UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

IN RE TYCO INTERNATIONAL, LTD., SECURITIES LITIGATION OVERBY, et al., Plaintiffs, v. TYCO INTERNATIONAL LTD., et al., Defendants.

02-MDL-1335-B
ERISA ACTION
Civil Action No.
02-1357-B

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS BODMAN AND LANE'S MOTION TO DISMISS CONSOLIDATED AMENDED COMPLAINT

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Defendants Richard S. Bodman and Wendy E. Lane, former outside directors of Tyco International Ltd. ("Tyco"), respectfully submit this memorandum in support of their motion to dismiss the Consolidated Amended Complaint (the "Complaint" or "Compl.") pursuant to Rules 12(b)(1) and (6), Fed. R. Civ. P., for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Preliminary Statement

Plaintiffs, participants in certain Retirement Savings and Investment Plans of Tyco International (US) Inc. (the "Plans"), assert claims for alleged breaches of fiduciary obligations under the Employee Retirement Income Security Act of 1974 ("ERISA"), and seek recovery on behalf of themselves, the Plans, and a class of participants in the Plans who purchased or held shares in the Tyco International Ltd. Stock Fund (the "Tyco Stock Fund"). Under the Plans' documents, Tyco International (US) Inc. ("Tyco US"), a subsidiary of Tyco -- but not Tyco itself -- is the Plans' sponsor; and the Tyco US Retirement Committee (the

"Retirement Committee") -- not Tyco's Board of Directors -- is the Plans' administrator and "named fiduciary" under the Plans. (Compl. ¶¶ 16, 17, 41). Nevertheless, rather than focusing their claims upon those with actual fiduciary responsibility for the Plans, plaintiffs have adopted a carpet bombing approach to this litigation in an effort to hit as many potential targets as possible, without differentiating between those subject to suit under ERISA and those not subject to such suit. Among those caught up in plaintiffs' tactics are defendants Bodman and Lane, who apparently were named as defendants solely because they were directors of the parent of the Plans' sponsor during a portion of the alleged class period.

There are many dispositive reasons why the instant Complaint is insufficient as a matter of law. To avoid unnecessary burden upon the Court, defendants Bodman and Lane respectfully incorporate by reference the points set forth in the Memorandum of Tyco International Ltd., Tyco International (US) Inc. and Certain of the Individual Defendants in Support of Their Motion to Dismiss, dated April 4, 2003, as they relate to the Tyco directors. Defendants Bodman and Lane will elaborate here only upon two points that are particularly relevant to their own motion to dismiss.

Specifically, there are two threshold reasons why the Complaint should be summarily dismissed as against defendants Bodman and Lane. First, the Plans themselves do not specify any fiduciary, administrative or managerial role concerning the Plans for the Tyco Board of Directors (the "Tyco directors"), nor does controlling law provide any basis for plaintiffs' conclusory allegations that Tyco directors were fiduciaries of the Plans. Plaintiffs' ipse dixit characterization of Mr. Bodman and Ms. Lane as Plan fiduciaries, owing duties to the Plans and their participants (the "Participants"), does not make it so, and cannot survive challenge on this motion. Second, even assuming, arguendo, that defendants Bodman and Lane had been Plan

fiduciaries, plaintiffs do not plead any facts demonstrating any conduct on their part that could constitute a breach of fiduciary duty under ERISA. Plaintiffs' sole charge against defendants Bodman and Lane is that, by signing allegedly "false and misleading" Tyco disclosure and registration statements filed with the Securities and Exchange Commission ("SEC"), the Tyco directors breached supposed fiduciary duties under ERISA owing to the Participants. However, the signing of SEC filings, required of an issuer's corporate directors under the securities laws, is not a fiduciary act as to a subsidiary's plan within the meaning of ERISA. There is not, and could not be, any allegations that Mr. Bodman or Ms. Lane (or any other Tyco director) signed the SEC filings other than expressly in their corporate business capacity as Tyco directors, and there certainly is (and could be) no pleading that they signed in the capacity of Plan fiduciaries under ERISA. Accordingly, plaintiffs' claims against defendants Bodman and Lane must be dismissed.

Argument

Plaintiffs, in conclusory fashion, have accused over 50 defendants of violating fiduciary duties under ERISA by supposedly: (1) making negligent representations and negligently failing to disclose material information to the Participants concerning Tyco corporate financial matters and whether the Tyco Stock Fund was an appropriate investment, and (2) allowing Participants to invest in the Fund when Tyco stock was not a prudent investment. Compl. ¶ 3.

However, defendants Bodman and Lane are mentioned by name only once in the entire Complaint: in a paragraph that simply lists persons who were members of the board of directors of Tyco at some point during the alleged class period. Compl. ¶ 26. The Tyco directors, in turn, are charged with nothing more than having signed certain Tyco disclosure and

registration statements that are required to be signed by corporate directors under the federal securities laws, and not under ERISA. Compl. ¶ 61. There is not -- and could not be -- any allegation that Mr. Bodman and Ms. Lane were directors of Tyco US, or members of the Retirement Committee responsible for administration of Plans, or were named in any Plan documents, much less that they ever agreed to undertake any such fiduciary role. Plaintiffs' conclusory characterizations fall woefully short of pleading the facts necessary to state a claim that the Tyco directors (including outside directors Bodman and Lane) were fiduciaries of the Tyco US Plans or that they engaged in any ERISA fiduciary acts that could subject them to liability under ERISA.[1]

I. THE TYCO DIRECTORS ARE NOT PLAN "FIDUCIARIES" WITHIN THE MEANING OF ERISA

There are three ways by which a person may be determined to be a plan fiduciary under ERISA: (1) by being named as a fiduciary under the plan documents; (2) by being named as a fiduciary pursuant to a procedure outlined in the plan documents, or (3) by being deemed a de facto fiduciary as a result of performing functions that fall within ERISA's definition of "fiduciary." Torchetti v. IBM Corp., 986 F. Supp 49, 55 (D. Mass. 1997). The Retirement Committee is the only "named fiduciary" under the Plans. Compl. ¶ 41. Moreover, plaintiffs do

[1] On a motion to dismiss for failure to state a claim for relief, the court must accept only the complaint's well-pled factual allegations as true. See Gomez v. Toledo, 446 U.S. 635, 636 (1980). However, this Court is "not obliged to accept as true legal conclusions or unsupported conclusions of fact." Hickey v. O'Bannon, 287 F.3d 656, 658 (7th Cir. 2002); Abbott v. United States, 144 F.3d 1, 2 (1st Cir. 1998); Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993). See also 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1363 (2d ed. 1990 & 2002 Supp.). The court also should not accept the plaintiffs' allegations where they are contradicted by the Plan documents attached to or referenced in the pleadings. It is well-established that where there is a disparity between a written instrument and the allegations in a pleading, the instrument controls. See Ogden Martin Sys. of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 529 (7th Cir. 1999). Such is the case here, where the plaintiffs' assertions of fiduciary status for the Tyco directors are wholly unsupported (and indeed, controverted) by the Plan documents themselves, copies of which are submitted with Tyco's motion to dismiss. Decl. of Francis Barron, Exs. 1-3.

not allege that any other defendant -- and certainly not Mr. Bodman or Ms. Lane, who were Tyco outside directors and had no position at Tyco US or the Plans -- was delegated fiduciary responsibility under a procedure specified in the Plans. Therefore, the Tyco Directors can be liable only if they are deemed de facto fiduciaries under ERISA § 3(21)(A), which reads as follows:

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

29 U.S.C. § 1002(21)(A) (emphasis added).

Because there is no allegation (much less a pleading of any fact establishing) that either Mr. Bodman or Ms. Lane provided fee-based investment advisory services to the Plans, plaintiffs can establish the existence of a fiduciary duty only if they plead specific facts demonstrating the existence or exercise of discretionary authority or responsibility in the management or administration of the Plans by Mr. Bodman or Ms. Lane. Plaintiffs plead no such facts. They could not. And in the absence of such factual allegations, plaintiffs' claims against these Tyco directors must be dismissed under Rule 12(b)(6). See, e.g., Adler v. Aztech Chas. P. Young Co., 807 F.Supp. 1068, 1072 (S.D.N.Y. 1992) (dismissing breach of fiduciary duty claims against CEO and parent company where plaintiffs failed to allege factual basis for fiduciary status). Here, plaintiffs have failed to allege any facts that would satisfy the statutory criteria for fiduciary status under ERISA.

As explained by the Supreme Court, ERISA makes a person a fiduciary "only 'to

the extent' that he acts in such a capacity in relation to the plan." Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) (citing 29 U.S.C. 1002(21)(A)); see also Mertens v. Hewitt Assoc., 508 U.S. 248, 262 (1993) ("ERISA. . . defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan" (emphasis in original)). The "key determinant" of functional fiduciary status is whether a person "exercises discretionary authority in respect to, or meaningful control over, an ERISA plan, its administration, or its assets." Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998). Moreover, fiduciary status is narrowly defined, "aris[ing] in specific increments correlated to the vesting or performance of particular fiduciary functions in service of the plan." Id. The First Circuit recently reaffirmed the narrow scope of fiduciary status under ERISA, holding that a plan administrator, who served as a fiduciary with respect to the management and distribution of plan assets, had no fiduciary responsibilities with respect to amendment of the plan. Campbell v. BankBoston, N.A., No. 02-1695, 2003 WL 834720, at *4 (1st Cir. Mar. 7, 2003).[2]

The sole basis upon which plaintiffs' purely conclusory assertion of fiduciary status rests is that Bodman and Lane were among the members of Tyco's board of directors who signed certain of Tyco's (not Tyco US's) SEC filings:

> The Directors of Tyco International, Ltd. signed the Form S-8 and many of the SEC filings incorporated by reference in the Form S-8 (and on information and belief, the SPD and Prospectus). The Directors of Tyco International, Ltd. were fiduciaries of the Plans because of these communications for the same reason that Tyco International Ltd. was a fiduciary.

[2] There is no basis under this narrowly-defined, "incremental" test for subjecting even members of the plan sponsor's Board of Directors to fiduciary liability merely by virtue of their position in the corporate heirarchy. Indeed, the Department of Labor's ERISA regulations expressly provide that the liability of a plan sponsor's directors is limited only to the acts they perform in a fiduciary capacity. 29 C.F.R. § 2509.75-8 (D-4). In the instant case, defendants Bodman and Lane are one more step removed from the Plan, since they were directors only of Tyco; and Tyco itself is not the Plans' sponsor, but the parent company of the Plans' sponsor (Tyco US).

Compl. ¶ 61.

Putting aside that Tyco, in its brief, already has established that it was not a Plan fiduciary, plaintiffs nowhere explain how the mere signing of SEC filings by corporate directors acting as corporate directors (conduct mandated by the securities laws long before ERISA's enactment in 1974)[3], without more, constitutes the exercise of "discretionary authority or discretionary control respecting management of [a pension benefit] plan . . . or disposition of its assets" or confers "discretionary authority or discretionary responsibility in the administration of such plan," especially where, as here, the claims involve plans of an issuer's subsidiary of which those signatories are not directors.

Indeed, plaintiffs never allege (much less plead any facts showing) that the Tyco directors had any discretionary power whatsoever regarding management or administration of the Plans, nor do they plead any facts showing that the Tyco directors exercised any such power over the Plans, or that they ever exercised control over any of the fiduciaries who were, in fact, responsible for the Plans. Significantly, one cannot even reasonably infer any such conduct: plaintiffs affirmatively allege that the Retirement Committee and Tyco US exercised discretionary authority with respect to management of the Plans, but no such allegation is made against Tyco or its board of directors (Compl. ¶¶ 42, 50) -- and certainly not against Mr. Bodman or Ms. Lane.

Tyco itself is not a fiduciary of the Plans (as established in its motion to dismiss); and therefore, its outside directors, who otherwise have no connection to the operations of Tyco US, cannot be held to be fiduciaries of benefit plans sponsored by Tyco's subsidiary. Nowhere

[3] Indeed, the SEC promulgated the Form S-8 registration statement more than 20 years before the enactment of ERISA, see Adoption of Rule S-8, 18 Fed. Reg. 3688 (June 16, 1953); and the securities laws have addressed the issue of director accountability for information contained in registration statements for more than 60 years. See, e.g., Oklahoma-Texas Trust v. SEC, 100 F.2d 888 (10th Cir. 1939).

do plaintiffs plead facts establishing that Tyco had any authority or control over the Plans, or indeed, any status other than being the corporate parent of the Plans' sponsor. Thus, there certainly is no basis in fact or law for this Court to impose fiduciary status on outside directors of the corporate parent simply by virtue of the existence of the parent-subsidiary relationship. Even as to a corporate parent, mere control over the general operations of a corporate subsidiary does not include specific authority and control over the administration or assets of the subsidiary's Plans, and the Court therefore cannot infer fiduciary status for the corporate parent. See Green v. William Mason & Co., 996 F.Supp. 394, 398 (D.N.J. 1998); Reily v. Axe-Houghton Management, Inc., No. 87 Civ. 2817 (SWK), 1988 WL 18895 (S.D.N.Y. Feb. 24, 1988) (dismissing claim of breach of fiduciary duty under Fed. R. Civ. P. 12(b)(6) against parent company of corporate fiduciary; plaintiff's allegations did not support assertion that corporate parent exercised any discretionary authority over the plans); Adkins v. Unum Provident Corp., 191 F.Supp.2d 956 (M.D. Tenn. 2002) (dismissing claims against corporate parent where parent did not fit into statutory definition of fiduciary); Adler, 807 F.Supp. at 1071 (dismissing claim against majority shareholder where complaint did not allege factual basis for fiduciary status within statutory definition). As there is no ERISA fiduciary duty for the parent itself, a fortiori, there can be no fiduciary duty for the directors of the parent corporation, whose relationship to the Plans is even more attenuated.[4]

[4] In a meritless attempt to avoid this conclusion, at least as to Tyco itself, Plaintiffs make a conclusory assertion that Tyco and Tyco US are alter egos. Compl. at ¶¶ 59, 60. Plaintiffs' bald allegation of alter ego status is insufficient to defeat a motion to dismiss. See Green v. William Mason & Co., 996 F.Supp. 394, 398 (D.N.J. 1998). Moreover, a "finding of some fraudulent intent is the *sine qua non*" to corporate veil-piercing. Crane v. Green & Freedman Baking Co., 134 F.3d 17, 22 (1st Cir. 1998). Plaintiffs have made no allegation of fraudulent intent, nor have they pled any facts whatsoever sufficient to raise even a genuine suggestion of alter ego status. In any event, as noted above, even if plaintiffs had adequately pled alter ego status as to Tyco, that would not be sufficient to establish a claim of fiduciary status as against the parent company's directors, such as Mr. Bodman and Ms. Lane.

II. DEFENDANTS BODMAN AND LANE ARE NOT ALLEGED TO HAVE ENGAGED IN ANY FIDUCIARY ACTS

The Complaint is not only devoid of any factual allegations establishing that defendants Bodman and Lane were fiduciaries to the Plans, it is devoid of factual allegations establishing any fiduciary acts on their part. The signing of SEC filings is a corporate business act on behalf of the parent corporation that is an issuer subject to the securities laws -- not a fiduciary act on behalf of a subsidiary's plan or its participants -- and therefore cannot give rise to fiduciary liability under ERISA. Fiduciary duty only arises with respect to conduct that involves the exercise of authority or control over plan management or administration. See supra, Point I; Pegram, 530 U.S. at 226: "[i]n every case charging breach of ERISA fiduciary duty. . . the threshold question is . . . whether [the defendant] was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." All corporations offering their own stock pursuant to a benefit plan -- whether or not the plan is covered by ERISA -- must file a SEC registration statement on Form S-8 or similar form. 17 CFR § 239.16b (2003). SEC filings made pursuant to a federal securities law mandate simply do not involve the exercise of discretionary authority or responsibility under ERISA. See Anoka Orthopaedic Assoc. v. Lechner, 910 F.2d 514, 517 (8th Cir. 1990).

Courts consistently have held that the performance of a corporate business function does not impose fiduciary responsibilities under ERISA. Dzinglski v. Weirton Steel Co., 875 F.2d 1075, 1079 (4th Cir. 1989) ("Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits"). Even where fiduciaries are performing functions that have a direct impact on ERISA plans, it is black letter law that no liability attaches if such performance was in a business (rather than an ERISA fiduciary) capacity. See, e.g., Lockheed Corp. v. Spink, 517 U.S. 882, 889-90 (1996)

(plan sponsors do not act in an ERISA fiduciary capacity when adopting, modifying or amending pension benefit plans that are subject to ERISA). The signing of purportedly misleading SEC filings is not a fiduciary act merely because plan participants allege that they were adversely affected. See Akers v. Palmer, 71 F.3d 226, 231 (6th Cir. 1995) ("ERISA does not require that day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants"). Thus, here, the only conduct by the Tyco directors that is alleged to constitute an ERISA fiduciary act - - the signing of SEC filings - - reflects acts that, as a matter of law, cannot give rise to ERISA fiduciary liability.[5]

Claims substantially identical to the ones asserted against the Tyco directors were recently dismissed by another district court in Crowley v. Corning, 234 F. Supp. 2d 222 (W.D.N.Y. 2002), a case in which directors of Corning (who did have the limited fiduciary responsibility to appoint and monitor the named plan fiduciary of a plan sponsored by Corning itself (not a Corning subsidiary)) were sued for breach of ERISA fiduciary duty based upon Corning's allegedly false SEC filings. The Tyco directors (including Mr. Bodman and Ms. Lane) here did not owe even the limited fiduciary duty owed by the Corning directors, since they

[5] In paragraph 61 of the Complaint, plaintiffs allege that the Tyco directors "signed the Form S-8 and many of the other SEC filings incorporated by reference in the Form S-8 (and on information and belief, the SPD and Prospectus)." The signatures of corporate directors of an issuer on Form S-8 and on still other SEC filings having nothing to do with (and which must be filed even if there are no) ERISA plans are mandated by the SEC pursuant to its authority under the securities laws. See, e.g., Form S-8, Fed. Sec. L. Rep (CCH) ¶ 7197, at 6337 (Signatures, Inst. 1). The instructions to Form S-8 make separate provision for signature of the S-8 by the trustee (or other administrator) of the employee benefit plan. Plaintiffs do not and cannot allege that defendants Bodman and Lane signed SEC filings in any capacity other than as directors of Tyco, the issuing corporation, pursuant to these express SEC requirements. Plaintiffs certainly do not and cannot allege that defendants Bodman and Lane signed these SEC filings in the capacity of trustee (or other administrator) of the Plans. Finally, to the extent plaintiffs may be asserting (on "information and belief") in paragraph 61 that the Tyco directors supposedly may have signed the "SPD" and "Prospectus," plaintiffs are simply incorrect, and (as noted in footnote 1, above), the assertion should be disregarded: no director signatures appear on a SPD or a Prospectus. See, e.g., Declaration of Francis P. Barron, dated April 3, 2003, Exhs. 4, 5, 6, 10.

were not members of the Tyco US board of directors, whose members had the limited fiduciary responsibility (similar to those of the Corning Board members) to appoint and monitor the Retirement Committee for the Plans here in issue.

In Crowley, a Corning retiree sued Corning (the plan sponsor of its ERISA investment plan) and the individual members of Corning's Board of Directors for breach of ERISA fiduciary duty on the basis of allegedly false and misleading statements in Corning's SEC Form 8-K, which was incorporated by reference in the plan's Summary Plan Description, and other SEC filings. The plaintiff alleged that the Corning directors breached their fiduciary duties by permitting the imprudent investment in Corning stock and making material misrepresentations and non-disclosures in the SEC filings, which caused the Plan to suffer losses. Id. at 227.

The Crowley court dismissed the claims on a Rule 12(b)(6) motion. The court noted that the only fiduciary responsibility that the Board members had under the plan was to appoint, retain, or remove members of the Investment Committee, which was the named fiduciary under the Corning Investment Plan. The Board itself had no control over the plan's investment options; and the Court therefore held that the allegation that the Board continued to offer participants the ability to invest in Corning stock did not state a claim for relief. Id. at 230. Further, because the Board had no responsibility to communicate information to the plan participants, the Board members could not be held responsible under ERISA for the alleged misrepresentations and non-disclosures made in the SEC filings concerning Corning's performance. Id.

Dismissal of the claims asserted here against the Tyco directors follows, a fortiori, from the reasoning in Crowley. The filings of SEC-mandated disclosure statements "were not

made by Corning [and its directors] in any fiduciary capacity regarding the [Corning ERISA investment plan.]" Id. at 228. The claim failed, as a matter of law, because "the Board was not charged under the Plan with the duty of communicating information to the [p]lan participants or beneficiaries." Id. at 229. The case for dismissal is even stronger here than in Crowley because here, the Tyco directors had no fiduciary responsibilities whatsoever regarding the Plans, whereas in Crowley, the Corning Board at least had authority to appoint and monitor the plan fiduciaries.

Moreover, on their face, the alleged misstatements contained in the SEC filings about which plaintiffs complain here were neither discretionary acts of authority or control over the Plans, nor communications from the Tyco directors to the Participants in the Plans. The SEC filings were communications to the SEC and the investing public generally. In asserting these claims, plaintiffs are doing nothing more than repackaging alleged securities law violations as ERISA claims. Any claim plaintiffs may have with respect to misrepresentations or omissions in Tyco's SEC filings is a claim that they may seek to pursue (if and to the extent they can, consistent with Rule 11) under the securities laws, not ERISA. Unlike the comprehensive sweep of the disclosure requirements under SEC regulations, ERISA mandates only the disclosure of an annual statement of a plan's assets, liabilities, receipts and disbursements, and upon request, a statement of a participant's or beneficiary's total accrued benefits and total non-forfeitable pension benefits. Moreover, ERISA's more limited disclosure requirements are the responsibility of the plan administrator, and not the responsibility of the directors of a parent company of the plan sponsor. ERISA § § 101-105, 29 U.S.C. §§ 1021-1025. Courts have uniformly rejected efforts to expand the scope of ERISA disclosure duties to information beyond what is expressly mandated to be disclosed under ERISA. See Childers v. Northwest Airlines,

Inc., 688 F.Supp. 1357, 1361 (D. Minn. 1988) ("the plan administrator is required to disclose only the information specified in § § 1021 through 1025 or in a plan's trust agreement"); Ehlmann v. Karser Found. Health Plan, 198 F.3d 552, 555 (5th Cir. 2000) ("[i]t is for Congress to determine whether to impose such a duty to disclose under ERISA and this court will not encroach on that authority by imposing a duty which Congress has not chosen to impose").

Finally, Claim II of the Complaint, which alleges that the defendants supposedly breached fiduciary duties by allowing the continued investment in Tyco stock when it was imprudent to do so, also must be dismissed as against the Tyco directors. Plaintiffs have failed to allege (nor is there any basis for asserting) any facts establishing that the Tyco directors (including Mr. Bodman and Ms. Lane) had any fiduciary duty to monitor the soundness of the Plans' or Participants' investment decisions. Plaintiffs allege that the Retirement Committee had discretionary authority to establish investment options under the Plans, but no such allegation is made concerning the Tyco directors. Further, it is clear from the Plan documents that discretion to make investment decisions was vested in the Participants, and certainly not with the Tyco Directors. Compl. at ¶¶ 42-43; Barron Decl., Exh. 1 at 25-27. The Crowley court dismissed claims against the Corning board in analogous (indeed, less compelling) circumstances. See Crowley, 234 F.Supp.2d at 229. See also Beauchem v. Rockford Products, No. 01 C 50134, 2003 WL 1562561 (N.D. Ill. Mar. 24, 2003) (dismissing breach of fiduciary duty claims against corporation where plaintiffs failed to allege corporation exercised any authority or control over decisions made by ERISA Plan Committee).[6]

[6] Beyond the issue of the Tyco director defendants' fiduciary status, plaintiffs have failed to adequately allege a breach of fiduciary duty at all against Mr. Bodman and Ms. Lane, as outside Tyco directors, regarding the prudence of investing in Tyco stock. For example, the plaintiffs here did not make the factual allegation that the Tyco directors (and especially Mr. Bodman and Ms. Lane) knew or believed that Tyco stock was an objectively imprudent investment. Indeed, in Hull v. Policy Mgmt. Systems Corp., No. CIV. A.3:00-788-17, 2001 WL 1836286, at *9,

In sum, there is no legal basis for plaintiffs to hold the Tyco directors (including defendants Bodman and Lane) liable under ERISA for breach of fiduciary duty based upon allegedly false and misleading SEC filings that the corporate directors signed in their corporate director capacities. As a matter of law, such conduct does not constitute an ERISA fiduciary act by the directors, and therefore cannot subject them to liability under ERISA. Likewise, there is no legal basis for plaintiffs to hold the Tyco directors liable under ERISA for making investments in Tyco stock an investment option under the Plans, since they had no authority or discretion with respect to that decision.

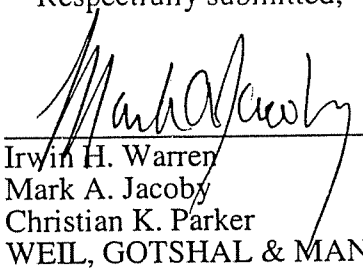
(D.S.C. Feb. 9, 2001), the district court ordered dismissal where the plaintiff had failed to allege that the Plan fiduciaries knew the information disseminated to plan participants was false: "[q]uite critically, plaintiff does not allege that the Committee defendants themselves had any actual knowledge of any misinformation or that they participated in the dissemination of information they knew or should have known was misleading." Id. at *9.

Conclusion

For the reasons set forth above, and in Tyco's previously-filed brief, defendants' motion to dismiss the complaint with prejudice should be granted in its entirety.

Dated: April 18, 2003

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Christian K. Parker, an attorney, hereby certify that on April 18, 2003, a copy of the following:

- Defendants Bodman and Lane's Motion To Dismiss Consolidated Amended Complaint;
- Memorandum Of Law In Support Of Defendants Bodman and Lane's Motion To Dismiss Consolidated Amended Complaint;

was mailed first-class, postage prepaid, to counsel of record as reflected on the attached service list.

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