No. 06-8031

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: TYCO INTERNATIONAL LTD., MULTIDISTRICT LITIGATION	)	On Petition for Leave to Amend from the District of New Hampshire
	)	02-MDL-1335-B
	)	**ERISA ACTION**
	)	Civil Action No. 02-cv-1357-PB
	)	Hon. Paul Barbadoro
	)	*Judge Presiding*

PLAINTIFFS' RESPONSE TO PETITION OF TYCO INTERNATIONAL LTD. FOR LEAVE TO APPEAL FROM THE DISTRICT COURT'S CLASS CERTIFICATION ORDER PURSUANT TO RULE 23(f)

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Plaintiff-Respondents Edmund Dunne, Kay Jepson, John Gordon, Gary Johnson, Peter Poffenberger and Karen Wade (the "ERISA Plaintiffs"), respectfully submit this Response to the Petition of Tyco International Ltd. Pursuant to Fed. R. Civ. P. 23(f) For Leave to Appeal From the District Court's Class Certification Order (the "Petition").[1]

INTRODUCTION

The ERISA Plaintiffs are current or former Tyco employees whose accounts in the Tyco 401(k) retirement plans ("Plans") lost substantial amounts because the Plans improperly invested in Tyco stock. The complaint alleges that Defendants breached their fiduciary duties under the Employee Retirement Income Security Act ("ERISA") in two separate counts. Count One alleges that Defendants violated ERISA by negligently misrepresenting and failing to disclose material information to the Plan participants concerning Tyco's business and financial condition. Count Two alleges that Defendants breached their fiduciary duties under ERISA by permitting the Plans to invest the Plan assets held in each

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[1] The District Court's class certification order which Tyco seeks to appeal, Overby v. Tyco Inern., Ltd., No. 02-1357-B, MDL No. 02-1335-B (D.N.H. Aug. 15, 2006) ("Order"), is attached to Tyco's petition as Exhibit A.

participant's account in Tyco stock while Tyco stock was an imprudent investment for retirement plan assets.[2] Plaintiffs assert both of these counts for damages to the Plans in a representative capacity on behalf of the Plans under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).[3]

The District Court certified a class of Plan participants under Fed. R. Civ. P. 23(a) and 23(b)(1)(B) with respect to both counts. However, Tyco seeks review of the District Court's order certifying the class only with respect to Count One and does not seek interlocutory review with respect to Count Two.

The Petition should be denied for many reasons. First, since the claim for damages is brought by the ERISA Plaintiffs in a representative capacity on behalf of the Plans under ERISA § 502(a)(2), and not on behalf of a class of individual Plan participants under § 502(a)(3), and this claim is not required to be brought under Rule 23, reversal of the District Court order or de-certification of the class will not change the dynamics of this case at all. Because the certification or non-

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[2] This case arises out of a massive accounting fraud and corporate malfeasance perpetrated by Tyco's senior executives, Dennis Kozlowski and Mark Swartz. Swartz and Kozlowski are now serving substantial prison sentences as a result of their misconduct.

[3] As discussed below, Plaintiffs also seek limited equitable relief on behalf of a class of Plan participants under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). No monetary relief is recoverable under this claim.

certification of the Count One claims is not important to this case, the issue should not be reviewed on an interlocutory basis. Second, since Tyco has not even petitioned to appeal the class certification with respect to Count Two, regardless of the decision on the Petition, this case will proceed as a class action under Count Two, and Tyco's exposure and incentive to settle will not change in any material way. Third, the Petition does not raise any novel or complex issues of law important to this case or the law generally. Rather, class certification of the types of ERISA claims alleged in Count One is routinely granted. Finally, there is no "significant" or other weakness in the District Court's opinion.

ARGUMENT

I. Tyco Cannot Meet the Burden For a Rule 23(f) Interlocutory Appeal

Interlocutory appeals under Rule 23(f) "should be the exception and not the rule; after all, many (if not most) class certification decisions turn on 'familiar and almost routine issues.'" Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000) (*quoting* Advisory Committee's Comments on Rule 23(f)). Because interlocutory appeals "are disruptive, time-consuming and expensive," the Court should exercise "restraint" in considering these types of appeals. Id. To meet the burden under Rule 23(f), a petitioner challenging certification of a class must prove either (1) that class certification raises the stakes

so substantially that there is an irresistible urge to settle, or (2) that the appeal will lead to clarification of an "unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." Id. at 293-94, *citing* Blair v. Equifax Check Services, Inc., 181 F.3d 832, 293 (7th Cir. 1999). Additionally, a petitioner "must demonstrate some significant weakness in the class certification decision." Waste Management, 208 F. 3d at 295. Tyco can not show that *any* of these factors are met here.

A. The Issue On Appeal Will Have Little, If Any, Effect On the Ultimate Outcome of this Case

The sole issue Tyco seeks to appeal is whether the District Court properly considered the presumption of reliance articulated in Affiliated Ute Citizens of Utah v. U. S., 406 U.S. 128, 152-3 (1972), as part of its Rule 23(a)(3) "typicality" analysis concerning Plaintiffs' negligent misrepresentation/non-disclosure claim. Neither resolution of this issue nor any decision on class certification will "raise the stakes" **at all** (much less substantially) or affect **any** "urge to settle" (much less "irresistible"), even if (1) the Petition is granted and (2) Tyco ultimately prevails on appeal.

First, Plaintiffs do not even need to use class action procedures to assert

their damage claims.[4] Therefore, Tyco's success or failure on the Petition has little bearing on the outcome of this case. Specifically, Plaintiffs' primary claims are brought under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), which permits the Secretary of Labor, a fiduciary or a participant to bring a claim for breach of fiduciary duty on behalf of a plan. Under this statute, the Secretary, a fiduciary and a participant stand in the same shoes in representing a plan. The Secretary of Labor does not use class action procedures to bring such claims.[5] The ERISA statute contains no different procedural obligations for a participant's claim under § 502(a)(2). *See* Coan v. Kaufman, 457 F.3d 250, 259 (2d Cir. 2006) (class certification is not necessary for § 502(a)(2) claim provided plaintiff takes appropriate actions to proceed in a representative capacity under the circumstances; "[i]t seems to us, rather, that Congress was content to leave the procedures necessary to protect absent parties, and to prevent redundant suits, to be worked out by parties and judges according to the circumstances on a case by

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[4] Plaintiffs voluntarily elected to file a motion for class certification to demonstrate that they brought their claims in a representative capacity, consistent with the cases cited below. However, use of this procedure was not in any way required.

[5] *See e.g.* Chao v. Day, 436 F.3d 234 (D.C. Cir. 2006) (secretary of labor bringing action under ERISA § 502(a)(2), not class action); Reich v. Rowe, 20 F.3d 25 (1st Cir. 1994) (same).

case basis"); Thompson v. Avondale Indus., 2001 WL 1543497, *2 (E.D. La. Nov. 30, 2001) ("the court will not require Plaintiffs to show that they are adequate class representatives within the meaning of Rule 23 (or that they satisfy any of the other requirements of Rule 23(a)), because Plaintiffs do not assert their ERISA claims as a class action. Rather, Plaintiffs state claims for breach of fiduciary duty on behalf of the ESOP as a whole, rather than individual claims for benefits under 29 U.S.C. § 1132(a)(1)(B)"). Thus, even if (1) the Court grants the Petition and (2) reverses the class certification of Count One (and even if the Court were to reverse certification of the Count Two claims, which is not even on appeal), this case would still proceed in its entirety in an appropriate representative capacity.

Second, the issue proposed for appeal applies only to the certification of Count One - the negligent misrepresentation/nondisclosure count- and Tyco does not even appeal class certification of Plaintiffs' imprudent investment claim in Count Two. Accordingly, whether or not Tyco succeeds on an interlocutory appeal as to Count One makes little difference to Tyco's potential liability in this case.[6] Again, the District Court's ruling doesn't raise the stakes and create an

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[6] Significantly, Tyco does not – and cannot– even attempt to argue that the damages it would suffer under Counts One and Two are different, or, more specifically, that potential damages under Count One are significantly greater than under Count 2. This is because essentially the same damages are recoverable under each count. Since Count Two is not the subject of appeal, the stakes are the

irresistible urge to settle. For these reasons, the District Court ruling has not raised the stakes or increased settlement pressure.

B. Appeal Would Not Clarify Important and Unsettled Legal Issues

Tyco's Petition should be denied because, as set forth above, appeal would have little if any effect on this case because this case does not need to be brought as a class action and because Count Two will proceed as a class action regardless of what happens on appeal.Therefore, appeal would not lead to clarification of an unsettled legal issue **important to this case**.

Appeal would also not clarify an unsettled legal issue generally. ERISA § 502(a)(2) misrepresentation/non-disclosure claims like those alleged in Count One are routinely certified. *See e.g.* In re Aquila ERISA Litigation, --- F.R.D. ---, 2006 WL 2289234 (W.D.Mo., Jul. 18, 2006) (ERISA § 502(a)(2) misrepresentation and non-disclosure claim certified); In re Enron Corp., 2006 WL 1662596 (S.D.Tex., Jun 7, 2006) (same);Rogers v. Baxter Intern. Inc., 2006 WL 794734 (N.D.Ill. Mar. 22, 2006) (same); In re Williams Companies ERISA Litigation, 231 F.R.D. 416 (N.D.Okla. 2005) (same); In re WorldCom, Inc. ERISA Litigation, 2004 WL

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same regardless of any decision on the appeal of Count One. As a result, Tyco has failed in its burden to demonstrate an increase in settlement pressure as a result of the certification of the Count One claim.

2211664 (S.D.N.Y. Oct. 4, 2004) (same); Rankin v. Rots, 220 F.R.D. 511 (E.D.Mich. 2004) (same); In re CMS Energy ERISA Litig., 225 F.R.D. 539, 2004 WL 3094447 (E.D. Mich. Dec. 27, 2004) (same); In re Ikon Office Solutions, Inc., 191 F.R.D. 457 (E.D.Pa. 2000) (same). In these decisions, courts have ruled that where a participant asserts an ERISA § 502(a)(2) claim on behalf of a plan arising out of plan-wide misrepresentations and non-disclosures directed to the plan and all participants as a whole, the plan-wide nature of the claims renders them common and typical under Rule 23. The rationale of these cases is that since (1) the plan, not an individual participant, was the investor and, therefore, the claimant under § 502(a)(2) and (2) all information was uniformly disclosed on a plan-wide basis, the claims arise out of the same course of conduct and rely on the same legal theory and, therefore, meet the typicality standard. That is the precise analysis of the District Court in this case.

In erroneously arguing that ERISA claims for negligent misrepresentation and non-disclosure are unsuitable for class treatment, Tyco does not address any of the ERISA § 502(a)(2) class certification cases cited above, but instead confuses claims under ERISA § 502(a)(2) with very different claims under § 502(a)(3), 29 U.S.C. § 1132(a)(3). As stated above, ERISA § 502(a)(2) allows the Secretary of Labor or a participant to assert a claim on behalf of a plan for

damages arising out of a breach of fiduciary duty to a plan. In contrast, § 502(a)(3) permits a claim by a participant on behalf of a class of participants but only for equitable relief. *See* 29 U.S.C. § 1132(a)(3).[7]

The class certification case Tyco relies upon for its argument that misrepresentation/non-disclosure claims should not be certified is In re Electronic Data Sys. Corp. ERISA Litig., 224 F.R.D. 613 (E.D. Tex 2004). In that case, the plaintiffs stipulated that the misrepresentation/non-disclosure claim was brought **only** under ERISA § 502(a)(3). Id. at 620 n. 3. Accordingly, Electronic Data is not even relevant to the ERISA § 502(a)(2) claims asserted here. Indeed, the Electronic Data court drew the distinction between § 502 (a)(2) and (a)(3) cases when it certified the § 502(a)(2) claims but not those under § 502(a)(3). Moreover, *none* of the cases cited by Tyco appear to be under § 502(a)(2). They either expressly reference § 502(a)(3) or are silent on this issue.[8] More to the

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[7] Because § 502 (a)(3) are only for equitable relief, money damages are not available. Coan v. Kaufman, 457 F.3d at 262-4 (money damages not avalable under § 502(a)(3); Crosby v. Bowater Inc. Retirement Plan for Salaries Employees of Great Northern Paper, 382 F.3d 587, 594-7 (6th Cir. 2004) (same). Plaintiffs reference § 502(a)(3) in their pleadings to ensure that any damages payable to the Plans are equitably distributed among the participants' Plan accounts. *See* Bowles v. Reade, 198 F.3d 752, 759-60, n. 3 (9th Cir. 1999).

[8] Romero v. Allstate Corp., 404 F.3d 212 (3d Cir 2005) (reversing motion to dismiss, ERISA § 502(a)(2) not mentioned in opinion); Burstein v. Retirement Account Plan For Employees of Allegheny Health Educ. and Research

point, courts that *have* considered the certification of ERISA § 502(a)(2) claims routinely certify classes when faced with the same type of typicality challenges Tyco raises here.[9]

C. There Is No Weakness In the District Court's Opinion

The District Court's decision was legally correct regardless of whether the Affiliated Ute presumption applies. Consistent with all of the cases cited above, the District Court found that "the class representatives' claims are based on the same legal theory that members of the putative class will use" and their "claims

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Found., 334 F.3d 365 (3d Cir 2003) ("These claims for breach of fiduciary duty under ERISA are brought pursuant to ERISA § 502(a)(3)(B)"); Allison v. Bank One-Denver, 289 F.3d 1223 (10th Cir. 2002) (applying ERISA § 502(a)(3) on issue of interest; § 502(a)(2) not cited); Brandt v. Grounds, 687 F.2d 895 (7th Cir. 1982) (ERISA § 502(a)(2) not mentioned in opinion); Hudson v. Delta Air Lines, Inc., 90 F.3d 451 (11th Cir. 1996) (same); Tootle v. ARINC, Inc., 222 F.R.D. 88 (D. Md. 2004) (same).

[9] *See* In re Enron Corp., 2006 WL 1662596, *11 (S.D. Tex. Jun. 7, 2006) ("given the representative nature of suit pursuant to ERISA 502(a)(2), each plan participant/class member's claims are necessarily typical of those of the rest of the class. There can be no conduct or claims conflicts among Plaintiffs or between Plaintiffs and the Plan because each class member is bringing suit on the Plan's behalf, not as an individual. In effect, class members, as the Plan's advocates, are each bringing the exact same suit." (Internal quotation marks and citations omited)); CMS Energy ERISA Litig., 225 F.R.D. at 544; Rankin v. Rots, 220 F.R.D. at 519 ; In re Aquila ERISA Litig., 2006 WL 2289234 at *5-7; Rogers v. Baxter Intern. Inc., 2006 WL 794734 at *4 ; In re Williams Companies ERISA Litigation, 231 F.R.D. at 421-424 (rejecting contention that differences in proposed class prevented typicality finding); In re Ikon Office Solutions, Inc., 191 F.R.D. at 465.

arise from the same allegedly actionable course of conduct for which the proposed class representatives are seeking to recover." Order at 15-16. "Because the proposed class representatives and the members of the class are aggrieved by the same conduct and rely on the same legal theories, there is substantial identity between their claims with respect to most of the relevant issues." Order at 17. As the Court correctly held, this satisfies Rule 23(a)(3)'s typicality requirement.[10] Indeed, the Court applied the "familiar," "routine"and "settled" standard for typicality under black letter class action law and that was applied in all the § 502(a)(2) ERISA cases discussed above.

Rather than rely solely on the widely accepted rationale of all the cases cited above, the District Court went a step further and decided that the class should be

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[10] *See* Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (applying a flexible standard for typicality, "Even in 23(b)(3) class actions alleging violations of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, a cause of action in which problems of differing degrees of reliance by class members on alleged misrepresentations by defendants invariably occur, wide variance is permitted among class members."); *see also* J. Moore, Moore's Federal Practice - Civil § 23.24 ("The class representative satisfies the typicality requirement if the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members."), *cited by* Collazo v. Calderon, 212 F.R.D. 437, 442-3 (D.P.R. 2002) ("While factual differences between the claims do not alone preclude certification, the representative's claim must arise from the same event, practice or conduct, and be based on the same legal theory as those of other class members.") and Rivera-Feliciano v. Acevedo-Villa, 2005 WL 2170881 (D.P.R. 2005).

certified if "near perfect" rather than merely "substantial" identity of claims was required. Order at 14 ("However, even if such near-perfect alignment were required, I would reach the same result."). Thus, Affiliated Ute was discussed only in the context of the hypothetical event that a more burdensome typicality standard would be applied in this case than in all of the other ERISA § 502(a)(2) cases cited above. Since Affiliated Ute issue was intentionally delineated in the opinion as *dicta*, assuming a typicality standard requiring "near-perfect" alignment of claims, it was not material to the Court's decision on typicality. Rather, and as has been found by virtually every other court to consider the issue, plan-wide misrepresentation/non-disclosure claims based on plan-wide conduct are routinely certified under the traditional typicality standard because they rely on the same legal theory and arise out of the same course of conduct. Therefore, regardless of the application of Affiliated Ute under ERISA, the Count One claims were properly certified.

Finally, even if the Affiliated Ute issue was so significant to this case as to warrant interlocutory review (which it is not) and even if the Court's conclusion on Affiliated Ute was necessary to support a finding of typicality (which it is not), the District Court still properly considered the reasoning of Affiliated Ute in an ERISA context. This Court has already held that Affiliated Ute is not limited to

Securities Act claims by applying the standard to a common law fraud claim. Ansin v. River Oaks Furniture, 105 F.3d 745 (1st Cir. 1997). Since this case concerns misrepresentations and non-disclosures concerning publicly traded Tyco stock, the factual and economic bases for Affiliated Ute apply equally well in this case. Accordingly, Defendants do not demonstrate a significant weakness in the District Court's decision.

Quite the contrary, the principal reason Tyco gives for not applying the Affiliated Ute standard under ERISA is the nebulous assertion that ERISA and the securities laws have different pleading standards. However, pleading issues have long since come and gone. Tens of millions of pages have been produced and the parties are in the middle of an aggressive deposition schedule. Whatever pleading issues may have existed years ago have little to do with the case at this stage. Moreover, the proof issues concerning Affiliated Ute would be identical under ERISA and the federal securities laws. Plaintiffs should be allowed to prove their case and this Court should consider this issue only if Plaintiffs succeed in their burden and Tyco appeals from an adverse ruling based on a proper trial record and conclusions of law from the District Court based on that record, including evidence and conclusions of law on reliance and causation.

CONCLUSION

Accordingly, for all the foregoing reasons, the Petition should be denied.

Dated: September 8, 2006

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CERTIFICATION

I hereby certify that a copy of the foregoing PLAINTIFFS' RESPONSE TO PETITION OF TYCO INTERNATIONAL LTD. FOR LEAVE TO APPEAL FROM THE DISTRICT COURT'S CLASS CERTIFICATION ORDER PURSUANT TO RULE 23(f) was served via email on this day of September 8, 2006 to the following electronic addresses below.

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