ERISA, a fiduciary has a duty to discharge his or her 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). Moreover, offering company stock as an investment option, even if it ultimately declines in market value, is not inconsistent with ERISA. See DeBruyne v. Equitable Life Assurance Soc'y of the U.S., 720 F. Supp. 1342, 1347 (N.D. Ill. 1989) (holding that, although a different investment strategy may have mitigated losses suffered after the 1987 stock market crash, the defendants fully complied with the fund in accordance with the plan documents and thus, did not violate ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D)).

With respect to the Savings and Thrift Plans, the existence of the Stock Fund as an investment option is part of the design of the Plans. Each Plan provides that one investment fund available under the Plans "*shall* be designated the [AOL] Time Warner Inc. Stock Fund and *shall* be invested in Employer Securities". Wolf Decl. Ex. A, Savings Plan § 6.2 (emphasis added), Am. No. 4 to the Time Warner Savings Plan; Ex. B, Thrift Plan § 6.2, Am. No. 7 to the Time Warner Thrift Plan ¶ 5.

Because the existence of the Stock Fund is an element of the Savings and Thrift Plans by design, the only way to eliminate the Stock Fund as an investment option is to amend the Plans. Plaintiffs do not allege that the Board Defendants--or any other Defendant--breached a fiduciary duty by failing to amend the Plans to eliminate the Stock Fund. Indeed, the failure to amend the Plans to eliminate the Stock Fund as an investment option is not a fiduciary act and

[15] As noted in Section II above, the Board Defendants have no fiduciary duties whatsoever under the TWC Plan.

cannot give rise to ERISA liability.[16] See In re McKesson HBOC, Inc. ERISA Litig., No. C00-20030RMW, 2002 WL 313431588, at *8 n.8, (N.D. Cal. Sept. 30, 2002) ("[T]he complaint fails to state a claim to the extent that plaintiffs' claim is based upon a failure to amend the Plan to provide for investments other than McKesson stock. Plan amendment is not a fiduciary act within the meaning of ERISA.") (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999); Lockheed, 517 U.S. at 890-91); see also Siskind, 47 F.3d 498, 506-507 (holding that plan amendment is not a fiduciary act); In re WorldCom, Inc. ERISA Litig, 263 F. Supp. 2d at 758 (the decision "to adopt, modify, or terminate a benefit plan . . . is not a fiduciary act since the [ERISA] statute's defined functions of a fiduciary do not include plan design") (citing Lockheed, 517 U.S. at 890). Therefore, the existence of the Stock Fund as an investment option under the Savings and Thrift Plans, which is an element of each Plan by design, cannot give rise to ERISA liability.[17]

[16] In WorldCom, plaintiffs' claim that defendants should have eliminated the WorldCom stock fund survived defendants' motion to dismiss. The court, however, specifically found that "nothing in the Plan committed WorldCom to offer an investment in WorldCom stock through its 401(k) plan" as "WorldCom stock could have been removed as one of the investments offered under the Plan *without amending* the Plan". In re WorldCom ERISA Litig., 263 F. Supp. 2d at 764, 765 (emphasis added). In contrast, the Defendants in this case could not have eliminated the Stock Fund as an investment option without amending the Plans.

[17] By design, the Savings and Thrift Plans provide that company matching contributions generally "will be credited" to the Stock Fund. Wolf Decl. Ex. A, Savings Plan § 6.4(a); Ex. B, Thrift Plan § 6.4(a). The Complaint does not allege that Defendants breached their fiduciary duties with respect to the Company's matching contributions, other than to assert in a wholly conclusory manner that "defendants failed to consider the risks inherent in the Stock Fund, as described above, when evaluating the prudence of the Fund as a Plan investment option, as well as prudence of matching Plan Participants' contributions with Fund shares". (Comp. ¶ 151.) To the extent that allegation is sufficient to assert a claim for breach of fiduciary duty based on the Company's matching contributions, the claim must nevertheless be dismissed because the requirement that matching contributions be invested in the Stock Fund likewise was an element of each Plan's design, and the failure to modify the Plans is not a fiduciary act.

B. The Investment Committee Defendants Had No Discretion Over the Stock Fund for the Savings and Thrift Plans.

Like the Board, the Investment Committee Defendants cannot be held liable under Claim 1 because the Stock Fund is a required element of the Savings and Thrift Plans.[18] Moreover, even beyond the fact that plan amendment is not a fiduciary act, the Investment Committee has no authority to amend the Plans. Accordingly, the Investment Committee Defendants cannot be charged with any failure to amend the Plans to eliminate the Stock Fund.

In addition, the Investment Committee Defendants cannot be held liable for breach of fiduciary duty under Claim 1 with respect to the Savings and Thrift Plans because, under the Plans, the Investment Committee expressly was given no investment policy discretion over the Stock Fund. The Savings and Thrift Plans explicitly provide that

> [T]he investment Committee *shall not* exercise any investment power or authority with respect to common stock of the Company, including, without limitation, any power or authority, directly or indirectly, to control or influence the times when, or the prices at which, any trustee or investment manager may sell common stock of the Company, the amount of such stock to be sold, the manner in which such stock is to be sold, or the selection of a broker or dealer through which sales of such stock may be executed . . . .

Wolf Decl. Ex. A, Savings Plan § 14.11; Ex. B, Thrift Plan § 14.11 (emphasis added). Because the Investment Committee Defendants had no discretion to sell the AOLTW stock held in the Stock Fund or to otherwise divest the Plans of their Stock Fund assets, the Investment Committee cannot be liable under Claim 1 for any damages allegedly suffered by the Savings Plan or Thrift Plan participants. See In re Williams. Cos. ERISA Litig., 2003 WL 21666555, at *8, *9; Crowley, 234 F. Supp. 2d at 228, 229.

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[18] The TWC Plan also includes language explicitly referencing the Stock Fund as an investment option available to Participants. See Wolf Ex. C, TWC Plan §§ 5.5, 7.6, 7.7; Ex. F, TWC Plan SPD at 10; Ex. G. Moreover, the same Investment Committee has authority with respect to all three Plans, and the Stock Fund is common to all three Plans. In any event, Claim 1 should be dismissed in its entirety as to the Investment Committee Defendants for the reasons set forth in Section IV.D below.

C. The Administrative Committee Defendants Did Not Act in a Fiduciary Capacity with Respect to Investment Decisions and Had No Discretion Over Investment Policy for Any of the Plans.

Like the Board and the Investment Committee, the Administrative Committee Defendants cannot be held liable under Claim 1 because the Stock Fund is a required element of the Savings and Thrift Plans. Moreover, even beyond the fact that plan amendment is not a fiduciary act, the Administrative Committee, like the Investment Committee, has no authority to amend the Plans and therefore, cannot be held liable under ERISA for failure to do so.

In addition, Claim 1 must be dismissed against the Administrative Committee Defendants because under the Plans, the Administrative Committee did not have any discretionary authority regarding the investment of Plan assets. Fiduciary status under ERISA "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.'" Kerns v. Benefit Trust Life Ins. Co., 992 F.2d 214, 217 (8th Cir. 1993) (quoting Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992)).

Here, the alleged breaches of duty under Claim 1 all relate to the Plans' investment policy, i.e., whether investing in company stock was prudent. The Administrative Committee Defendants had no discretionary authority with respect to investment policy or the selection of investment funds under any of the Plans.[19] Moreover, the Complaint does not allege that any of the Administrative Committee Defendants actually exercised authority over

[19] The Complaint erroneously alleges that "the Administrative Committee of the TWC Savings Plan had the responsibility to establish overall investment policy for the TWC Savings Plan". (Compl. ¶ 85.) The Plan, however, contradicts this assertion. Article 11, which sets for the duties and responsibilities of the Administrative Committee, does not authorize the Administrative Committee to exercise discretion over investment decisions. See Wolf Decl. Ex. C, TWC Savings Plan § 11.2. Moreover, section 15.2 of the Plan provides that "[t]he Investment Committee shall have full authority, subject to the express provisions of the Plan and Trust, to determine the investment policy for the Plan". Id., TWC Plan § 15.2.

investment policy. The Administrative Committee Defendants therefore cannot be held liable for alleged breaches of fiduciary duty relating to investment decisions under any of the Plans.[20] See In re Williams Cos. ERISA Litig., 2003 WL 21666555, at *8 (dismissing claim against company for breach of fiduciary duty for continuing to offer plan participants the opportunity to invest in company stock because "Williams did not control investment decisions"); id. at *9 (dismissing claims against Board for breach of fiduciary duty for failing to disclose financial information about the company because "the Board does not have the power to control investment options or to communicate Plan information"); Crowley, 234 F. Supp. 2d at 228 (dismissing claims against Company for allegedly mismanaging plan assets because "Corning was not charged with this function"); id. at 229 (dismissing claim against Board for imprudently continuing to offer plan participants the ability to invest in company stock because "the Board did not control investment options").

D. Selling AOLTW Stock Based on Alleged Material Insider Information Would Have Violated the Securities Laws.

Plaintiffs' claim that Defendants should have divested the Stock Fund of all Plan assets is not consistent with the federal securities laws. Rule 10b-5 prohibits corporate insiders from trading company stock on the basis of material, non-public information. See United States v. O'Hagan, 521 U.S. 642, 651-52 (1997). This prohibition applies to ERISA fiduciaries. See SEC Release No. 33-6188, Employee Benefit Plans, 1980 WL 29482, at *28 & n.168 (Feb. 1, 1980) (the antifraud provisions of Rule 10b-5 apply to sales of an employer's stock by an employer-sponsored pension fund). Indeed, ERISA expressly provides that it should not be

[20] Likewise, neither AOLTW nor TWE had any discretionary authority with respect to the Plans' investment policies. Thus, even if it could be argued, contrary to fact, that AOLTW and TWE are fiduciaries under the Plans, see Part I.A, the scope of their fiduciary duties could not extend to investment decisions and Claim 1 therefore should be dismissed against them.

construed to require such violations of federal law. See ERISA § 514(d), 29 U.S.C. § 1144(d) (ERISA should not be construed to "alter, amend, modify, invalidate, impair, or supersede" any federal law, rule or regulation).

Plaintiffs allege that Defendants knew that AOLTW stock was an imprudent investment, based upon material, non-public information, and that Defendants should have sold AOLTW stock on the basis of that information. Accepting as true plaintiffs' allegations, Defendants would have had to violate the securities laws in order to sell off the Plans' Stock Fund holdings. Defendants cannot be held liable under ERISA for failure to violate the securities laws.

Plaintiffs allegations are similar to those in In re McKesson HBOC. In that case, the court dismissed plaintiffs' allegation that defendants breached their fiduciary duties by failing to divest a plan of its company stock after a merger. See In re McKesson HBOC, 2002 WL 31431588, at *8. The court observed that "[n]ot even a fiduciary acting in its fiduciary capacity is permitted to engage in insider trading". Id. at *6 (citation omitted). Indeed, fiduciaries are "not obligated to violate securities laws" to protect the interests of plan participants. Id. The court then dismissed the claim, holding that because plan fiduciaries were unable, consistent with the federal securities laws, to sell the plan's employer stock "at the artificially high price", "there was no lawful action that could have been taken by the fiduciaries that would have avoided the subsequent loss occurring after public disclosure of the accounting problems". Id. at *6, *8; see also Hull v. Policy Mgmt. Sys. Corp., No. CIV. A.3:00-778-17, 2001 WL 1836286, at *9 (D.S.C. Feb. 9, 2001) (dismissing claims against investment committee where imposing ERISA liability "would put the Committee in the untenable position of choosing one of three unacceptable (and in some instances illegal) courses of action; (1) obtain 'inside' information and then make stock

purchase and retention decisions based on this 'inside' information; (2) make the disclosures of 'inside' information itself before acting on the discovered information, overstepping its role and, in any case, likely causing the stock price to drop; or (3) breach its fiduciary duty by not obtaining and acting on 'inside' information."). In this case, assuming that Defendants believed that the Stock Fund was an imprudent investment, the securities laws likewise prevented them from selling the AOLTW stock based upon such material, non-public information.[21]

E. No Claim for Co-Fiduciary Breach is Cognizable.

The Complaint suggests, albeit ambiguously, that there might be co-fiduciary liability with respect to Claim 1. (See Compl. ¶ 150.) The Complaint utterly fails, however, to allege any facts that would put any Defendant on notice of what he or she might have done that gives rise to co-fiduciary liability. Therefore, to the extent it is based on co-fiduciary liability, Claim 1 should be dismissed. See In re McKesson HBOC, 2002 WL 31431588, at *17 (dismissing claim for co-fiduciary liability because the complaint did not "put each defendant on notice of what it is that he, she or it has done that allegedly gives rise to liability"); Vulcan Material Co. v. City of Tehuacana, 238 F.3d 382, 387 (5th Cir. 2001) (dismissing claim that merely "faithfully recites" the relevant statute but "does no more than that"); Haber v. Brown,

[21] Although Judge Cote in WorldCom rejected a defense based on the federal securities laws, her decision is not inconsistent with McKesson or with Defendants' argument here. Judge Cote held only that defendant Ebbers could not use his obligations under the federal securities laws as a defense to a claim that he *failed to disclose* material non-public information to Plan participants. 263 F. Supp. 2d at 765. Here, however, as in McKesson, Defendants' argument relates only to Claim 1, which alleges a breach of duty by *failing to divest* the Plans of AOLTW stock, not an alleged failure to disclose. This important distinction was recently recognized in Rankin v. Rots, No. 02-CV-71045, 2003 WL 21995176, at *18 (E.D. Mich. Aug. 20, 2003) (noting that McKesson is not inconsistent with WorldCom because McKesson addressed "whether plaintiffs stated a claim for breach of a *duty to divest* the 401K Plan of company stock after a merger, not whether they breached a *duty to disclose information* with respect to the company") (emphasis in original).

774 F. Supp. 877, 879 (S.D.N.Y. 1991) (dismissing ERISA claim that "simply . . . incorporat[ed] terms directly from the statute").

V. CLAIM 2 SHOULD BE DISMISSED BECAUSE THE ALLEGATIONS ARE TOO GENERALIZED AND THE ALLEGED MISSTATEMENTS WERE NOT MADE IN A FIDUCIARY CAPACITY.

In Claim 2, plaintiffs assert that all 47 Defendants breached a fiduciary duty under ERISA § 404, 29 U.S.C. § 1104 by negligently misrepresenting and failing to disclose material information to Plan participants. 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. Claim 2 should also be dismissed to the extent it relies on alleged misstatements because the Complaint fails to allege that any misstatement was made by any of the Defendants in a fiduciary capacity.

A. Claim 2 Fails to Plead Specific Facts to Support a Claim for Breach of Fiduciary Duty.

The Complaint generally alleges that all 47 Defendants breached a fiduciary duty under ERISA § 404, 29 U.S.C. § 1104 "through negligent misrepresentations and the failure to disclose information that would have influenced the investment decisions of Plan participants and fiduciaries". (Compl. ¶ 155.) The Complaint, however, makes no effort to differentiate the roles of any of these Defendants with respect to the wrongful conduct alleged, or to identify which Defendants had a fiduciary duty to communicate with Plan participants or fiduciaries.

Under ERISA, a person is a fiduciary only "to the extent" that he or she "exercises any discretionary authority or discretionary control respecting management" of a plan. ERISA § 3(21)(A), 29 U.S.C. § 1102(21)(A); see also Lockheed, 517 U.S. at 890. Accordingly,

in every case alleging breach of ERISA fiduciary duty, "the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint". Pegram v. Herdrich, 530 U.S. 211, 226 (2000). ERISA imposes liability on a fiduciary only to the extent that he or she breached a duty that related to matters within his or her discretion and control. Schultz v. Texaco, Inc., 127 F. Supp. 2d 443, 451 (S.D.N.Y. 2001).

Here, each Plan allocates fiduciary duties among its Investment Committee, Administrative Committee and, in the case of the Savings and Thrift Plans, the Board, which appoints Committee members. Each Plan further provides 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". Wolf Decl. Ex. A, Savings Plan § 14.14(b); Ex. B, Thrift Plan § 14.14(b); see also Ex. C, TWC Plan § 12.5. Thus, the Plans limit the scope of duties assigned to each fiduciary and the concomitant potential liabilities. Nevertheless, the Complaint fails to acknowledge the distinct roles played by each fiduciary and instead indiscriminately attempts to hold all 47 Defendants liable for allegedly misrepresenting and failing to disclose information to Plan participants. For example, under each Plan, the fiduciary duties assigned to the Administrative Committee are limited to the interpretation of the Plan, the determination of employees' eligibility for benefits and the resolution of disputes arising from the administration of the Plan. See Wolf Decl. Ex. A, Savings Plan § 14.4; Ex. B, Thrift Plan § 14.4; Ex. C, TWC Plan § 11.2. Nevertheless, plaintiffs seek to hold the Administrative Committee of each Plan liable for alleged misrepresentations contained in SEC filings without explaining how the Administrative Committees had any fiduciary duties

relating to those disclosures. Likewise, the Savings and Thrift Plans limit the Investment Committees' fiduciary duties to the determination of available investment options. Plaintiffs, however, seek to hold the Investment Committees liable for alleged misstatements in communications with Plan participants concerning the AOLTW Stock Fund without explaining why such communications even fall within the scope of the Investment Committees' duties.

At bottom, the Complaint's vague and generalized allegations are defective because they fail to identify, with respect to each Defendant, the scope of his or her fiduciary duties and the acts taken that allegedly give rise to ERISA liability. For example, the Complaint alleges that all Defendants "made direct negligent misrepresentations to Participants concerning the financial performance and prospects of AOL and the Stock Fund." (Compl. ¶ 172.) Yet in support of this allegation, plaintiffs assert in only one paragraph a single instance of alleged negligent misrepresentation, namely that "[d]efendant Parsons sent frequent memos to Participants which negligently misrepresented the financial information alleged [in the Complaint]". Id. The Complaint, however, does not allege which Defendants, other than Parsons, sent any alleged memos, and what information any of the memos contained. And with respect to all Defendants, plaintiffs fail to specify whether Defendants were communicating to all company employees, including Plan participants, in their capacities as corporate officers or to Plan participants only in their capacities as fiduciaries.[22] Similarly, the Complaint alleges that all 47 Defendants negligently misrepresented information in AOL and AOLTW's SEC filings, but fails to identify which Defendants made any statements within the meaning of securities laws or were otherwise responsible for those SEC filings. Thus, the Complaint's generalized allegations

[22] To the extent that that alleged communications were made to employees generally, Defendants cannot be said to have made them as Plan fiduciaries and therefore, such communications cannot give rise to liability under ERISA. See Pegram, 530 U.S. at 225-26 (fiduciary obligations imposed by ERISA are implicated only when an officer wears his fiduciary hat).

fail "to put the various defendants on notice of the allegations against them" and should be dismissed. In re Providian Fin. Corp. ERISA Litig., No. C 01-05027 CRB, 2002 WL 31785044, at *1 (N.D. Cal. Nov. 14, 2002) (ordering plaintiffs to file an amended complaint where "plaintiffs 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 addition to lacking specificity as to duties and acts, the Complaint contains only vague, generic assertions that the Defendants "knew" or "should have known" underlying facts concerning the accounting for AOL advertising revenue that allegedly made the Stock Fund an imprudent investment. The Complaint never identifies what each Defendant allegedly knew that was not publicly known or how each Defendant purportedly obtained such nonpublic information.[23] See Compl. ¶ 105 (as a result of "due diligence", "Defendants should have known that AOL was a risky stock for retirement plan investments"); ¶ 125 ("Defendants, because of their senior positions with the Company and because of the 'due diligence' conducted in connection with the Merger, should have known that online advertising was not growing"); ¶ 126 ("By the time the Merger closed, all Defendants should have known that the Fund was an imprudent investment."). As an example, it is difficult to understand how some former Time Warner executives--such as Parsons and Pace--were aware of alleged accounting problems at AOL prior to the merger[24]. It is equally difficult to understand how plaintiffs claim that Time Warner's former outside directors--such as Akerson, Bollenbach and Hills--were aware of alleged errors in AOL's books. For these reasons, Claim 2 should be dismissed for failure to

[23] The Complaint repeatedly states that the "America Online Defendants should have known" that America Online Inc. was losing advertising revenue. (Compl. ¶¶ 120, 122.) The Complaint, however, does not define the term "America Online Defendants".

[24] Defendant Pace, for example, was not even employed as CFO of AOLTW until November of 2001, which is nearly one year after the AOL/Time Warner Inc. merger closed.

state a claim against any particular Defendant. See Crowley, 234 F. Supp. 2d at 230 (dismissing claim alleging breach of fiduciary duty for failure to disclose material non-public information where "plaintiff's allegations are made against all defendants, without specifying when the 'adverse information' was available, or known, to Committee members, or any single one of them"); Hull, 2001 WL 1836286, at *9 ("Quite critically, plaintiff does not allege that the Committee defendants themselves had any actual knowledge of any misinformation or that they participated in the dissemination of information they knew or should have known was misleading.").

B. Alleged Misstatements in SEC Filings Were Not Made in a Fiduciary Capacity.

Even if the Court accepts the Complaint's generalized allegations, Claim 2 must nevertheless be dismissed to the extent that it relies on alleged misstatements in SEC filings because they were not made in any fiduciary capacity.

ERISA permits fiduciaries to wear two "hats"--that of a corporate officer or director and that of an ERISA fiduciary. See In re WorldCom Inc. ERISA Litig., 263 F. Supp. 2d at 760 (citing Pegram, 530 U.S. at 225). "ERISA liability arises only from actions taken or duties breached in the performance of ERISA obligations." Id. SEC filings are corporate statements, made on behalf of a company in order to comply with federal securities laws. "With respect to these statements, no fiduciary liability can be implicated", because these are "statements made to the market in general, not Plan participants specifically." Stein v. Smith, No. Civ.A.01-10500-RCL, 2003 WL 21513207, at *11 (D. Mass. July 3, 2003); see also In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d at 760.

Here, plaintiffs allege that AOLTW filed misleading SEC filings, which were incorporated by reference into Plan SPDs. (Compl. ¶¶ 97-101). Although the Plan SPDs

incorporate AOLTW's SEC filings by reference, "those connections are insufficient to transform those documents into the basis for ERISA claims against their signatories". In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d at 760. Because Defendants cannot be held liable under ERISA for acts performed in their non-fiduciary capacities, Claim 2 should be dismissed. See Stein, 2003 WL 21513207 at *11 (dismissing claim for breach of fiduciary duty for failure to disclose complete information about company's financial condition); In re Williams Cos. ERISA Litig., 2003 WL 21666555, at *8 (dismissing claim for breach of fiduciary duty based on alleged material misrepresentations and nondisclosures by the company because "such statements, regardless of truth or falsity, were not made by Williams in any fiduciary capacity regarding the Plan"); In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d at 760 (dismissing claims against company and board for same reason); Crowley, 234 F. Supp. 2d at 228 (dismissing claim for breach of fiduciary duty based on alleged material misrepresentations and nondisclosures concerning company's future performance because "such statements, regardless of the truth or falsity, were not made by Corning in any fiduciary capacity regarding the Plan").[25]

VI. CLAIM 3 SHOULD BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ADEQUATELY ALLEGE THE BREACH OF ANY FIDUCIARY DUTY.

In Claim 3, plaintiffs assert that the Board Defendants breached their fiduciary duties under ERISA by (i) appointing Committee members who "lacked the knowledge, skill and

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[25] In a recent and factually indistinguishable case, a district court dismissed all claims, stating:

> If the allegations of wrongdoing, including allegations of providing misinformation and failing to provide accurate information, ultimately prove true, the Plan's remedy will be the same as for the plaintiff class in the related securities action. This result is not at all unreasonable as the *duties of disclosure owed to the Plan by the corporate defendants are not based on the duties owed by an ERISA fiduciary to a Plan and its participants, but the general duties of disclosure owed by a corporation and its officers to the corporation's shareholders.*

Hull, 2001 WL 1836286, at *8 (emphasis added).

expertise" to manage the Plans' assets prudently, and (ii) failing to inform the Committees of "the information the Committee needed to know". (Compl. ¶ 173.) Neither of these claims, however, is supported by allegations sufficient to state a cognizable claim under ERISA.

With respect to the Savings Plan and the Thrift Plan, the AOLTW Board does have authority to appoint and remove Administrative and Investment Committee members.[26] See Wolf Decl. Ex. A, Savings Plan § 14.1, § 14.8; Ex. B, Thrift Plan § 14.1, § 14.8. However, plaintiffs' assertion that Committee members were unqualified to serve as fiduciaries is wholly conclusory. Plaintiffs' only basis for this assertion is that the Board appointed "employees" to serve on these Committees. (Compl. ¶173(a).) ERISA, however, expressly permits the appointment of employees as Plan fiduciaries. See ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3) ("[n]othing in section 1106 of this title shall be construed to prohibit any fiduciary from . . . serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest"); see also Gelardi, 761 F.2d at 1325 ("ERISA anticipates that employees will serve on fiduciary committees") (citations omitted). Moreover, the Plan documents clearly contemplate the appointment of employees to these Committees, and expressly provide that Plan participants may serve on these Committees. See Wolf Decl. Ex. A, Savings Plan § 14.1, § 14.8; Ex. B, Thrift Plan § 14.1, § 14.8. Because both ERISA and the Plan documents permit

[26] As discussed above, see Point II, under the TWC Plan, the Board Defendants do not have any authority, including the authority to appoint or remove Committee members. See Wolf Decl. Ex. C, TWC Plan § 11.1, § 15.2. Accordingly, the Board Defendants cannot be liable under ERISA for claims arising out of the failure to appoint or monitor members of the TWC Plan Committees. See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1459-60 (5th Cir. 1986) ("a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control") (citations omitted).

employees to serve on Plan Committees, the appointment of employees to Plan Committees, without more, cannot give rise to liability under ERISA.

Similarly, there are no facts alleged in the Complaint to establish that the Board Defendants failed to communicate any material information to the Administrative and Investment Committee members. To avoid dismissal for failure to state a claim, plaintiffs must plead something other than wholly-conclusory allegations disguised as factual assertions. Accordingly, plaintiffs' claim based on the Board Defendants' alleged failure to appoint, monitor or properly inform Plan Committee members must be dismissed. In re McKesson, 2002 WL 31431588, at *15-*16 (dismissing claims company and Board for failure to monitor Committee members and failure to communicate information to Committee members where no facts are alleged to establish claims).

VII. CLAIM 4 SHOULD BE DISMISSED BECAUSE SALES OF AOLTW STOCK WERE NOT MADE IN A FIDUCIARY CAPACITY.

In Claim 4, plaintiffs allege that the Selling Defendants breached a fiduciary duty of loyalty by selling shares of AOLTW stock held in a personal capacity. This allegation does not state a claim under ERISA. Fiduciary liability attaches only to those actions that are performed in a fiduciary capacity, see, e.g., Sommers Drug Stores, 793 F.2d at 1459-60, and a fiduciary's sale of securities held in a personal capacity is not a fiduciary act. Indeed, to sustain this claim, the Court would have to find that ERISA prohibits any fiduciary from selling any security that is also held by any Plan to which that fiduciary is bound. Neither ERISA nor the cases interpreting ERISA provide for any such prohibition. See O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc., 37 F.3d 55, 61 (2d Cir. 1994) ("The fiduciary duty of loyalty imposed by ERISA is designed to ensure that fund assets are held and administered for the sole and exclusive benefit of plan participants.") (citation omitted).

Conclusion

For the foregoing reasons, Defendants respectfully request that the Court grant its Motion to Dismiss the Consolidated ERISA Complaint.

September 12, 2003

CRAVATH, SWAINE & MOORE LLP

by 

Robert D. Joffe (RJ-6825)
Evan R. Chesler (EC-1692)
Peter T. Barbur (PB-9343)

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Defendants AOL Time Warner Inc., Time Warner Entertainment Co., L.P., the Committee Defendants and the Individual Defendants