TYCO 4/4/03

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

IN RE TYCO INTERNATIONAL, LTD. SECURITIES LITIGATION	02-MDL-1335-B
OVERBY, *et al.*, Plaintiffs, -against- TYCO INTERNATIONAL LTD., *et al.*, Defendants.	**ERISA ACTION** Civil Action No. 02-1357-B

MEMORANDUM OF TYCO INTERNATIONAL LTD., TYCO INTERNATIONAL (US) INC. AND CERTAIN OF THE INDIVIDUAL DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS

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This memorandum is submitted on behalf of defendants Tyco International Ltd., Tyco International (US) Inc., Robert A. Bent, Kelly Heffernan, Irving Gutin, Jerry R. Boggess and Richard J. Meelia,[1] in support of their motion to dismiss the consolidated amended complaint ("the complaint"), pursuant to Rules 12(b)(1) and 12(b)(6).

Preliminary Statement

In this action, plaintiffs who identify themselves as participants in the seven Retirement Savings and Investment Plans of Tyco International (US) Inc. ("the Plans") allege that Tyco International Limited ("Tyco" or "Tyco Ltd.") and former members of its Board of Directors ("Tyco Ltd. Directors"); Tyco International (US) Inc. ("Tyco US") and former members of its Board of Directors ("the Tyco US Board");[2] the Tyco US Retirement Committee, alleged to consist of 30 unnamed John Does ("the Committee");[3] Tyco's former chairman and chief executive officer; Tyco's former chief financial officer; Tyco's former chief corporate counsel; and two Tyco US employees are each liable for breaching fiduciary obligations under the Employee Retirement Income

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[1] See the signature block on page 74 *infra*. Defendants Bent and Heffernan are employees of Tyco US. Defendants Gutin, Boggess and Meelia are former directors of Tyco US.

[2] Tyco International (US) Inc. is a wholly owned subsidiary of Tyco International Ltd. (Compl. ¶ 16.)

[3] In this brief, we discuss the reasons why claims against the Committee should be dismissed. However, this should not be construed as an appearance by the Committee members, who have been neither named nor served.

Security Act of 1974 ("ERISA" or "the Act"), 29 U.S.C. § 1001 *et seq.* Plaintiffs purport to seek "Plan-wide relief on behalf of the Plans" and on behalf of themselves and a class of plan participants who "purchased and/or held" shares in the Tyco International Ltd. Stock Fund ("the Tyco Stock Fund" or "the Fund") (Compl. ¶ 1), which is one of many investment options available under the Plans.

The claims in this ERISA class action are based on substantially the same allegations as those in the consolidated securities class action now pending before this Court (the "Securities Action"). The Plans, as holders of Tyco stock, are members of the putative class in the Securities Action, and will share in any recovery if the claims asserted in that action are successful. If plaintiffs were successful in this ERISA action, there would be a double recovery.[4]

Plaintiffs have converted a securities action into an ERISA action by framing two claims:

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[4] 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 v. Policy Mgmt. Sys. Corp., No. CIV.A.3:00-778-17, 2001 WL 1836286, at *8 (D.S.C. Feb. 9, 2001) (emphasis added).

First, plaintiffs allege in essence that, because certain documents relating to the Plans incorporated by reference some of Tyco's filings with the Securities and Exchange Commission ("SEC"), and because those filings allegedly contained material misrepresentations and omissions, defendants (each of whom is alleged to be a fiduciary of the Plans) are liable for breach of fiduciary duty under ERISA. (Compl. ¶¶ 47, 71-106.)

Second, plaintiffs allege that defendants breached a fiduciary duty of prudence under ERISA by allowing the Plans to purchase or hold shares of Tyco, and by allowing the Tyco Stock Fund to remain an investment alternative under the Plans. (*Id.* ¶¶ 118-19.) Plaintiffs allege that, because none of the defendants terminated the Fund as an investment option and sold all Tyco shares, all defendants breached a fiduciary duty of prudence. (*Id.* ¶ 121.)

Plaintiffs have failed to state a viable claim under ERISA:

First, plaintiffs are without standing to assert, and the Court is without subject matter jurisdiction to hear, claims relating to Plans I, IV, VI and VII. (*See infra* pp. 11-13.)

Second, both claims should be dismissed because the Plans are self-directed plans that fall within ERISA's safe harbor provision, thus exempting any fiduciary from liability for the Plan participants' own investment decisions. (*See infra* pp. 13-23.)

Third, Claim I should be dismissed because the allegations that the SEC filings of Tyco Ltd. were false and misleading do not support a claim for breach of fiduciary duty against either those defendants who were fiduciaries of the Plans or (of course) those who were not. Defendants other than the Committee were not fiduciaries of the Plans. And there is no allegation (nor could there be) that the Committee was responsible for Tyco's SEC filings. Nor is there any nonconclusory allegation that the Committee members had knowledge that any Tyco SEC filing was misleading. Moreover, neither the required filings with the SEC, nor any of the communications with Tyco employees cited by plaintiffs, was an activity undertaken in a fiduciary capacity under ERISA. (*See infra* pp. 24-54.)

Fourth, Claim II should be dismissed because the allegations do not support a claim that defendants breached a duty of prudence by allowing the Tyco Stock Fund to remain one of the many investment options under the Plans. Most of the defendants were *not* fiduciaries under the Plans at all and, thus, cannot have breached fiduciary duties owed to the Plans. As to the Committee, which *is* a fiduciary under the Plans, (1) the investment option of an Employee Stock Ownership Plan ("ESOP"), such as the Tyco Stock Fund, is completely consistent with, and encouraged under, ERISA; (2) ESOPs are explicitly exempt from ERISA's diversification requirement; (3) because the Plans are self-directed plans, the Committee did not have the authority to sell the Tyco shares held in the Tyco Stock Fund for plan participants; (4) the public information concerning Tyco cited by plaintiffs does not support the claim that Tyco shares were an

imprudent investment; (5) even if, as plaintiffs allege, the Committee had access to inside information concerning Tyco, and did have authority to sell shares held by the Fund, it could not have done so without violating the federal securities laws; and (6) plaintiffs have not overcome the presumption that an ESOP's investment in the employer's stock is prudent. (*See infra* pp. 55-69.)

Fifth, both Claims should be dismissed because ERISA does not authorize the relief that plaintiffs seek. Plaintiffs allege that they are entitled to relief under Sections 502(a)(2) and 502(a)(3) of ERISA. 29 U.S.C. § 1132(a)(2)-(3).[5] It is well settled that Section 502(a)(2) does not authorize suits for individualized losses such as plaintiffs here seek to recover by way of a class action. It is equally well settled that Section 502(a)(3) does not authorize suits for money damages. (*See infra* pp. 69-74.)

Plaintiffs have failed to state a claim against any of the defendants. The complaint should, therefore, be dismissed.

The Purpose and Structure of ERISA

Congress enacted ERISA in 1974 to protect employee benefit plans and to encourage employers to establish such plans. *See* H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670. As the Supreme Court repeatedly has observed, "ERISA is a comprehensive and reticulated statute," *Great-West Life & Annuity Ins. Co. v. Knudson,*

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[5] In conformity with common ERISA citation practice, the Act's provisions are referred to in the text by their section numbers under the Act, followed by citation to their corresponding United States Code section numbers.

534 U.S. 204, 209 (2002) (quotation marks omitted), and "is enormously complex and detailed," *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quotation marks omitted). As a result, "it should not be supplemented by extratextual remedies." *Id.*

ERISA outlines the responsibilities of various parties involved in the establishment and administration of an ERISA plan. The Act requires that every employee benefits plan "be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1) (2003). Every plan shall have a plan "administrator," which shall be either a person so designated in the instrument establishing the plan or, in the absence of such designation, the plan sponsor by default. *See id.* § 1002(16)(A). The plan sponsor is generally the employer who establishes the plan. *See id.* § 1002(16)(B).

The instrument establishing the plan "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." *Id.* § 1102(a)(1). Thus, every employee benefits plan must have at least one "named fiduciary." Persons may also be deemed to be plan fiduciaries, even if not expressly named so in the plan document, by exercising discretionary authority or control over the management or administration of the plan or its assets. *See id.* § 1002(21)(A). Fiduciary duties under ERISA are set out in Sections 404 and 406. Section 404 imposes on fiduciaries the duties of care and loyalty. *See id.* § 1104(a). Section 406, which plaintiffs do not allege was breached in this case, prohibits fiduciaries from engaging in certain transactions involving the plan. *See id.* § 1106.

Plan participants may bring civil actions against plan fiduciaries for breaching their duties under Section 502(a)(2), which provides relief to the plan as a whole, and under Section 502(a)(3), which permits equitable relief. *See id.* § 1132(a)(2)-(3). There is an exemption from liability, however, where an ERISA plan provides for individual accounts and permits plan participants to control their own accounts. *See id.* § 1104(c). Under this "safe harbor" provision, no liability may attach to any person who is otherwise a fiduciary to the plan. *See id.* Thus, it is the general rule that, where an ERISA plan is "self-directed"--*i.e.*, gives plan participants the authority to control the investments in their own accounts--others cannot be held liable for the consequences of participants' investment decisions.

An employee stock ownership plan ("ESOP") is a specific type of ERISA plan "which is designed to invest primarily in qualifying employer securities," *id.* § 1107(d)(6)(A), usually the common stock of the employer or plan sponsor. An ESOP is a type of eligible individual account plan ("EIAP"). *See id.* § 1107(d)(3)(A). The Plans at issue here are EIAPs both because they are savings plans and because the Tyco Stock Fund is an ESOP. *Id.* Congress expressly sanctioned the creation of ESOPs because they serve the dual purposes of (i) providing employers with a tool of corporate finance, and (ii) providing employees with a retirement benefit and ownership stake in the companies at which they work. *See, e.g., Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 860 (8th Cir. 1999). To encourage employers to offer ESOPs, Congress passed laws providing special treatment for such plans. For example, ESOPs, and other EIAPs, are

exempt from ERISA's requirement that investment options offered to employees be diversified. *See* 29 U.S.C. § 1104(a)(2). Thus, an ESOP may hold only employer stock, notwithstanding the significant risks in doing so, without breaching ERISA's fiduciary duty of diversification. *See Brown*, 190 F.3d at 860.

Tyco's ERISA Plans[6]

Tyco US maintains seven Retirement Savings and Investment Plans. (*See* Affidavit of Mindy Ebert ("Ebert Aff."), sworn to April 2, 2003, ¶ 2.) Each plan is an "individual account plan" under ERISA because it "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). (Compl. ¶ 36.)

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[6] Copies of the documents upon which plaintiffs' allegations explicitly or implicitly depend have been collected as exhibits to the accompanying Declaration of Francis P. Barron, and are referred to herein as "Ex. ___." Where the authenticity of such documents is not challenged, they "effectively merge into the pleadings" and can be relied upon by the Court "without converting the motion to dismiss into one for summary judgment." *In re Tyco Int'l Ltd. Secs. Litig.*, 185 F. Supp. 2d 102, 104 (D.N.H. 2002). As the First Circuit held in *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12 (1st Cir. 1998), a trial court may appropriately consider such documents, even where they are "neither appended . . . to the complaint nor incorporated . . . therein by an explicit reference," because when "a complaint's factual allegations are expressly linked to -- and admittedly dependent upon -- a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." *Id.* at 16-17 (allowing consideration of a trust agreement between bank and ERISA plan).

All of the Plans are 401(k) plans that were voluntarily established by Tyco US and are voluntarily participated in by eligible Tyco employees. (*Id.* ¶ 37.) Tyco US voluntarily matches the contributions of participants in an amount equal to a percentage of a participant's compensation. (*Id.* ¶ 39.) Participants are offered over a dozen different investment options under the Plans. (*See* Your Tyco Retirement and Savings Plan Investment Options ("Investment Options"), Ex. 7.) The options cover a range of investment types (bond funds, growth funds, asset allocation funds, etc.), which in turn cover a wide range of investment risk. (*See id.*) One of the investment options offered under the Plans is the Tyco Stock Fund, which is an ESOP designed to invest in Tyco Ltd. stock. (*See id.* at 2.)

Plan participants have sole authority to select the funds into which their individual account assets will be invested. (Compl. ¶ 37.) Participants may freely transfer assets in their accounts, and there are no restrictions on how often participants may reallocate to the different fund options the assets in their accounts. (Summary Plan Description ("SPD") Exs. 4-6 at 8 ("[Y]ou can make daily changes in your investment elections, as well as transfers among investment funds, automatically by calling the Tyco Benefits Center.").) Similarly, there are no restrictions on the percentage of an individual's account that may be allocated to any particular fund option, with one exception: participants are not permitted to allocate more than 25% of the assets in their individual accounts to the Tyco Stock Fund. *See id.* at 7 ("You may invest all of your account in one fund, or divide your investment among more than one fund . . .

However, because the [Tyco Stock Fund] is a one-stock fund, . . . it may be subject to greater price fluctuation than multi-investment funds. As such, investments in this fund are limited to no more than 25 percent . . . ."). It would have been perfectly lawful to permit participants to invest the entirety of their individual account assets in the Tyco Stock Fund; the 25 percent limitation is a reflection of the desire to protect participants from the potential for loss inherent in a fund holding a single stock. As an ESOP, the Tyco Stock Fund is not required to be a diversified fund. 29 U.S.C. § 1104(a)(2).

Under the express terms of the Plan documents, only two entities have any duties and responsibilities with respect to the Plans: (1) the Tyco US Board, for which the only responsibility is to appoint the members of the Committee (Exs. 1-3, § 8.1 ("[T]he Board of Directors of the Plan Sponsor shall have the sole responsibility for the appointment of the Retirement Committee.")); and (2) the Committee, which is both the administrator of the Plans and their named fiduciary. (*Id.* § 8.4 ("For purposes of ERISA, the Committee shall be the Plan Administrator and a 'named fiduciary' of the Plan.")). The plan documents expressly limit the authority of all parties to "only those specific powers, duties, responsibilities and obligations as are specifically given them under this Plan and the trust agreement." (*Id.* § 8.1.)

The Committee alone is responsible for the administration and management of the Plans. (*Id.* ("The Committee shall have the sole responsibility for the general administration of the Plan and for carrying out its provisions.").) This

includes, among other things, selecting the investment vehicles to be offered under the Plans and prescribing the rules and procedures governing plan participants' investment selections (*id.* § 8.4(j)); preparing and distributing information explaining the Plans (*id.* § 8.4(c)); appointing trustees for the Plans (*id.* § 8.4(h)); and reviewing reports of the financial condition of the assets in the Plans (*id.* § 8.4(e)). None of the other defendants has any duties under the Plans.

Argument

I. PLAINTIFFS DO NOT HAVE STANDING TO ASSERT CLAIMS RELATING TO PLANS I, IV, VI OR VII AND, THEREFORE, THE COURT IS WITHOUT SUBJECT MATTER JURISDICTION TO HEAR SUCH CLAIMS.

Plaintiffs purport to sue on behalf of all seven Plans maintained by Tyco (US) and a class of all participants in the Plans. (Compl. ¶ 1.) A civil action under ERISA may be brought only by a participant, beneficiary or fiduciary of the plan, or by the Secretary of Labor.[7] Thus, in order to assert a claim on behalf of a plan or plan participants, plaintiffs must allege and prove that they themselves are participants in the relevant plan.[8] "This is both a standing and a subject matter jurisdictional requirement." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986); *cf. Curtis v.*

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[7] *See* 29 U.S.C. § 1132(a); *see also Texas Life, Accident, Health & Hosp. Serv. Ins. Guar. Ass'n v. Gaylord Entm't Co.*, 105 F.3d 210, 214 (5th Cir. 1997) ("The list of parties allowed to bring [ERISA] actions is limited, however. Only the Secretary of Labor, participants, beneficiaries or fiduciaries of plans may bring suit [for breach of fiduciary duty].").

[8] ERISA defines "participant" as "any employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7).

Nevada Bonding Corp., 53 F.3d 1023, 1026 (9th Cir. 1995) ("[F]ederal courts lack subject matter jurisdiction if the plaintiff in an action for benefits owed under an ERISA plan lacks standing to bring a civil suit enforcing ERISA . . . .").

In paragraphs 1, and 7 through 12, plaintiffs allege that each of them is "a Participant in the Plans," without specifying in which of the Plans each is a participant. Thus, it is not possible to ascertain from the complaint whether there is, among the plaintiffs, a participant in each of the Plans that plaintiffs purport to represent. This would be reason enough to dismiss a complaint. Here, however, the relevant records disclose that plaintiffs do *not* have standing to assert claims on behalf of all the Plans. Plaintiff Jepson is a participant in Plan II; plaintiffs Gordon, Johnson, Peterson and Swanson are participants in Plan III; plaintiff Overby is a participant in Plan V and plaintiffs Konyn and Dunne are participants in none of the Plans. (*See* Ebert Aff. ¶¶ 3-10.)[9] There is no plaintiff who is a participant in Plan I, Plan IV, Plan VI or Plan VII. Plaintiffs therefore are without standing to assert claims on behalf of those Plans or participants in those Plans, and the Court is without subject matter jurisdiction to hear

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[9] In considering a motion to dismiss for lack of subject matter jurisdiction, the Court is not confined to the face of the pleadings. *See, e.g., Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002) ("In resolving the question of jurisdiction, the district court can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists."); *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 748 (2d Cir. 2000) ("[O]n a challenge to the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." (alterations and quotation marks omitted)).

such claims. *See Bradshaw v. Jenkins*, No. C83-771R, 1984 U.S. Dist. LEXIS 20013, *11-12 (W.D. Wash. January 30, 1984) (dismissing all claims relating to benefit plans in which plaintiff was not a participant because "[plaintiff] has standing to sue on behalf of [the] Profit Sharing Plan . . . , but not on behalf of the other employee benefit plans [in which she is not a participant]").

Accordingly, plaintiffs' claims relating to Plans I, IV, VI and VII should be dismissed pursuant to Rule 12(b)(1).[10]

II. PLAINTIFFS CANNOT STATE A CLAIM UNDER ERISA BECAUSE THE PLANS ARE SELF-DIRECTED AND, THUS, FALL WITHIN ERISA'S SAFE HARBOR PROVISION.

As the complaint itself concedes, participants in the Plans at issue control the assets in their individual accounts. (Compl. ¶ 37.) The Plans are, thus, precisely the type for which Congress intended to provide an exemption from liability under the "safe harbor" provision of Section 404(c). *See* 29 U.S.C. § 1104(c).

Section 404(c) of ERISA provides that

> [i]n the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in this account . . . *no person who is otherwise a fiduciary shall be liable under this part for any loss*, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

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[10] Throughout the remainder of this brief, the term "Plans" refers to Plans II, III and V.

Id. § 1104(c)(1)(B) (emphasis added). The legislative history of Section 404(c) makes clear that its purpose is to relieve any fiduciary of liability resulting from any loss or breach when the plan participant exercised control over his or her individual account:

> A special rule is provided for individual account plans where the participant is permitted to, and in fact does, exercise independent control over the assets in his individual account. In this case, the individual is not to be regarded as a fiduciary and other persons who are fiduciaries with respect to the plan are not to be liable for any loss that results from the exercise and control by the participant or beneficiary. Therefore, *if the participant instructs the plan trustee to invest the full balance of his account in, e.g., a single stock, the trustee is not liable for any loss because of a failure to diversify or because the investment does not meet the prudent man standards.*

H. Conf. Rep. 93-1280, Joint Explanatory Statement of the Committee of Conference, *reprinted in* 1974 U.S.C.C.A.N. 5085-86 (emphasis added). This exemption from liability makes perfect sense: no employer would voluntarily establish an employee benefits plan that allowed participants to make their own investment decisions but, at the same time, permitted them to hold the employer liable for the consequences of those decisions. Similarly, no reasonable entity or individual would agree to serve as a fiduciary to such a plan.

Participants in the Plans at issue here are explicitly told that they alone are responsible for their investment decisions. The SPD for each plan states:

> *Your investment decisions are **your** responsibility. Under Department of Labor regulations, the Tyco 401(k) Plan qualifies as a Section 404(c) plan, and neither Tyco nor any of Tyco's*

> *representatives are responsible for the consequences of your investment decisions.*

(Exs. 4-6 at 8 (emphasis in original).)

Plaintiffs nonetheless allege that defendants are not entitled to the Section 404(c) exemption from liability because they did not comply with the provision's requirements. (Compl. ¶ 68.) This contention is without merit and is based solely on conclusory allegations and mischaracterizations of the safe harbor's requirements.

The question whether an ERISA plan qualifies as a Section 404(c) plan--thereby exempting from liability persons who are otherwise fiduciaries--is governed by the rules and regulations set forth in 29 C.F.R. § 2550.404c-1. Fiduciaries are exempt from liability under Section 404(c) if (1) participants have the opportunity to exercise control over their individual accounts, *id.* § 2550.404c-1(b)(2); (2) the plan offers a broad range of investment alternatives, *id.* § 2550.404c-1(b)(3); and (3) participants in fact exercise control over their individual accounts, *id.* § 2550.404c-1(c). The Plans here satisfy each of these requirements.

A. Plan Participants Have the Opportunity To Control Their Individual Accounts.

Plaintiffs do not allege that there are any restrictions on participants' ability to freely transfer the assets in their individual accounts among the many investment alternatives, or that any individual has authority to refuse to follow participants' investment instructions or in any way to control participants' accounts.

See id. § 2550.404c-1(b)(2)(i)(A). They do allege, however, that participants did not receive the required information regarding the investment alternatives. (Compl. ¶ 68(ii).) The regulations relating to participants' "opportunity to exercise control" impose on the plan fiduciary the duty to provide participants with

> [a] description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the designed investment alternative.

29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii). Plaintiffs allege that this requirement was not met because defendants "failed to provide an adequate description of the investment objectives and risk and return characteristics of the Funds." (Compl. ¶ 68(ii).) This allegation is insufficient for two reasons.

First, the allegation is wholly conclusory. Plaintiffs do not specify what information is lacking; they merely recite the regulatory language and state that it was not complied with.

Second, the allegation is expressly contradicted by plan information that plaintiffs do not contest that they received. The Investment Options document plainly provides the information required by the regulations. (*See* Ex. 7.) The investment alternatives under the Plans are clearly set forth and are located across a wide spectrum of investment risk. (*See id.* at 3.) For each fund offered under the Plans, the document explains the investment objective, what type of fund it is, the investment goal, and what

the fund invests in. (*See id.* at 3-9.) Such information clearly satisfies the requirement that participants be given "a general description of investment objectives and risk and return characteristics." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii).

Plaintiffs also cannot reasonably allege that they were uninformed of the risk of investing in the Tyco Stock Fund in particular. In the Investment Options document, the Tyco Stock Fund is located at the farthest right end of the "risk meter," indicating that, of all the investment options offered, the Fund carries the greatest degree of risk. (Ex. 7 at 3.) Moreover, the description of the Tyco Stock Fund explains that

> [i]nvesting in a non-diversified single stock fund involves more investment risk than investing in a diversified fund. You may not direct the investment of more than twenty-five percent (25%) of your future contributions to the Tyco Stock Fund [and] you cannot reallocate more than twenty-five percent (25%) of your account balances to the Tyco Stock Fund.

(*Id.* at 7.) Similarly, under the heading, "What should I consider before I invest my accounts in the Tyco Stock Fund?" the Plan Information Statement ("Plan Prospectus") answers:

> Diversification--spreading the risk--is important when you make your investment choices. Each of the other Investment Funds available under the Plans is invested in a number of securities . . . , not just the stocks or bonds of one company. Please remember that the Tyco Stock Fund holds the stock of only one company and is not a diversified investment.

(Ex. 8 at 4 ¶ 8.) This information clearly satisfies the requirement that participants be given "information relating to the type and diversification of assets comprising the portfolio of the designed investment alternative." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii).

The Investment Options document provides the information required by the "safe harbor" regulations relating to the "opportunity to exercise control," and plaintiffs concede that they received this document. (Compl. ¶ 107(a).)

B. **The Plans Offer a Broad Range of Investment Alternatives.**

Plaintiffs do not allege that the Plans fail to comply with this requirement--nor could they. In order to come within the safe harbor provision, a plan must offer three diversified investment alternatives that allow participants to achieve a portfolio with aggregate risk and return characteristics. 29 C.F.R. § 2550.404c-1(b)(3)(B). The Plans here offered over a dozen investment alternatives, all of which, except the Tyco Stock Fund, were diversified. The investment alternatives span a wide spectrum of risk. (Ex. 7 at 3.) Furthermore, the plan information document entitled "Your Guide to Investing with the Tyco 401(k) Plan" ("the Guide") explains how to develop an investment strategy, and, in particular, how to "[b]alance risk and return." (Ex. 9 at 7.) The Guide also provides examples of how a participant might balance the various investment options in his or her individual account depending on whether the investment goal is conservative, moderate, growth or aggressive. (*See id.* at 8.)

It is not surprising that plaintiffs do not challenge compliance with this requirement for safe harbor treatment.

C. Plan Participants Exercise Control Over Their Individual Accounts.

Plaintiffs allege that the Plans do not fall within the Section 404(c) safe harbor because (1) defendants did not disclose information required to be disclosed under the regulations, and (2) participants were subjected to improper influence. (Compl. ¶ 68(i) and (iii).)

1. The allegation of nondisclosure is not sufficient to negate "control in fact."

Under the regulations, "control in fact" is negated if

> [a] plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act.

29 C.F.R. § 2550.404c-1(c)(2)(ii). Plaintiffs allege that this exception to the safe harbor applies because defendants "failed to disclose in a fiduciary capacity all material information that they were not precluded from disclosing under other applicable law." (Compl. ¶ 68(i).) This conclusory allegation cannot withstand scrutiny.

First, plaintiffs have not identified what "material non-public facts regarding the investment" were concealed.

Second, the only named fiduciary in the Plans was the Committee.[11] There is no nonconclusory allegation that the Committee knew of any "material non-public facts," let alone which such facts were known to the Committee.

Third, the course of action that plaintiffs implicitly suggest--that defendants disclose to plan participants material inside information upon which the participants could then make stock sales and purchases--is illegal under the insider trading prohibitions of the federal securities laws. *See United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997).[12] In the course of their business, employers always have material inside information that has not been shared with the public and, thus, not with participants in their retirement plans.[13] If plaintiffs' theory of liability were accepted, it would be virtually impossible for an ERISA plan to fall within the Section 404(c) safe harbor. It cannot be that ERISA requires the employer to disclose information which the securities laws would not. *See Vartanian v. Monsanto Co.*, 131 F.3d 264, 270 (1st Cir. 1997) ("A corporation could not function if ERISA required complete disclosure of

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[11] As discussed further below (*see infra* pp. 24-45), none of the other defendants was a plan fiduciary.

[12] To the extent that plaintiffs are suggesting that defendants were required to disclose alleged material information to the public at large, they are simply asserting the claims made in the Securities Action, not ERISA claims. (*See supra* p. 2 n.4.)

[13] It is for this reason that companies have the policies that this Court referred to in *In re Tyco International, Ltd. Securities Litigation*, 185 F. Supp. 2d 102, 112 n.6 (D.N.H. 2002): "[M]ost publicly traded companies have adopted policies which prevent insiders from trading except during narrow windows that are open for only brief periods following the release of accounting information."

every facet of . . . on-going [business] activities." (*quoting Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996))).

2. **The allegation of improper influence is not sufficient to negate "control in fact."**

Under the regulations, a participant's "control in fact" is negated if "[t]he participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction." 29 C.F.R. § 2550.404c-1(c)(2)(i). Plaintiffs allege, in wholly conclusory fashion, that defendants "failed to ensure that Participants were not subject to undue influence, and indeed themselves subjected Participants to undue influence."[14] (Compl. ¶ 68.) The sole basis for the alleged "improper influence" is eight letters or memoranda sent by defendant Kozlowski to all Tyco employees ("the letters"). (*Id.* ¶ 109.)

The letters do not support a claim of improper influence. They were not communications with plan participants but, rather, communications with all Tyco employees, as plaintiffs themselves concede. (*See, e.g., id.* ¶ 109(a) ("In a letter to Tyco employees"); ¶ 109(b) ("In a memo to employees").) The letters were not directed to plan participants. As quoted by plaintiffs themselves, they make general statements

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[14] Plaintiffs' characterization of this regulation as one requiring that defendants "ensure" participants are not subjected to any improper influence is a distortion of the plain text of the regulation. The regulation requires only that a fiduciary or plan sponsor *itself* not improperly influence a participant's decision with respect to an investment transaction; it does not require that any person "ensure" that participants are not improperly influenced with respect to a plan investment transaction.

such as "Tyco will emerge from this episode even stronger than before. All things considered, this is a very exciting time for Tyco and I am confident in our future." (*Id.* ¶ 109(a).) The letters make no reference to the Plans, to the Tyco Stock Fund or to any other plan specific information. They are general statements about the Company that are in the nature of "pep talks" to all employees by the Company's CEO.

As discussed further below (*see infra* pp. 31-34, 47), when an employer engages in its ordinary business activities, it is not acting with respect to an ERISA plan, even if those activities affect employees who are plan participants. *See Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) ("[The employer and plan administrator did not] act[ ] as a fiduciary simply because it made statements about its financial condition . . . ."); *Grindstaff v. Green*, 133 F.3d 416, 423 (6th Cir. 1998) ("[P]urely business decisions by an ERISA employer are not governed by section 1104's fiduciary standards." (quotation marks omitted)); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1995) (Easterbrook, J.) ("Employers decide who receives pension benefits and in what amounts, select levels of funding, adjust myriad other details of pension plans, and may decide to terminate the plan altogether. In doing these things, . . . *they are no more the employees' 'fiduciaries' than when they decide what wages to offer or whether to close the plant and lay the workers off.*" (emphasis added)). The distribution of letters or memoranda to all employees of the company -- a subset of whom are plan participants and a sub-subset of whom have chosen to allocate assets in their individual accounts to one of the many funds available -- is an activity like "decid[ing] what wages to offer or whether to

close the plant and lay the workers off." *Id.* It cannot be said to constitute "improper influence . . . with respect to [a] transaction" in the Plans. 29 C.F.R. § 2550.404c-1(c)(2)(i). Indeed, the letters were not made "with respect to [any] transaction" involving a plan investment decision; they say absolutely nothing about plan investment decisions or transactions. If communications of this type were sufficient to take a plan out of the Section 404(c) safe harbor, the safe harbor would be meaningless for any plan that offered the employer's stock as an investment option. This would frustrate the intent of Congress in creating the Section 404(c) safe harbor and in encouraging employers to establish ESOPs.

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In sum, plaintiffs' conclusory allegations are insufficient to defeat application of ERISA's safe harbor provision. Defendants have complied with all the rules and regulations governing application of the provision. Plaintiffs freely exercise the authority granted solely to them to make investment decisions and asset transfers whenever they so choose. All plan fiduciaries are required to follow a participant's investment instructions. No plan fiduciary has responsibility for plaintiffs' investment choices, including investments in the Tyco Stock Fund. Accordingly, the Plans fall within ERISA's safe harbor provision, and defendants cannot be held liable for any losses that resulted from participants' unfettered exercise of control over their individual accounts. The complaint, therefore, should be dismissed.

III. CLAIM I SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY ARISING OUT OF ALLEGED MISREPRESENTATIONS OR OMISSIONS.

Claim I alleges that two corporate entities, 19 named individual defendants and the unnamed Committee members (identified as "John Does") breached their fiduciary duties by misrepresenting and failing to disclose material information in (1) Tyco's SEC filings, (2) plan information documents, and (3) the eight letters that defendant Kozlowski sent to Tyco employees. (Compl. ¶¶ 71-115.) But before a defendant can be charged with breaching a fiduciary duty, it must first be shown that the defendant *is* a fiduciary. Plaintiffs have failed to allege facts sufficient to show that any of the defendants other than the Committee is a fiduciary to the Plans. And, in any case, the alleged misrepresentations and omissions are not actionable under ERISA. For these reasons, Claim I should be dismissed as against all defendants.

A. The Committee Is the Only Defendant that Acted in a Fiduciary Capacity with Respect to Any of the Actions Alleged to Constitute a Breach of Fiduciary Duty Under Claim I. The Claim Therefore Should Be Dismissed as Against All Other Defendants.

In every ERISA case charging breach of fiduciary duty, the "threshold question" is "whether [a particular defendant] 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). *Accord, Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54 (4th Cir. 1992) ("Before one can conclude that a fiduciary duty has been violated, it must be established that the party charged with the breach meets the

statutory definition of 'fiduciary.'"). A plaintiff must first allege sufficient facts showing that each defendant acted in a fiduciary capacity with respect to the particular activity alleged to constitute the breach. Plaintiffs here cannot satisfy this threshold requirement for stating a claim under ERISA with respect to any defendant other than the Committee.

A person can be a fiduciary under ERISA in three ways: (1) by being named a fiduciary in the plan documents; (2) by being named a fiduciary pursuant to a procedure specified in the plan documents; or (3) by performing fiduciary functions that bring him or her within ERISA's definition of fiduciary. *See Flanigan v. Gen. Elec. Co.*, 93 F. Supp. 2d 236, 251 (D. Conn. 2000).

Plaintiffs concede that the Committee is the only defendant that is a "named fiduciary" under the Plans. (Compl. ¶ 41.) And they do not allege that any defendant is a fiduciary pursuant to a procedure specified in the plan documents. Instead, plaintiffs allege that all other defendants were "*de facto* fiduciaries" (Compl. ¶ 49) by virtue of performing fiduciary functions that bring them within ERISA's statutory definition, which reads:

> 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).

Plaintiffs do not allege that any defendant offered investment advice for a fee. Thus, defendants other than the Committee can be deemed fiduciaries "with respect to" the Plans only "to the extent" that they exercise discretionary authority or control respecting management or administration of the Plans. *Id.* As explained by the First Circuit, "fiduciary status is not an all or nothing proposition; the statutory language indicates that a person is a plan fiduciary only 'to the extent' that he possesses or exercises the requisite discretion and control." *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998); *see also Pegram*, 530 U.S. at 225-26 ("[T]he statute does not describe fiduciaries simply as administrators of the plan, or managers or advisors. Instead it defines an administrator, for example, as a fiduciary only 'to the extent' that he acts in such a capacity in relation to a plan."); *Coleman*, 969 F.2d at 61 ("[T]he inclusion of the phrase 'to the extent' . . . means that a party is a fiduciary only as to the activities which bring the person within the definition. The statutory language plainly indicates that the fiduciary function is not an indivisible one.").

Because a person can be liable for breach of fiduciary duty only if the acts alleged to constitute that breach were undertaken by that person in a fiduciary capacity, "a court must ask whether [the] person is a fiduciary with respect to the *particular* activity at issue." *Id.* (emphasis added); *see also Hozier v. Midwest Fasteners, Inc.*, 908 F.2d

1155, 1158 (3d Cir. 1990) ("Fiduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions."); *In re McKesson HBOC, Inc. ERISA Litig.*, No. C00-20030, 2002 WL 31431588, at *9 (N.D. Cal. Sept. 30, 2002) ("To determine fiduciary status, it is necessary to examine the particular activity in question and assess the individual's role with regard to it.").

The determination of a party's fiduciary status is made by examining the documents governing the ERISA plan at issue, because "[t]he discretionary authority or responsibility which is pivotal to the statutory definition of 'fiduciary' is allocated by the plan documents themselves." *Coleman*, 969 F.2d at 61. "[T]he policy of ERISA requires strict attention to the actual language of the plan's governing documents." *Siskind v. Sperry Ret. Program*, 47 F.3d 498, 506 (2d Cir. 1995).

The complaint here simply ignores the allocation of duties and authority outlined in the Plans and, instead, begins by generally alleging that all defendants were plan fiduciaries, and then proceeds to discuss the actions allegedly constituting breaches of fiduciary duties, stating simply that the claims are against "Defendants." However, "[t]he ERISA fiduciary duty doctrine envisions that one entity will have fiduciary duty attach to some activities but not others; the existence of a duty turns not on who acts but on the nature of the action." *Campbell v. BankBoston, N.A.*, No. 02-1695, 2003 WL 834720, at *4 (1st Cir. March 7, 2003). Thus, as the case law makes clear, the question is not whether an individual or entity is a fiduciary in some general sense, or took some action that in some way affected a plan or its participants; it is, rather,

whether the *particular* activity that is alleged to be the breach was an activity undertaken by a *particular* defendant in a fiduciary capacity. *See Crowley v. Corning, Inc. Investment Plan*, 234 F. Supp. 2d 222, 230 (W.D.N.Y. 2002) (dismissing complaint where "plaintiff's allegations are made against all defendants, without specifying when the 'adverse information' was available, or known, to . . . any single one of them"); *McKesson*, 2002 WL 31431588, at *3 (dismissing complaint that was "replete with overly general allegations pursuant to which nearly all defendants are generally alleged to be liable for all breaches of fiduciary duty, all the while failing to identify *specific* defendants who are liable for *specific* breaches of *specific* fiduciary duties" (emphases added)).

Under the express terms of the Plans' governing documents here, the Committee has sole responsibility for the general administration of the Plans. (*See* Exs. 1-3 § 8.1.) The other defendants can be liable for breach of fiduciary duty only if the alleged wrongful acts (*i.e.*, the alleged misrepresentations and omissions) constituted the exercise by them of discretionary authority or control over the Plans provided for in the plan documents. The allegations of the complaint do not support such a claim against any of them.

1. **Plaintiffs do not allege that defendants Bent or Heffernan acted as fiduciaries.**

Plaintiffs name as defendants Robert A. Bent, allegedly a Tyco US employee and clerk of the Committee, and Kelly Heffernan, allegedly a Tyco US

employee and authorized signatory of the Committee. Even assuming that these defendants hold the positions plaintiffs allege, nowhere in the complaint do plaintiffs allege that either Bent or Heffernan is or acted as a fiduciary. The complaint is utterly silent with respect to any role played by either. Indeed, apart from their inclusion in the list of party defendants, neither is mentioned anywhere else in the complaint.[15] Thus, there is no allegation that Bent or Heffernan has exercised any discretionary authority or control over the Plans; plaintiffs simply do not explain how they are plan fiduciaries.

Because plaintiffs have failed to meet the threshold requirement for stating a claim under ERISA--a showing that Bent and Heffernan acted as plan fiduciaries--all claims against them should be dismissed.

2. **Tyco Ltd. was not a *de facto* fiduciary.**

Claim I should be dismissed as against Tyco Ltd. because it is not a named fiduciary in the plan documents, and did not function as a fiduciary with respect to the alleged misrepresentations and omissions. Tyco Ltd. is even more removed from the Plans at issue than in the typical case of a corporate defendant, because its only relationship to the Plans is that it is the parent corporation of Tyco US, which is both the employer and plan sponsor. The law is clear that a company is not an ERISA fiduciary

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[15] Even if Bent is the "clerk" of the Committee and Heffernan a "signatory," such positions involve only ministerial functions, which do not invoke ERISA's fiduciary obligations. *See, e.g., Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 21 (2d Cir. 1996); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 987 (3d Cir. 1995).

by virtue of being either the employer or plan sponsor. (*See infra* pp. 38-40.) It follows, *a fortiori*, that the parent of the employer or sponsor is not an ERISA fiduciary.

Plaintiffs allege that Tyco Ltd. was a plan fiduciary because it (1) filed certain SEC documents (Compl. ¶¶ 55-57, 61-62); (2) "made direct representations to Participants relating specifically to Plan investment options" (*id.* ¶ 58); and (3) "controlled" Tyco US (*id.* ¶ 59). These allegations do not support a claim because none involve the exercise of discretionary authority or control respecting the management or administration of the Plans or disposition of plan assets, as required to confer fiduciary status under ERISA. *See* 29 U.S.C. § 1002(21)(A). Tyco Ltd. had no authority to, and did not, undertake *any* activity with respect to the Plans.

a. **The filing of SEC documents does not make Tyco Ltd. a fiduciary to the Plans.**

Plaintiffs contend that because Tyco Ltd. filed SEC Forms S-8 and 11-K with the SEC, it is a fiduciary to the Plans. That is not so.

First, it is well established that employers do not act as fiduciaries when they engage in activity relating to the design of an ERISA plan.[16] Inherent in the

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[16] *See Hughes Aircraft*, 525 U.S. at 444 ("ERISA's fiduciary duty requirement simply is not implicated where [an employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan."); *Pegram*, 530 U.S. at 226 ("[A]n employer's decisions about the content of a plan are not themselves fiduciary acts."); *King v. Nat'l Human Res. Comm., Inc.*, 218 F.3d 719, 723 (7th Cir. 2000) ("It is . . . clear that the defined functions of a fiduciary do not include plan design, the amendment of a plan, or the termination of a plan."); *Siskind*, 47 F.3d at 505 ("An employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary."); *Johnson*, 19 F.3d at 1188 ("One subject conspicuously missing from [ERISA's

maintenance of any ERISA plan is the requirement that certain forms be filed with the SEC. Forms S-8 and 11-K are two such forms. Form S-8 is a registration statement required to be filed by any corporation that offers its stock to its employees or employees of a subsidiary under any employee benefit plan. *See* 17 C.F.R. § 239.16b (2003). Form 11-K is a required annual financial report regarding ERISA plans. *Id.* § 249.311. Because the design of any ERISA plan includes the filing of these forms, such activity does not trigger any fiduciary duties under ERISA. If Tyco US was offering its own shares to the ESOP, it could not, as the employer and plan sponsor, be deemed a fiduciary as a result of filing such forms. It follows, *a fortiori*, that Tyco Ltd., which is neither the employer nor the plan sponsor, but only the parent of the employer and plan sponsor, cannot be said to act as a fiduciary by filing Forms S-8 and 11-K.

Second, the filing of SEC documents is not a discretionary action undertaken in a fiduciary capacity; it is, rather, a required action taken in a business or corporate capacity pursuant to the securities laws, not ERISA. General business activities do not trigger fiduciary obligations under ERISA. *See Frank Russell Co. v. Wellington Mgmt. Co., LLP*, 154 F.3d 97, 103 (3d Cir. 1998) ("[A] decision which is strictly a corporate management business decision imposes no fiduciary duties." (alterations and punctuation omitted)); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998) ("[T]he fact that an action taken by an employer to implement a business decision may

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definition of fiduciary status] is the establishment and amendment of the plan itself.").

ultimately affect the security of employees' welfare benefits does not automatically render the action subject to ERISA's fiduciary duties."); *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.'" (*quoting Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1497 (3d Cir. 1994) ("ERISA does not impose fiduciary duties on employers acting in their management capacity."); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989) ("Where . . . employers conduct business and make business decisions not regulated by ERISA, no fiduciary duties apply."); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets.").

The production of financial documents required by the securities laws is an activity undertaken in the ordinary course of business; indeed, it is a quintessential act of corporate management and, therefore, does not constitute an act taken in a fiduciary capacity. Thus, the filing of such documents does not confer fiduciary status under ERISA. *See Anoka Orthopaedic Assoc. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1990) ("[P]reparation of reports required by government agencies[] does not entail discretionary authority or responsibility within the meaning of [ERISA]."); *Useden v. Acker*, 947 F.2d 1563, 1576 n.17 (11th Cir. 1991) ("[T]he ministerial preparation of [a

federally required form] clearly does not confer fiduciary status needed to bring that breach within the proscription of ERISA."). To the extent that a parent corporation is required to file statements with the SEC, it is complying with governmental regulations and communicating with a regulatory body and shareholders at large; it is not exercising discretionary authority or control over the management or administration of an ERISA plan or its assets.[17]

In the recent case of *Crowley v. Corning Inc.*, 234 F. Supp. 2d (W.D.N.Y. 2002), the court rejected the very same argument made by plaintiffs here. In *Crowley*, the plaintiff attempted to establish the fiduciary status of the corporation and its directors on the basis that plan information documents "incorporated by reference all of the documents filed by Corning with the [SEC]," *id.* at 225, which plaintiff asserted contained false and misleading statements regarding the financial condition of the company, *id.* at 226-27. The court rejected the attempt to convert SEC disclosure functions into ERISA fiduciary duties and violations, holding that "it is apparent from the amended complaint that such statements, regardless of truth or falsity, were not made by Corning in any fiduciary capacity regarding the Plan." *Id.* at 228. Any actions taken by the corporation and its directors with respect to Corning's SEC filings could

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[17] Indeed, since the filing of these forms is required under the securities laws, such activity is in no way "discretionary." Acts that are not discretionary in nature cannot confer fiduciary status. *See, e.g., Maniace v. Commerce Bank*, 40 F.3d 264, 267 (8th Cir. 1994) ("Clearly, discretion is the benchmark for fiduciary status under ERISA."); *Pohl v. Nat'l Benefits Consultants*, 956 F.2d 126, 129 (7th Cir. 1992) ("ERISA makes the existence of discretion a sine qua non of fiduciary duty.").

not form the basis of fiduciary status under ERISA. Accordingly, the court dismissed all claims against the corporation, its directors and the 30 John Doe committee members. *Id.* at 228-30. This Court should reach the same result.[18]

b. **The Mallinckrodt Update did not make Tyco Ltd. a fiduciary to the Plans.**

Plaintiffs' contention that Tyco Ltd. "made direct representations to the plan participants relating specifically to Plan investment options" is based entirely on a document entitled "Update to the Prospectus and Summary Plan Description for the Investment Plan for Employees of Mallinckrodt Inc." ("Mallinckrodt Update"). (Compl. ¶ 58(a)-(f).) The document does not support the contention.

As is plain from the face of the document, the Mallinckrodt Update was issued to employees of Mallinckrodt Inc. to inform them of changes in their existing retirement and investment plan as a result of the merger between a subsidiary of Tyco Ltd. and Mallinckrodt. (Ex. 10 at 2.) The primary information the document conveys is that the Mallinckrodt Stock Fund--an ESOP offered to Mallinckrodt employees under their existing plan--would be replaced by the Tyco Stock Fund as a result of the merger. In order to communicate this information to plan participants, the Mallinckrodt Update obviously had to mention Tyco Ltd. and the fact that the Tyco Stock Fund would hold the common stock of Tyco Ltd. To this end, "the Update provided 'certain additional

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[18] See also *Hull*, 2001 WL 1836286, in which the court dismissed all claims against the corporation, the committee and a director where the allegations "effectively mirror[ed] the allegations in the related securities litigation." *Id.* at *3. (*See supra* p. 2 n.4.)

information regarding Tyco International Ltd.'s common shares'" (Compl. ¶ 58(a)); "described Tyco International Ltd. stock 'as securities to be offered under the Plan'" (*id.* ¶ 58(c)); "directed Participants to the Tyco International Ltd. Form S-8 Registration Statement for further information" (*id.* ¶ 58(b)); and "expressly incorporated by reference all of Tyco International Ltd.'s SEC filings" (*id.* ¶ 58(f)). Plaintiffs' allegation that this quoted language renders Tyco Ltd. a fiduciary to the Plans is nonsense. If that contention were accepted, every fund offered under the Plans would be an ERISA fiduciary. For example, plan information documents "provide[] information" regarding the Fidelity Freedom Funds, because they are funds "to be offered under the Plan." (*See, e.g.*, Ex. 7 at 8-9.) This obviously does not mean that the Fidelity Freedom Funds or the companies that manage these funds are fiduciaries to the Plans. It simply conveys the information that such funds are available as investment options.

Plaintiffs' contention that the Mallinckrodt Update is a direct representation by Tyco to plan participants is apparently based on the allegation that the Update "expressly stated that Tyco International Ltd., not the Committee, will disseminate to participants the Update." (Compl. ¶ 58(e).) But the Update does not say that. It simply tells Mallinckrodt employees that information about the changeover in their retirement plan will be coming from Tyco, not Mallinckrodt: "Tyco is or will be delivering to all employees of Mallinckrodt and its subsidiaries eligible to participate in the Plan a copy of this Update, as well as a copy of Tyco's most recent annual report to

shareholders." (Ex. 10 at 4.) There is no mention of the Committee, and no basis on which to allege that the Committee was not responsible for distribution of the Update.

None of plaintiffs' allegations concerning the Mallinckrodt Update supports a contention that Tyco Ltd. exercised discretionary authority or control over the Plans or their assets, so as to make it a fiduciary to the Plans.

c. **The allegation that Tyco US is its alter ego does not make Tyco Ltd. a fiduciary to the Plans.**

Plaintiffs allege that Tyco Ltd. is a fiduciary because it controls Tyco US (Compl. ¶ 59) and Tyco US is its alter ego (*see id.* ¶ 60). These conclusory allegations are not sufficient to establish alter ego liability. But, in any event, these allegations are irrelevant because, as discussed further below (*see infra* pp. 38-40), Tyco US was not a fiduciary to the Plans in any respect. Thus, the relationship of the two corporate entities does not affect the determination that Tyco Ltd. was not a fiduciary to the Plans.

* * *

Because Tyco Ltd. was in no way a fiduciary to the Plans, Claim I cannot be asserted against it. *See Boyer v. J. A. Majors Co. Employees' Profit Sharing Plan*, 481 F. Supp. 454, 458 (N.D. Ga. 1979) ("[T]he Company was not a named fiduciary under the Act [and] there is no evidence that the Company controlled the Plan or had anything to do with its administration. This being the case, the Company is not a proper party defendant in this ERISA action and its motion to dismiss is granted.").

3. **The Tyco Ltd. Directors were not *de facto* fiduciaries.**

The Tyco Ltd. Directors[19] are not named fiduciaries in the plan documents. Plaintiffs allege, in a wholly conclusory single paragraph, that they were fiduciaries solely on the basis that they "signed the Form S-8 and many of the SEC filings incorporated by reference in the Form S-8." (Compl. ¶ 61.) This does not confer fiduciary status on the Tyco Ltd. Directors. There is no basis for concluding that the Tyco Ltd. Directors exercised any discretionary authority or control over the Plans or their assets. As explained above (*see supra* pp. 31-34), the signing of SEC documents is not an exercise of discretionary authority over an ERISA plan or its assets and is not therefore an action taken in a fiduciary capacity as defined by the Act. 29 U.S.C. § 1002(21)(A). It is instead an action taken in a corporate capacity. The Tyco Ltd. Directors, who are in no other way fiduciaries to the Plans, do not become fiduciaries merely by signing corporate documents required under federal law.[20] Thus, Claim I cannot be asserted against the former Tyco Ltd. Directors.

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[19] Plaintiffs name as defendants the following former Tyco Ltd. Directors: L. Dennis Kozlowski, Mark Swartz, Michael Ashcroft, Joshua M. Berman, Richard S. Bodman, John F. Fort, Stephen W. Foss, Richard A. Gilleland, Philip M. Hampton, James S. Pasman, Jr., W. Peter Slusser, Frank E. Walsh and Wendy Lane.

[20] Even where a corporation is a named fiduciary, employees acting on behalf of the corporation are not, as a result, fiduciaries under ERISA. *See, e.g., Confer v. Custom Eng'g Co.*, 952 F.2d 34, 37 (3d Cir. 1991) ("[W]hen an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of that corporation are not fiduciaries within the meaning of [ERISA], unless it can be shown that these officers have *individual* discretionary roles as to plan administration." (emphasis in original)).

4. **Tyco US was not a *de facto* fiduciary.**

Like Tyco Ltd. and the Tyco Ltd. Directors, Tyco US was neither a named fiduciary in the plan documents nor a *de facto* fiduciary. By the express terms of the Plans' governing documents, Tyco US is the plan sponsor and nothing more. That is an insufficient basis on which to impose fiduciary status under ERISA. "[T]he plan sponsor, as long as it is not acting as an administrator, generally does not [owe a fiduciary duty to plan participants]." *Payonk*, 883 F.2d at 231 (Stapleton, J., concurring). *See also In re Fruehauf Trailer Corp.*, 250 B.R. 168, 205 (D. Del. 2000) ("[T]he corporate sponsor of a benefit plan . . . is generally not a fiduciary."); *Indep. Ass'n of Publishers' Employees, Inc. v. Dow Jones & Co.*, 671 F. Supp. 1365, 1367 (S.D.N.Y. 1987) ("An employer does not fall under [ERISA's definition of a fiduciary] by merely creating and financing a plan, i.e., by being the 'plan sponsor.'"). (*See supra* p. 30 n.16.)

Tyco US is the employer and plan sponsor, but it is not the plan administrator. Thus, Tyco US had no fiduciary status under the Plans, and plaintiffs do not allege that it engaged in any discretionary management or administration of the Plans or their assets. In many cases, the plan sponsor is also the named plan administrator, thereby presenting a closer question of the plan sponsor's fiduciary status. Even in such cases, however, courts follow the so-called "two hats" doctrine, which dictates that "when employers wear 'two hats' as employers and as administrators they assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is

not regulated by ERISA." *Payonk*, 883 F.2d at 225 (quotation marks omitted). Here, Tyco US, the employer and plan sponsor, has elected *not* to act as plan administrator at all, and has designated the Committee as plan administrator. (Exs. 1-3 § 8.4.) As the Third Circuit has explained:

> [A]n employer can elect to wear only its plan sponsor "hat" and may designate . . . a separate entity as plan administrator. [The plan sponsor here] has made such an election and has designated the Annuities and Benefits Committee as plan administrator. Given this election, [the plan sponsor] is not subject, in its capacity as employer/plan sponsor, to ERISA's fiduciary obligations. Thus, [plaintiff's] claim of fiduciary breach is properly limited in this case to the plan administrator, i.e., the Annuities and Benefits Committee.

Taylor v. Peoples Natural Gas Co., 49 F.3d 982, 984 n.1 (3d Cir. 1995) (citations omitted).

The fiduciary status of a plan sponsor that is not also the plan administrator (as is the case here) is significantly limited because the sponsor acts in a fiduciary capacity only to the extent that it exercises discretionary authority conferred upon it in the plan documents. *See Beddall*, 137 F.3d at 18; *Coleman*, 969 F.2d at 61. The plan documents here do not confer on Tyco US *any* discretionary authority to manage or administer the Plans or their assets. In fact, Tyco US--like Tyco Ltd. and the Tyco Ltd. Directors--has no fiduciary role with respect to the Plans at all.

To the extent that plaintiffs allege that aspects of the Plans' structure and design, and amendments thereto, constitute breaches of fiduciary duty, their claims are barred by the settlor doctrine. It is black-letter law that a plan's sponsor, or settlor, does

not act as a fiduciary when designing ERISA plans. (*See supra* p. 30 n.16.) As the Seventh Circuit has explained:

> One subject conspicuously missing from [ERISA's definition of fiduciary status] is the establishment and amendment of the plan itself. Employers decide who receives pension benefits and in what amounts, select levels of funding, adjust myriad other details of pension plans, and may decide to terminate the plan altogether. In doing these things, . . . they are no more the employees' "fiduciaries" than when they decide what wages to offer or whether to close the plant and lay the workers off.

Johnson, 19 F.3d at 1188. *Accord, Lockheed 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."). Thus, any claim relating to the structure, design or amendment of the Plans is not actionable under ERISA.

The only basis on which plaintiffs allege that Tyco US was a fiduciary is the fact that its employees served on the Committee, and the contention that the members of the Tyco US Board were fiduciaries. (Compl. ¶¶ 52-54.) For the reasons discussed below (*see infra* pp. 42-45), this *respondeat superior* theory of liability should be rejected. Plaintiffs do not even allege that Tyco US participated in the actions alleged to constitute a breach of fiduciary duties under Claim I. That Claim should therefore be dismissed as against Tyco US.

5. **The Tyco US Board members were not *de facto* fiduciaries.**

Plaintiffs allege that "[t]he Directors of Tyco [US] were fiduciaries pursuant to ERISA in that they exercised discretionary authority or control respecting management of the Plans or management or disposition of its assets." (Compl. ¶ 50 (citations omitted).)[21] This conclusory allegation is flatly contradicted by the plan documents, in which administrative authority and control is granted solely to the Committee. (Exs. 1-3 § 8.1 ("The Committee shall have the sole responsibility for the general administration of the Plan and for carrying out its provisions.").) In fact, the plan documents allocate to the Tyco US Board a single responsibility: to appoint the members of the Committee. (*Id.*) With respect to this duty, plaintiffs contend that the Tyco US Board "had a duty to appoint persons with sufficient education, knowledge and experience to inform themselves as necessary to perform their duties and to evaluate the merits of the Plans' investment options." (Compl. ¶ 51.) Plaintiffs fail, however, to allege a single fact in support of the implication that the Committee members were in any respect deficient.

Plaintiffs' allegations are wholly conclusory. They presumably seek to establish fiduciary liability through the following chain of unsupported inferences: the value of Tyco stock declined; the Committee must therefore have breached its fiduciary duty in offering the Tyco Stock Fund as an investment option under the Plans; and since

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[21] The former Tyco US Board members named in the complaint are defendants Irving Gutin, Jerry R. Boggess and Richard J. Meelia. (Compl. ¶¶ 20-22.)

the Tyco US Board appointed the Committee members, it must have appointed incompetent individuals, thereby breaching its fiduciary duty to the Plans. Such unsupported and conclusory allegations (even if made explicitly) cannot establish that the Tyco US Board functioned as a fiduciary to the Plans (*i.e.*, exercised discretionary authority or control over the Plans or their assets). In any event, since the Committee itself did not breach any fiduciary duty under ERISA (*see infra* pp. 46-69), the Tyco US Board could not have breached any fiduciary duty with respect to the appointment of the Committee.

Claim I should be dismissed as against the three former Tyco US Board members.

6. ***Respondeat superior* liability should not be applied in cases arising under ERISA.**

It appears that plaintiffs seek to hold the corporate defendants liable on a *respondeat superior* theory, asserting that employees who breached their fiduciary duties were acting within the scope of their employment. (Compl. ¶¶ 52, 58.) Plaintiffs' attempt to impose *respondeat superior* liability should be rejected. No federal court of which we are aware--either appellate or district--has found an employer or a related entity liable for breach of fiduciary duty under ERISA on the basis of *respondeat superior*. This Court should decline to be the first to do so.[22]

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[22] In any event, none of the defendants breached a fiduciary duty under ERISA and, therefore, there is no underlying breach on which to base a claim of *respondeat superior* liability.

The concept of *respondeat superior* is completely inconsistent with the "two hats" doctrine described above. Where an employer elects to wear only its plan sponsor "hat," and designates other individuals and entities to serve as plan fiduciaries, the employer is not subject to ERISA's fiduciary duties. The designation of fiduciaries would be meaningless if the employer would nonetheless be liable for their breaches under a *respondeat superior* theory of liability.

In alleging *respondeat superior* liability, plaintiffs implicitly argue that liability under ERISA can be imposed on nonfiduciaries. This is entirely inconsistent with the considerable weight of ERISA jurisprudence. Importation of the *respondeat superior* doctrine to the ERISA context would not comport with Supreme Court pronouncements restricting the scope of ERISA remedies to those expressly provided for in the statute. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("Congress did *not* intend to authorize remedies [not] incorporate[d] expressly."). The Court has also held that, "[b]ecause ERISA . . . is enormously complex and detailed, it should not be supplemented by extratextual remedies, such as the common-law doctrines advocated by [plaintiffs]." *Hughes Aircraft*, 525 U.S. at 447 (citations omitted). *Respondeat superior* is such a common-law doctrine, which should not be imported as an "extratextual" remedy into ERISA.

In *Reich v. Rowe*, 20 F.3d 25, 26 (1st Cir. 1994), the First Circuit squarely held that ERISA "does not authorize suits against nonfiduciaries." The Court reached this conclusion with respect to a nonfiduciary who was charged with knowingly

participating in a breach of fiduciary duty. *Id.* at 31. In so holding, the Court relied primarily on the Supreme Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), in which the Court explained that

> [n]o provision [of ERISA] explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely, moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* cotrustees *and* third persons was well established under the common law of trusts.

Id. at 254 (emphasis in original). If a nonfiduciary who is a knowing participant in a breach of fiduciary duty is not liable under ERISA, then surely there is no basis on which to impose liability on a nonfiduciary on a theory of *respondeat superior*.

In *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), the Ninth Circuit reached the same conclusion as the First Circuit in *Reich*, holding that only fiduciaries may be held liable for breaches of fiduciary duty under ERISA. *Id.* at 871 ("The plain language of section 409(a) limits its coverage to fiduciaries, and nothing in the statute provides any support for holding others liable under that section."). This was consistent with an earlier decision, in which the same court held that "ERISA permits suits . . . for breach of fiduciary duty only against the fiduciary." *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-25 (9th Cir. 1985) (per curiam). Although the court in *Gelardi* did not use the words "*respondeat superior*," it unmistakably rejected application of the doctrine in a situation similar to that presented here:

> Although employees of Pertec serve on the Employee Benefits Committee and the Committee has a fiduciary responsibility in determining claims, this does not make the employer a fiduciary with respect to the Committee's acts. ERISA anticipates that employees will serve on fiduciary committees but *the statute imposes liability on the employer only when and to the extent that the employer himself exercises the fiduciary responsibility allegedly breached.*

Id. at 1325 (emphasis added; citation omitted).[23]

* * *

In sum, none of the defendants discussed above was a fiduciary with respect to plaintiffs' claim regarding alleged misrepresentations and omissions. Thus, plaintiffs have failed to meet the threshold requirement for stating a claim under ERISA against those defendants. Claim I should be dismissed as to them.

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[23] In *Am. Fed'n of Unions v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 665 (5th Cir. 1988), the court suggested, in dictum, that the doctrine of *respondeat superior* can be a source of liability in ERISA cases. However, although the court spoke of *respondeat superior*, it also suggested that, to find liability on that basis, the employer must have actively and knowingly participated in the breach of the employee. *Id.* The Sixth Circuit, in *Hamilton v. Carell*, 243 F.3d 992 (6th Cir. 2001), declined to recognize the applicability of *respondeat superior* in the ERISA context and criticized the decision in *American Federation*, noting that the Fifth Circuit "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." *Id.* at 1002. *See also Crowley*, 234 F. Supp. 2d at 228 (declining to apply the doctrine of *respondeat superior* in the ERISA context).

B. Claim I Should Be Dismissed as Against the Committee Because the Alleged Misrepresentations and Omissions Are Not Actionable Under ERISA.

1. Alleged misstatements and omissions in Tyco Ltd.'s SEC filings do not support a claim for breach of fiduciary duty under ERISA.

The allegation that Tyco Ltd.'s SEC filings contained misrepresentations or omissions cannot form the basis for a breach of fiduciary duty claim against the Committee for at least three reasons: (1) there is no allegation that the Committee played a role in the preparation or filing of Tyco's SEC documents and, thus, it could not have acted as a fiduciary with respect to such documents; (2) as discussed above (*see supra* pp. 31-34), the preparation and filing of SEC documents is a corporate business activity that does not implicate any fiduciary obligations under ERISA; and (3) ERISA imposes no duty to disclose the information that plaintiffs allege the SEC filings failed to disclose.

First, plaintiffs do not allege that members of the Committee were involved in or responsible for the preparation of Tyco's SEC filings that allegedly contained misrepresentations and omissions. Instead, plaintiffs seek to tie the Committee (and other defendants) to the allegedly false and misleading SEC filings on the ground that the "Form S-8 and, upon information and belief, the SPD and the Prospectus, incorporated by reference all of Tyco International Ltd.'s SEC filings." (Compl. ¶ 47.) The members of the Committee are not responsible for the Form S-8; that is a required SEC document filed by Tyco Ltd., and the fact that a Summary Plan

Description document refers to Tyco Ltd.'s SEC filings does not mean that the Committee is responsible under ERISA for the accuracy and completeness of the Tyco Ltd. SEC filings.

Second, as discussed above (*see supra* pp. 31-34), the act of producing a company's financial statements and other documents for filing with the SEC does not involve the exercise of discretionary authority or control over the management or administration of an ERISA plan or its assets and, therefore, cannot constitute a breach of ERISA's fiduciary obligations by any defendant, let alone the Committee (which is not alleged to have had any role with respect to the SEC filings). *See* 29 U.S.C. § 1002(21)(A). It is, rather, part of managing the company as a whole and, thus, an act taken in a corporate capacity. Although "[v]irtually all of an employer's significant business decisions affect the *value* of its stock, and therefore the benefits that ESOP plan participants will ultimately receive," that does not render the employer's business decisions fiduciary acts within the meaning of ERISA. *Grindstaff*, 133 F.3d at 424 (emphasis in original; quotation marks omitted).[24]

Third, while corporations have a legal duty pursuant to the federal securities laws to accurately report their financial condition to shareholders and the public at large in their SEC filings, ERISA does not impose such a duty on ERISA fiduciaries. ERISA requires that particular plan information, such as summary plan

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[24] As noted, the SEC filings here are not even the filings of the employer and plan sponsor, but those of the parent of the employer and sponsor.

descriptions, be disseminated to plan participants. *See* 29 U.S.C. § 1024(b); *Barrs v. Lockheed Martin Corp.*, 287 F.3d 202, 207 (1st Cir. 2002). Plaintiffs here do not allege that the Committee failed to comply with its statutory duty to make such disclosures. What plaintiffs implicitly suggest, therefore, is that in addition to the statutorily mandated disclosure requirements, ERISA fiduciaries have additional disclosure obligations. However, as the First Circuit has explained, "[w]hen ERISA itself has specified a duty and a corresponding remedy, we will impose a further duty on fiduciaries only in very narrow circumstances." *Watson v. Deaconess Waltham Hosp.*, 298 F.3d 102, 105 (1st Cir. 2002). There is no general duty of disclosure under ERISA. Indeed, "[a] corporation could not function if ERISA required complete disclosure of every facet of . . . ongoing [business] activities." *Vartanian* 131 F.3d at 270 (*quoting Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996)).

No court of which we are aware has found misrepresentations or omissions in SEC filings to constitute a breach of fiduciary duty under ERISA.[25] But in a recent and factually indistinguishable case, a federal court did soundly reject the theory of liability advanced by plaintiffs here. *See Hull v. Policy Mgmt. Sys. Corp.*, No.

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[25] Misrepresentations have been held to give rise to a claim for breach of fiduciary duties under ERISA only in very narrow circumstances. For instance, there can be liability where an employer, acting in its role as the named plan administrator: tricks plan participants into surrendering their plan benefits, *Varity*, 516 U.S. at 506; makes affirmative material misrepresentations to a plan participant in response to questions about changes to a plan, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 441 (3d Cir. 1996); or misrepresents to its employees that no change in benefits is forthcoming when, in fact, such a change is under serious consideration, *Vartanian*, 131 F.3d at 272.

CIV.A.3:00-778-17, 2001 WL 1836286 (D.S.C. Feb. 9, 2001). In *Hull*, plaintiffs sued their employer corporation, its chief executive officer, and the three members of the plan's administrative committee for breaching their fiduciary duties under ERISA. *Id.* at *2. The claims were based on "alleged dissemination of misinformation and failure to disclose information which plaintiff contend[ed] the . . . defendants were obligated to disclose." *Id.* at *3. The 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.*

Id. at *8 (emphasis added). The same conclusion should be reached here. The Plans are members of the putative class in the Securities Action pending before this Court, and will recover if that action is successful. In any case, there is no basis for holding that Tyco Ltd.'s SEC filings constituted a breach of fiduciary duty by the Committee.

2. **The allegations concerning Kozlowski's letters to all Tyco employees do not support a claim for breach of ERISA's fiduciary duties.**

Plaintiffs allege that the eight letters sent by defendant Kozlowski to all Tyco employees contained misrepresentations and omissions that breached ERISA's fiduciary obligations. (Compl. ¶¶ 109-10.) These letters do not represent a breach of duty by the Committee under ERISA for at least two reasons: (1) it is not alleged that

the Committee had any role with respect to the letters; and (2) the letters are, in any event, not statements made in a fiduciary capacity.[26]

First, plaintiffs do not allege that the Committee was in any way involved in the dissemination of the Kozlowski letters to Tyco employees. A defendant can be liable for breaching fiduciary duties under ERISA only to the extent that he or she undertakes the actions alleged to constitute the breach in a fiduciary capacity. (*See supra* pp. 24-28.) Since the plaintiffs do not allege that the Committee members had anything to do with the letters at all, a claim against them based on alleged misrepresentations in the Kozlowski letters should be dismissed.

Second, Kozlowski's letters cannot support a claim for breach of ERISA's fiduciary duty against *any* defendant because they do not involve the management or administration of the Plans. A person is a functional fiduciary under ERISA only to the extent that he or she engages in the activities in question as an exercise of discretionary authority or control over the management or administration of the ERISA plan. *See* 29 U.S.C. § 1002(21)(A), and discussion *supra* pp. 24-28. As discussed above (*see supra* pp. 21-23), the letters were communications from the chief executive officer of the company to all employees, not to plan participants, and are not alleged to have made any reference to the Plans. These letters plainly do not constitute the exercise of

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[26] Even if the other defendants were fiduciaries to the Plans, which they were not, the Kozlowski letters would not represent breaches of fiduciary duty by any of them for one or both of the same reasons.

discretionary authority or control over plan management or administration and, thus, do not trigger ERISA's fiduciary duties as to *any* defendant. In any event, the Committee cannot be held liable on the basis of activity with which it had no involvement.

3. **Plaintiffs' allegations concerning the plan documents' description of the investment objectives and risk characteristics of the Tyco Stock Fund do not support a claim.**

Plaintiffs' final allegation under Claim I is that plan information documents contained material misrepresentations. (Compl. ¶¶ 107-08.) It is only with respect to the allegations in these two paragraphs that the Committee could be said to have in any way acted as a fiduciary, because under the Plans the Committee is responsible for preparing and distributing the statutorily required plan information documents. (*See* Exs. 1-3 § 8.4(c).) Nonetheless, plaintiffs' allegations do not support the claim.

Plaintiffs allege that "[d]efendants negligently made misrepresentations concerning the investment objectives and risk and return characteristics of the Tyco Stock Fund" (Compl. ¶ 107) by making the following two statements: (1) participants who invest in the Tyco Stock Fund "are trying to increase the value of [their] investments over the long term by investing in the common stock of [their] company" (*id.* ¶ 107(a)); and (2) the Tyco Stock Fund performance "depends solely on the performance of a single stock" and participants should invest in the Fund only "if interested in sharing in the long-term growth of" Tyco stock (*id.* ¶ 107(b)). Plaintiffs

allege that "[t]hese statements were materially false and misleading in that they failed to disclose that the performance of the Fund depended in part upon the impact of the negligent misrepresentations and nondisclosures on the value of the Fund." (*Id.* ¶ 108.)

This allegation does not support a claim.

First, the allegation does not support the contention that either statement is in any way "false." The first statement (that participants who invest are trying to increase the value of their investment) is obviously true, and has nothing to do with the Fund's performance. Plaintiffs' explanation of why the statement is false and misleading (*i.e.*, because it failed to disclose Fund performance information), is a *non sequitur*. The statement is merely a recitation of what, in accordance with common sense, is an obvious investment goal of the Tyco Stock Fund, and cannot rationally be characterized as untrue or misleading.

With respect to the first portion of the second allegedly misleading statement (that the Tyco Stock Fund performance "depends solely on the performance of a single stock"), plaintiffs have taken the words out of context. The quoted language appears in the Mallinckrodt Update, under the general heading "A Few Words About Risk":

> A company stock fund is more risky than the average stock mutual fund because it *depends solely on the performance of a single stock*. Stock mutual funds generally hold the stocks of many companies and are not dependent on a single company. Therefore it may be wise for investors to limit their company stock investments to a portion of their overall savings.

(Ex. 10 at 6 (emphasis added).) Read in context, it is clear that the language quoted by plaintiffs--"depends solely on the performance of a single stock"--is not even a representation regarding the Tyco Stock Fund in particular.[27] Rather, it is general information about the risk characteristics of a fund holding a single stock. The statement cannot be deemed "false," and cannot constitute a misrepresentation as to the Tyco Stock Fund.

The second portion of the second statement (that one should invest in the Fund only "if interested in sharing in the long-term growth of" Tyco stock) cannot rationally be characterized as untrue or misleading. Again, as a matter of common sense, it is obvious that those who invest in a single stock fund are hoping that their investment will grow in value, and that the long-term growth in the value of the fund depends on the long-term growth in the value of the stock.

Both of the statements referred to by plaintiffs are, at best, akin to vague statements of corporate optimism that courts consistently have concluded are not materially false and misleading in the securities fraud context. *See, e.g., Suna v. Bailey Corp.*, 107 F.3d 64, 72 (1st Cir. 1997) ("[M]ere expressions of optimism from company spokesmen" are not materially false and misleading statements (*citing Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993))); *Lasker v. N.Y. State Elec. & Gas Corp.*, 85 F.3d 55, 58-59 (2d Cir. 1996) (same).

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[27] It is a fair inference, we submit, that the complaint (¶ 107(b)) does not identify the document being quoted precisely because the quotes are taken out of context.

Second, and more importantly, plaintiffs' explanation as to why the two statements are false and misleading is patently absurd. According to plaintiffs, it was a material omission not to disclose that the performance of the Tyco Stock Fund would be impacted if it turned out that corporate insiders were defrauding Tyco out of millions of dollars, engaging in massive securities law violations and mismanaging the company on a grand scale. Under plaintiffs' logic, all corporate statements about any company would have to be accompanied by such disclosure. Indeed, under plaintiffs' theory, the description of the other investment options under the Plans would be required to state that the performance of each fund depends on an absence of criminal or negligent activity by the fund managers or within the companies in which the funds invest. The absence of such disclosure cannot be deemed material, since it merely reflects an underlying assumption of *all* statements made by corporations to the public and its shareholders.

* * *

Claim I should be dismissed in its entirety as to all defendants.

IV. CLAIM II SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE NOT ALLEGED FACTS SHOWING A BREACH OF THE DUTY OF PRUDENCE IN ALLOWING THE PLANS TO PURCHASE AND HOLD TYCO SHARES OR IN CONTINUING TO OFFER THE TYCO STOCK FUND AS AN INVESTMENT OPTION.

In their second claim, plaintiffs allege that defendants breached a fiduciary duty of prudence under ERISA by allowing the Plans "to purchase and hold shares in the Tyco Stock Fund" and "by allowing the Tyco Stock Fund to remain an investment option under the Plans. " (Compl. ¶ 118.) This allegation does not support a claim.

A. The Committee Is the Only Proper Defendant with Respect to Claim II. The Claim Should Therefore Be Dismissed as Against All Other Defendants.

As discussed above (*see supra* pp. 24-28), a person can be a fiduciary only if that person acted in a fiduciary capacity with respect to the particular actions alleged to constitute a breach. Plaintiffs' second claim relates only to investment options under the Plans. The plan documents provide that the Committee has sole responsibility for selecting the investment vehicles to be offered under the Plans and presenting the rules and procedures governing plan participants' investment decisions. (Exs. 1-3 § 8.4(j).) Claim II may therefore be asserted only against the Committee. *See Hull*, 2001 WL 1836286, at *3 ("Nothing in the Plan documents . . . suggests that [any defendant other than the Committee had] fiduciary responsibility [with respect to] investment decisions.") Because only a "defendant who ha[s] discretionary authority with regard to investment policies under the Plan is potentially an appropriate defendant,"

McKesson, 2002 WL 31431588, at *9, plaintiffs' claims regarding decisions made or not made with respect to investments--in Tyco stock or otherwise--cannot be asserted against any defendant other than the Committee. *See id.* at *15 ("To the extent that a claim is made that [company stock] was an imprudent investment option, the claim is only assertable against the . . . Committee.").[28]

B. The Committee Did Not Breach a Duty of Prudence by Failing to Divest the Fund of Tyco Shares or by Continuing to Offer the Fund as an Investment Option.

1. ESOPs, by definition, are intended to hold shares in the employer's stock.

As discussed above (*see supra* pp. 7-8), the Tyco Stock Fund, as an ESOP, is designed to "invest[] primarily in 'qualifying employer securities,' which 'typically are shares of stock in the employer creating the plan.'"[29] *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995) (*quoting* 29 U.S.C. § 1107(d)(6)(A)); *see also Moench v. Robertson*, 62 F.3d 553, 568 (3d Cir. 1995) ("[U]nlike the traditional pension plan governed by ERISA, ESOP assets generally are invested in securities issued by [the plan's] sponsoring

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[28] Plaintiffs allege that the Tyco US Board breached its fiduciary duties to appoint and monitor the Committee. (Compl. ¶ 124.) As discussed above (*see supra* pp. 41-42), plaintiffs offer no facts to support this conclusory allegation. Even assuming that the Tyco US Board had such duties, they could only have been breached if the Committee breached its own fiduciary duties. For all the reasons stated herein, the Committee did not breach any fiduciary duties and, therefore, the Tyco US Board could not have breached any alleged duty to appoint or monitor the Committee.

[29] In this case, the securities are shares in the parent (Tyco Ltd.) of the employer (Tyco US).

company." (quotation marks omitted)). Congress created the ESOP as "an effective merger of the roles of capitalist and worker." *Donovan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). Thus, "the concept of employee ownership constituted a goal in and of itself" for Congress when it passed laws allowing creation of an ESOP. *Moench*, 62 F.3d at 568.

To further this goal, Congress enacted a series of special laws "designed to encourage employers to set up" ESOPs. *Id.* (*quoting Donovan*, 716 F.2d at 1458). "Congress has repeatedly expressed its intent to encourage the formation of ESOPs by passing legislation granting such plans favorable treatment." *Grindstaff*, 133 F.3d at 423. For instance, ERISA contains special rules that ease an ESOP's ability to borrow money to buy employer securities. 29 U.S.C. § 1107(b)(3). Indeed, an ESOP--unlike other pension plans--may borrow money from the employer to buy employer stock. *Id.* § 1108(b)(3). Congress also modified ERISA's "prohibited transactions" rules, which contain strict prohibitions against self-dealing, *id.* § 1106, to permit ESOPs to acquire "employer securities," *id.* § 1108(e). In addition, as discussed further below, a fiduciary of an ESOP is exempt from ERISA's normal requirement that a plan's investments be diversified. *See id.* § 1104(a)(2).

Congress recognized trade-offs when it enacted special rules that apply to ESOPs. For instance, "by its very nature, an ESOP places employee retirement assets at much greater risk than does the typical diversified ERISA plan." *Moench*, 62 F.3d at 568

(quotation marks omitted). But Congress made it clear that these trade-offs were worth the greater goal of encouraging employee ownership:

> The Congress is deeply concerned that the objectives sought by [the series of laws encouraging ESOPs] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, Pub. L. No. 94-455, ¶ 803(h), 90 Stat. 1520 (1976) (historical and statutory note to 26 U.S.C. § 4975).

Against this backdrop, plaintiffs claim that defendants breached their fiduciary duties by permitting investment in the Tyco Stock Fund. The claim fails. Congress expressly encouraged the creation of ESOPs, knowing that they would involve greater risk, and it is plaintiffs themselves who made the decision to invest portions (not in excess of 25 percent) of their individual accounts in the Fund. Claim II should be dismissed.

2. **Concentration of investment in the Tyco Stock Fund does not breach fiduciary duties under ERISA because ESOPs are exempt from the diversification requirement.**

Plaintiffs allege that the "massive investment in the Tyco Stock Fund was an imprudent investment for Plans whose purpose was to provide for employee retirement income security." (Compl. ¶ 118.) This allegation does not support a claim.

ERISA generally requires that a fiduciary "diversify[] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C). There is, however, a statutory exemption applicable to the Tyco Stock Fund with respect to the diversification requirement: "In the case of an [ESOP,] the diversification requirement of paragraph (1)(C) and the prudence requirement [with respect to diversification] is not violated by acquisition or holding of . . . qualifying employer securities . . . ." *Id.* § 1104(a)(2). Thus, as a general rule, "ESOP fiduciaries cannot be held liable for failing to diversify investments, regardless of whether diversification would be prudent under the terms of an ordinary non-ESOP pension plan." *Kuper*, 66 F.3d at 1458; *see also Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 860 (8th Cir. 1999). Plaintiffs cannot, therefore, assert a claim for breach of fiduciary duty against the Committee based on the alleged "massive investment" of plan assets in the Tyco Stock Fund.

The claim fails for other reasons as well.

First, as plaintiffs concede, "[t]he Plans provide several options for investment of Participant contributions." (Compl. ¶ 38.) Thus, it was participants--not the Committee members--who determined the portion of their accounts that would be allocated to the Tyco Stock Fund.

Second, although plaintiffs characterize the investment in the Tyco Stock Fund as "massive" because it held Tyco shares "worth in excess of $700 million during the Class Period" (Compl. ¶ 118), they fail to acknowledge that, whatever the total value of stock in the Fund, no individual participant was permitted to allocate more

than 25 percent of his or her account to that Fund. Thus, although participants could have been, consistent with ERISA, permitted to allocate 100 percent of their accounts to the Tyco Stock Fund, they were limited to 25 percent.

Third, plaintiffs cannot claim to have been unaware of the risk involved in investing in the Tyco Stock Fund. The plan documents expressly and repeatedly informed participants of the high risk level involved in investing in the Fund as compared to the other investment options available. The Plan Prospectus instructs that, before investing in the Tyco Stock Fund, participants should consider the level of risk:

> Each of the other Investment Funds available under the Plans is invested in a number of securities (such as stocks, bonds, notes, fixed interest rate contracts, etc. depending on the investment objective), not just the stocks or bonds of one company. Please remember that the Tyco Stock Fund holds the stock of only one company and is not a diversified investment.

(Ex. 8 at 4 ¶ 8.) Similarly, the Investment Options document explains that "[i]nvesting in a non-diversified single stock fund involves more investment risk than investing in a diversified fund." (Ex. 7 at 7.)

For all these reasons, plaintiffs cannot state a claim based on the alleged "massive investment" in the Tyco Stock Fund.

3. **Because the Plans are self-directed, the Committee had no authority to sell the Tyco shares held in the Tyco Stock Fund.**

If the Committee had "directed the Plans to sell all Fund shares" (Compl. ¶ 122), it would have violated the terms of the Plans by overriding the

investment decisions of plan participants. As the complaint itself concedes, it is only the plan participants--not the Committee members--who direct the investments made under the Plans: "Participants direct the Plans to purchase investments from among the investment options available in the Plans and allocate them to Participants' individual accounts." (Compl. ¶ 37.) Moreover, plan participants were in no way required to direct *any* portion of their individual accounts to the Tyco Stock Fund. That was merely one investment option among many from which participants could choose. Plaintiffs do not allege otherwise, nor could they do so.

Because the Committee had no authority to redirect the investments of plan participants, to have done so would have violated the express terms of the Plans' governing documents. If plaintiffs' theory is accepted, the Committee would have breached its fiduciary duties under ERISA by either following or not following the investment directions of plan participants. An ERISA plan fiduciary cannot be put in this untenable position. The Committee was required to follow the directions of the plan participants.

4. **The public information concerning Tyco cited by plaintiffs does not support the claim that Tyco shares should have been seen as an imprudent investment.**

Plaintiffs allege that the Committee breached a duty of prudence because, based on publicly disclosed facts, it "should have known that (1) Tyco was engaged in a massive, high risk acquisition program involving many disparate industries, (2) Tyco's accounting was impenetrable and, therefore, the merits of investing Plan assets in the

Fund could not reasonably be evaluated, and (3) analyst reports concerning Tyco could not be trusted." (Compl. ¶ 119.) To support this allegation, plaintiffs refer to 26 newspaper articles that appeared at various times over a five-and-a-half-year period, and that include statements critical of Tyco. (Compl. ¶ 119 (a)-(z).) Of the complaint's 18 pages covering the allegations in support of plaintiffs' second claim (*i.e.*, that continuing to offer the Tyco Stock Fund as an investment option breached ERISA's duty of prudence), over 15 consist solely of the excerpts from these news articles. (*Id.*)

Plaintiffs offer no explanation for how these articles compel the conclusion that investment in Tyco stock was imprudent. Even these articles, which plaintiffs presumably have selected because they best support plaintiffs' case, show that many knowledgeable observers considered Tyco stock to be a good investment. Thus, for example:

- The *Wall Street Journal* article cited in ¶ 119(a) quotes an investment officer at Massachusetts Financial Services, whose mutual funds owned 5.6 million shares of Tyco, as saying, "I'm generally not a big fan of conglomerates, but I like Tyco." (Ex. 11.)

- The *New York Times* article cited in ¶ 119(b) reports that a Lehman Brothers analyst "who has Tyco rated as his top pick, sharply raised his 18-month price target on the company's shares . . . to $100 a share from $75 previously." (Ex. 12.)

- The *Bloomberg News* article cited in ¶ 119(d) reports that "Tyco has been one of the best performing U.S. stocks, surging more than eightfold in the five years ended Sept. 30 while the Standard & Poor's 500 index nearly tripled," and also reported that Tyco was on Goldman Sachs' "recommended list." (Ex. 13.)

- The *Wall Street Journal* article cited in ¶ 119(e) reports that "[m]any Wall Street analysts, who almost universally have issued buy recommendations on Tyco stock, backed Tyco management." (Ex. 14.)

Indeed, one of the excerpts quoted by plaintiffs actually contradicts their assertion that publicly available information showed Tyco shares to be an imprudent investment. The excerpt states: "Thirteen firms, including nine of the 10 largest U.S. investment banks by capital, underwrote the $2 billion initial stock sale of TyCom. Eleven have analysts who cover Tyco, and all 17 analysts who follow the company rate it a 'buy.'" (Compl. ¶ 119(j).)[30]

It is thus apparent, even from the articles selected by plaintiffs, that their assertion that publicly available information showed Tyco shares to be an imprudent investment does not survive scrutiny. The Class Period spans a volatile period in the markets generally and, whatever difficulties Tyco encountered, there were analysts and investors who continued to recommend and to purchase Tyco stock. Indeed, plaintiffs implicitly concede this by alleging that "analyst reports concerning Tyco could not be trusted." (Compl. ¶ 119). Plaintiffs offer no explanation for why Tyco should have been seen as an imprudent investment when, as the complaint shows, "all 17 analysts who follow the company rated it a 'buy.'" (Compl. ¶ 119(j).) In *Kuper*, 66 F.3d at 1460, the court held that continued investment in company stock, which had dropped 80

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[30] Plaintiffs cite a *Wall Street Journal* article for its discussion of the $20 million payment to a former director and a charity of which he is trustee (Compl. ¶ 119(q)), without acknowledging the statement of a chief investment officer that he "continues to believe Tyco is a sound company and a good investment." (Ex. 15.)

percent during the relevant period, was not imprudent because, *inter alia*, "several investment advisors recommended holding [the] stock." *Id.* The news articles cited by plaintiffs here likewise demonstrate that numerous analysts and investment managers continued to recommend Tyco stock and rated it a "buy." Thus, plaintiffs' contention that knowledge of public information would have led a reasonable investment manager to conclude that Tyco stock was an imprudent investment is, on its face, baseless.

It should be noted as well that, whatever the content of news articles concerning Tyco, such information was equally available to the plaintiffs, and it was, in fact, only plaintiffs themselves who had authority to manage, acquire or dispose of the assets in their individual accounts, not the Committee or any other defendant. Moreover, "[a] fiduciary has no obligation . . . to provide investment advice to a participant or beneficiary under an ERISA section 404(c) plan." 29 C.F.R. § 2550.404c-1(c)(4). It is the plan participants who should have weighed conflicting opinions and reports, and redirected their assets out of the Tyco Stock Fund--as they were free to do at any time--if they concluded that investment in Tyco stock was imprudent. The plan SPDs expressly state: "*It is your responsibility to select, monitor, and reallocate your investments according to your needs and changing market conditions.*" (Exs. 4-6 at 1 (emphasis in original).)

Plaintiffs have failed to state a claim for breach of the duty of prudence based on publicly disclosed information.

5. **Even if, as plaintiffs allege, the Committee had inside information, and did have authority to sell Tyco shares held by the Fund, it could not have done so without violating the federal securities laws.**

Plaintiffs allege that defendants breached a duty of prudence by not taking certain actions with respect to material nonpublic information. They assert that "[t]o the extent that the Defendants possessed material adverse nonpublic information, it [sic] should have prevented the Plans from purchasing additional Fund shares." (Compl. ¶ 122.) But defendants cannot be required to violate the federal securities laws in order to fulfill fiduciary duties under ERISA. *See McKesson*, 2002 WL 31431588, at *7 ("[T]he fiduciaries were not obligated to violate the securities laws or other laws merely to protect the interests of Plan participants."). Indeed, plaintiffs have implicitly recognized this by first alleging that *publicly* available information demonstrated that Tyco was an imprudent investment. (*See supra* pp. 61-64.)[31]

Rule 10b-5 promulgated under the Securities Exchange Act of 1934 prohibits corporate insiders from trading company stock on the basis of material nonpublic information. *See United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997). This prohibition applies to ERISA fiduciaries and ERISA plans that acquire material nonpublic information. *See* Employee Benefit Plans, Securities Act Release No. 33-6188, 1980 WL 29482, at *28 & n.168 (Feb. 1, 1980) (stating that the antifraud provisions of

[31] Plaintiffs' allegations that the Committee breached the duty of prudence based on publicly available information is clearly an effort to circumvent the conclusion that the Committee could not legally have made investment decisions based on inside, nonpublic information.

Rule 10b-5 apply to sales of an employer's stock by an employer-sponsored pension fund). Thus, neither the Plan nor its fiduciaries could have traded company stock held by the Plans on the basis of material nonpublic information because "[n]ot even a fiduciary acting in its fiduciary capacity is permitted to engage in insider trading." *McKesson*, 2002 WL 31431588, at *6.

Plaintiffs have attempted to frame their allegation so as not to involve a sale or purchase of stock, asserting that defendants "should have prevented the Plans from purchasing additional Fund shares." (Compl. ¶ 122.) But this same effort was rejected by the court in *Hull*:

> Plaintiff argues that at least the decision to refrain from additional purchases would not violate securities laws and regulations prohibiting insider trading. Assuming without deciding that this is true, plaintiff's theory would, nonetheless, violate the spirit of these rules and, at the least, impose a higher standard on ERISA fiduciaries as to Plan purchases of employer stock than would be applied to other stock purchases. Plaintiff has offered no authority for such a dual standard and the court is aware of none.

2001 WL 1836286, at *9.

Seeking to extricate themselves from this dilemma, plaintiffs suggest that the Committee "should also have directed the Plans to sell all Fund shares and disclosed this nonpublic information prior to any sales by the Plans." (Compl. ¶ 122.) Plaintiffs allege that "[h]ad it done so, the Plans would have limited their losses substantially, even though the price might have dropped somewhat upon disclosure." (*Id.*) Even assuming that the Committee members had the alleged nonpublic

information, the steps plaintiffs suggest would not have limited the Plans' losses. Plaintiffs themselves allege that disclosure would have caused the price of Tyco shares to drop in any event. (*Id.*) Although plaintiffs suggest that this course of action would have caused the price to drop only "somewhat," they allege no basis for concluding that participants would have avoided losses as a result. And, in fact, the suggestion that they would have done so is contradicted by the efficient market theory on which securities class actions are based. *See Kriendler v. Chem. Waste Mgmt. Inc.*, 877 F. Supp. 1140, 1151 n.8 (N.D. Ill. 1995) ("Upon publication of the information, the market immediately reacts, adjusts and incorporates the new information into the stock price." (citations omitted)); *McKesson*, 126 F. Supp. 2d at 1261 ("If the true facts were disclosed prior to the merger, the market presumably would have acted rationally and discounted the shares to correct the previous inflation."). Simply put, plaintiffs have suffered no damage as a result of defendants' alleged failure to disclose the material nonpublic information and then sell the Tyco shares held by the Fund. So this alternative theory cannot support a claim for breach of fiduciary duty.

6. **Plaintiffs have failed to overcome the presumption that an ESOP's investment in employer stock is prudent.**

To accommodate congressional policies and the competing duties facing ESOP fiduciaries, courts apply a presumption of prudence to fiduciaries' decisions, under plans that are not self-directed plans, to invest plan assets in employer securities.

See, e.g., *Moench*, 62 F.3d at 571; *Kuper*, 66 F.3d at 1458; *Landgraff v. Columbia/HCA Healthcare Corp.*, No. 3-98-0090, 2000 WL 33726564, at *6 (M.D. Tenn. May 24, 2000).

In *Moench*, the Third Circuit adopted a deferential standard of review in such instances, holding that "the fiduciary's decision to continue investing in employer securities should be reviewed for an abuse of discretion." 62 F.3d at 571. To rebut the presumption of prudence, a plaintiff must show that the "ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate." *Id.*

In *Kuper*, plaintiffs claimed that defendants breached their fiduciary duties under ERISA by failing to investigate the appropriateness of continuing to hold company stock despite their knowledge that company insiders were selling their stock and that the company was facing financial difficulties. 66 F.3d at 1459. The court rejected plaintiffs' claim, concluding that "a fiduciary's failure to investigate an investment decision *alone* is not sufficient to show that the decision was not reasonable. Instead, . . . a plaintiff must show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." *Id.* at 1459 (emphasis in original).

The presumption of prudence should be even stronger in the case of self-directed plans. Here, plaintiffs have not alleged, and cannot allege, that the Committee abused its discretion by continuing to invest in Tyco stock because, simply put, it was not the Committee's decision whether to invest in Tyco stock--it was the plan

participants'. Plaintiffs have failed to rebut the presumption because they allege no facts to support a showing that an adequate investigation would have revealed to the Committee that investment in the Tyco Stock Fund was imprudent. The only facts offered by plaintiffs are the 26 news articles discussed above. (*See supra* pp. 61-64.) For the reasons stated, those articles would not have led a reasonable fiduciary to conclude that offering the Tyco Stock Fund as an investment alternative was imprudent.

* * *

Plaintiffs have failed to state a claim that the Committee breached its fiduciary duties by not selling the Tyco stock held by the Plans and discontinuing the Tyco Stock Fund as an investment option under the Plans. Accordingly, Claim II should be dismissed.

V. ERISA DOES NOT AUTHORIZE SUITS FOR INDIVIDUAL LOSS UNDER SECTION 502(a)(2) OR FOR DAMAGES UNDER SECTION 502(a)(3).

Plaintiffs contend that as a result of defendants' alleged violations of ERISA, they are entitled to relief under two statutory provisions: Sections 502(a)(2) and 502(a)(3). *See* 29 U.S.C. § 1132(a)(2)-(3). (Compl. ¶ 1.) Neither of these provisions, however, authorizes the relief plaintiffs seek.

A. Plan Participants Cannot Assert Claims for Individual Loss Under Section 502(a)(2).

Section 502(a)(2) of ERISA allows a participant or beneficiary of an ERISA plan to obtain relief for breach of a fiduciary duty under Section 409(a), which in turn provides as follows:

> Any person who is a fiduciary *with respect to a plan* who breaches [a fiduciary duty to the plan] shall be personally liable to make good *to such plan* any losses *to the plan* resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan* by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (emphases added). This remedial provision, by its plain terms, allows a plan participant to seek relief on behalf of *the plan as a whole*. It is settled law, however, that this provision does *not* permit recovery for individual losses resulting from breaches of fiduciary duty. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (holding that "recovery for a violation of § 409 inures to the benefit of the plan as a whole" not to individual participants); *see also Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (stating that Section 409 "does not provide a remedy for individual beneficiaries"); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) (noting that "*Russell* . . . bars plaintiffs from suing under [Section 409] because plaintiffs are seeking damages on their own behalf, not on behalf of the Plan").

As the Supreme Court explained in *Russell*, "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." 473 U.S. at 142. The Court based its conclusion on an examination of the legislative history of Section 502(a)(2): "The floor debate also reveal[ed] that the crucible of congressional concern was misuse

and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." *Id.* at 140 n.8. Accordingly, "[u]nder ERISA, damages for breach of fiduciary duty inure to the benefit of the plan as a whole rather than to individuals." *Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999). *Russell* makes clear that plaintiffs suing under ERISA Section 502(a)(2) "cannot recover in their individual capacities." *Tregoning v. American Cmty. Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993). Nor can plaintiffs circumvent the *Russell* rule by ostensibly seeking relief "on behalf of the plan" that will actually result in an individual adjustment to their personal plan accounts. *See Call v. Sumitomo Bank*, 881 F.2d 626, 629 n.5 (9th Cir. 1989).

Plaintiffs' request for individualized relief appears on the face of the complaint: plaintiffs seek "actual damages in the amount of any losses the Plans suffered, to *be allocated among the Participants' individual accounts in proportion to the accounts' losses.*" (Compl. at 61.F (emphasis added).) If plaintiffs were truly suing for plan-wide relief there would be no need to seek class certification because success in the name of a single plan participant would "inure[ ] to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. The complaint alleges, however, that class certification is necessary "because the injury suffered by the individual class members may be relatively small, [and] the expense and burden of individual litigation makes it impracticable for the Class members individually to redress the wrongs done to them." (Compl. ¶ 34.) In fact, exactly the opposite is true: the certification of a class would be

wholly unnecessary if this action properly sought plan-wide relief under Section 502(a)(2).

Section 502(a)(2) does not authorize the individualized relief that plaintiffs seek.

B. **Plan Participants Cannot Seek Money Damages Under Section 502(a)(3).**

Plaintiffs also assert claims for relief under Section 502(a)(3) of ERISA. That provision provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3) (emphasis added). While Section 502(a)(3) allows for individualized equitable relief, any claim for money damages under this provision is foreclosed by two recent Supreme Court decisions.

In *Mertens v. Hewitt Associates*, the Supreme Court held that the catch-all phrase "other appropriate equitable relief" does not authorize suits for money damages for breach of fiduciary duty. 508 U.S. 248, 257-58 (1993); *see also Turner v. Fallon Cmty. Health Plan, Inc.*, 127 F.3d 196, 198 (1st Cir. 1997) ("[Section 502(a)(3)] is expressly limited to providing equitable relief . . . ."); *Lee*, 991 F.2d at 1011 ("The plain language of [Section 502(a)(3)] does not provide for monetary relief and a review of the legislative history confirms that Congress did not contemplate that this phrase would include an award of money damages.").

Plaintiffs cannot avoid the rule of *Mertens* by "struggl[ing] to characterize the relief sought as 'equitable'." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U. S. 204, 210 (2002). While plaintiffs here also ask for equitable relief, it is apparent that "[t]he complaint does not [in actuality] seek equitable relief; rather, it asks for damages." *Lee*, 991 F.2d at 1011. In addition to requesting the imposition of a constructive trust (Compl. at 61.D), an injunction prohibiting further breaches (*id.* at E), and "equitable restitution and other appropriate equitable relief" (*id.* at 62.J), plaintiffs also seek "[a]ctual damages in the amount of any losses the Plans suffered" (*id.* at 61.F). As the plaintiffs themselves state, "[a]s a consequence of Defendants' breaches, the Plans suffered losses. The Defendants are liable to personally make good to the Plans any losses to the Plans resulting from each breach." (*Id.* ¶¶ 126-27.) Thus, in plaintiffs' own words, they are seeking money damages for losses suffered as a result of defendants' alleged breach of their fiduciary duties. A plaintiff seeking compensation for loss resulting from a defendant's breach of a legal duty is asking for money damages. *See* Dan R. Dobbs, *Law of Remedies* § 1.1 at 3 (2d ed. 1993) ("The damages remedy is a money remedy aimed at making good the plaintiff's losses."). As the Supreme Court held in *Mertens*, Section 502(a)(3) does not permit recovery of money damages.

Characterizing the monetary relief sought as "equitable restitution" does not help plaintiffs. In *Great-West Life*, the Supreme Court explained that Section 502(a)(3) only authorizes actions seeking remedies "that were *typically* available

in equity," 534 U.S. at 210 (citing *Mertens*, 508 U.S. at 256), and "not all relief falling under the rubric of restitution is available in equity," *id.* at 212. A plaintiff could typically only "seek restitution *in equity* . . . where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. This remedy makes sense because, unlike claims for money damages, "[t]he restitutionary goal is to prevent unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff." Dobbs, *supra*, at 5.

Plaintiffs have not alleged that the defendants took money from the Plans. Nor have they alleged that defendants possess particular funds or property that rightly belong to plaintiffs. Plaintiffs therefore have failed to state a valid claim for equitable restitution. To the extent plaintiffs seek money damages under Section 502(a)(3), their claims should be dismissed.

Conclusion

For the reasons set forth above, defendants' motion to dismiss the complaint should be granted.

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Respectfully submitted,
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