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

IN RE TYCO INTERNATIONAL, LTD. SECURITIES, DERIVATIVE AND "ERISA" LITIGATION	)	MDL Docket No. 02-1335-B (PJB)
This document relates to:	)	No. 02-1357-B
The ERISA Action	)	

MEMORANDUM OF LAW OF DEFENDANT L. DENNIS KOZLOWSKI
IN SUPPORT OF HIS MOTION TO DISMISS THE ERISA ACTION

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Defendant L. Dennis Kozlowski, by his undersigned counsel, respectfully submits this memorandum of law in support of his motion, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Consolidated Amended Complaint, dated February 3, 2003, in the ERISA Action (the "Complaint" or the "ERISA Complaint").

PRELIMINARY STATEMENT

Plaintiffs' Complaint against Mr. Kozlowski is an attempt to stretch the limits of fiduciary liability under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), beyond all legally supportable bounds. It seeks to impose ERISA fiduciary obligations on Mr. Kozlowski based solely on the fact that, as an officer and director of Tyco International Ltd., he signed various filings with the Securities and Exchange Commission ("SEC") and made various company-wide statements about the company's financial condition. Plaintiffs' unprecedented theory, if endorsed by this Court, would subject virtually

every officer and director of every public company to ERISA fiduciary obligations simply by virtue of their performance of the routine corporate responsibilities that are attendant to such positions. Such a result would be contrary to the firmly established body of law that an officer or director of a company does not acquire ERISA fiduciary status simply by virtue of those corporate positions.

ERISA imposes fiduciary obligations only with respect to acts involving the administration or management of an ERISA-regulated retirement plan. Here, plaintiffs do not allege that Mr. Kozlowski had any authority, control or responsibility whatsoever regarding the Tyco International (US) Inc. Retirement Savings and Investment Plans at issue in this case (the "Plans" or the "Tyco Inc. Plans"). Under the plain language of the statute and well-established precedent cited herein, Mr. Kozlowski cannot be held to ERISA fiduciary standards absent any authority, control or responsibility respecting these Plans.

Plaintiffs' novel theory – that Mr. Kozlowski's alleged signing of SEC filings and issuance of company-wide statements, in his role as a corporate officer and director, give rise to ERISA fiduciary obligations – is wholly inconsistent with settled law. Indeed, this novel theory, which would impose ERISA fiduciary obligations on a corporate officer or director with no responsibility for any ERISA fiduciary function, has been flatly rejected in the only two cases to consider it. *See Crowley v. Corning, Inc.*, 234 F. Supp. 2d 222, 228-29 (W.D.N.Y. 2002) (dismissing breach of ERISA fiduciary duty claim against members of the board of directors who allegedly signed SEC filings incorporated by reference in plan documents); *Hull v. Policy Mgmt. Sys. Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286, at *7 (D.S.C. Feb. 9, 2001) (dismissing

breach of ERISA fiduciary duty claim against chief executive officer who allegedly made false statements concerning the company's financial condition).

Accordingly, the Complaint fails to state a valid claim against Mr. Kozlowski for breach of ERISA fiduciary duties.

THE ERISA COMPLAINT'S FACTUAL ALLEGATIONS AGAINST MR. KOZLOWSKI

Overview

Plaintiffs bring this ERISA action on behalf of a purported class of current and former participants in a series of Tyco International (US) Inc. Retirement Savings and Investment Plans who invested their individual Plan accounts in the Tyco International Ltd. Stock Fund (the "Tyco Stock Fund"). *See* Complaint ¶ 1.[1] The Tyco Inc. Plans are defined, voluntary contribution 401(k) investment plans, under which participants had the option of investing their contributions in the Tyco Stock Fund, among other investment options. *See id.*, ¶¶ 36-38. Plaintiffs claim that the defendants breached their fiduciary duties to the Plan participants under ERISA in two ways: (a) by negligently misrepresenting and failing to disclose material facts concerning the Tyco Stock Fund (Claim I of the Complaint), and (b) by negligently permitting the Tyco Stock Fund to

[1] The Complaint lists seven Plans. Plaintiffs lack standing to assert claims on behalf of Plans I, IV, VI and VII or the participants in those Plans. *See* Memorandum of Tyco International Ltd., Tyco International (US) Inc., and Certain Individual Defendants in Support of Their Motion to Dismiss (the "Tyco Brief"), at Section I, pp. 11-13. This Court therefore lacks subject matter jurisdiction as to claims relating to Plans I, IV, VI and VII, and such claims should be dismissed as to Mr. Kozlowski for this added reason pursuant to Fed. R. Civ. P. 12(b)(1). *See id.*

be available as an investment option under the Tyco Inc. Plans (Claim II of the Complaint). *See id.*, ¶ 2.

Mr. Kozlowski was the Chief Executive Officer ("CEO"), President and Chairman of the Board of Directors of Tyco International Ltd. ("Tyco Ltd.") and the CEO and President of Tyco Ltd.'s subsidiary, Tyco International (US) Inc. ("Tyco Inc."). *See id.*, ¶ 23. He was not a member of the Board of Directors of Tyco Inc. *See id.* Plaintiffs do not allege that Mr. Kozlowski was named as a fiduciary in any Tyco Inc. Plan documents or identified as a fiduciary pursuant to any Tyco Inc. Plan-specified policies or procedures. In fact, none of the Plan documents themselves mention Mr. Kozlowski at all, much less identify him as being a Plan fiduciary or having any role or responsibility respecting any Plan functions. *See* Exs. 1-3 (Tyco Inc. Plans II, III and V).[2] The various Plan documents provide that the Tyco Inc. Retirement Committee (the "Committee") "shall have the sole responsibility for the general administration of the Plan," that the Tyco Inc. Board of Directors "shall have the sole responsibility for the appointment of the [] Committee," and that the Committee and the Tyco Inc. Board are the only "named fiduciaries" of the Plans. *See* Exs. 1-3 (Tyco Inc. Plans II, III and V, at Section 8.1).

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[2] Citations to "Exs. __" herein refer to Exhibits to the Declaration of Francis P. Barron, dated April 3, 2003, submitted in support of the Tyco Brief. On a motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss a claim for breach of ERISA fiduciary duty, the district court may consider documents whose contents are described in the complaint and whose authenticity is not challenged by plaintiffs, even where such documents are not appended to the complaint. *See Beddall v. State Str. Bank & Trust Co.*, 137 F.3d 12, 16-17 (1st Cir. 1998); *see also In re Tyco Int'l Ltd. Sec. Litig.*, 185 F. Supp. 2d 102, 104 (D.N.H. 2002).

Alleged Misrepresentations and Omissions

Plaintiffs allege that Mr. Kozlowski was a "*de facto*" ERISA fiduciary because "by his conduct, he engage[d] in fiduciary activities." *See* Complaint ¶ 49. Specifically, plaintiffs allege two categories of conduct on which they purport to impute fiduciary status to Mr. Kozlowski.

First, they point to the fact that Mr. Kozlowski signed Tyco Ltd. filings with the SEC, including proxy statements and SEC Forms 14A and 10-K. *See id.*, ¶¶ 62, 77. These filings allegedly contained misrepresentations and omissions. *See id.*, ¶ 78. Plaintiffs allege that these SEC filings were incorporated by reference in Tyco Ltd.'s SEC Form S-8s and, "on information and belief," in various Plan documents, including Summary Plan Descriptions and Plan Prospectuses. *See id.*, ¶ 77. Plaintiffs do not allege that Mr. Kozlowski caused the SEC filings to be incorporated by reference in Tyco Inc. Plan documents or that he had any role or responsibility whatsoever respecting the preparation or dissemination of the Summary Plan Descriptions, the Plan Prospectuses or any other Plan documents. *See id.*, ¶¶ 44-47 (alleging that the Committee was responsible for these documents). The Plan documents themselves confirm that all such responsibilities rested solely with the Committee. *See* Exs. 1-3 (Tyco Inc. Plans II, III and V, at Section 8.4). Moreover, the Summary Plan Descriptions and other Plan-related documents do not mention Mr. Kozlowski at all. *See* Exs. 4-10.

Second, plaintiffs allege that Mr. Kozlowski issued eight letters and memoranda that were disseminated company-wide between November 1999 and March 2002 allegedly containing negligent misrepresentations about the company's financial condition. *See* Complaint ¶¶ 62, 109-10. These eight communications are alleged to have been disseminated to all employees. *See id.*, ¶¶ 109(a)-(h). They are not alleged to have been directed specifically at

Plan participants, to have been made in the context of a discussion of Plan benefits, or to have related specifically in any way to the Tyco Inc. Plans. *See id.*

Alleged Imprudent Investment in the Tyco Stock Fund

Plaintiffs allege that the Committee and its members breached their fiduciary duties by permitting the Tyco Stock Fund to be available as an investment option under the Plans. *See* Complaint ¶¶ 42-43, 118. They allege that the Committee "had a duty to review Plan investment policies and alternatives, and the selection and performance of those alternatives, and had the discretion to establish, change and terminate investment options under the Plans." *See id.*, ¶ 42. Plaintiffs do not allege (nor could they allege) that Mr. Kozlowski was ever a member of the Committee or that he had any such duty, authority or discretion. Nor have plaintiffs alleged that Mr. Kozlowski had any role or responsibility whatsoever respecting the selection, maintenance or termination of any Plan investment option. The Plan documents themselves confirm that responsibility for the investment options rested solely with the Committee. *See* Exs. 1-3 (Tyco Inc. Plans II, III and V, at Section 8.4(j)). Plaintiffs allege that directors of Tyco Inc. breached their duty to monitor the Committee. *See* Complaint ¶¶ 123-24. But plaintiffs do not allege (nor could they allege) that Mr. Kozlowski was ever a director of Tyco Inc. or ever had any duties whatsoever respecting the Committee or its activities. *See id.*, ¶ 23.

ARGUMENT

I.

MR. KOZLOWSKI IS NOT AN ERISA FIDUCIARY.

A. To State A Claim As To Mr. Kozlowski, Plaintiffs Must Allege That His Conduct Was Performed Pursuant To A Statutorily Defined ERISA Fiduciary Function.

As a threshold matter, it is firmly settled that an officer or director of a company does not acquire ERISA fiduciary status simply by virtue of such positions. *See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1460 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987) (fiduciary status cannot arise merely from [defendant's] status . . . as an officer and director and principal shareholder of the employer"); *Dep't of Labor Interpretive Bulletin*, 29 C.F.R. § 2509.75-8, at D-4 and D-5 (1975) (questions and answers relating to ERISA fiduciary status prepared by the Department of Labor, holding that a director's or officer's position with a company does not in itself give rise to ERISA fiduciary status). *See also Torchetti v. Int'l Bus. Mach. Corp.*, 986 F. Supp. 49, 51 (D. Mass. 1997) (dismissing ERISA fiduciary breach claim against CEO); *Crowley*, 234 F. Supp. 2d at 230 (dismissing ERISA fiduciary breach claim against members of the board of directors); *Hull*, 2001 WL 1836286, at *7-*9 (dismissing ERISA fiduciary breach claim against CEO and other individual defendants).

In cases asserting claims for breach of fiduciary duty under ERISA, the "threshold question" is always whether a 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).[3] In this Circuit, the "key determinant of whether a person qualifies as a [*de facto*] fiduciary is whether that person exercises discretionary authority in respect to, or meaningful control over, an ERISA plan, its administration, or its assets." *Beddall*, 137 F.3d at 18; *accord Pegram*, 530 U.S. at 222 ("[a] fiduciary within the meaning of ERISA must be someone acting in the capacity of manager, administrator, or financial adviser to a 'plan'").[4]

B. **Mr. Kozlowski's Alleged Conduct Was Not Performed In An ERISA Fiduciary Capacity.**

Plaintiffs do not allege that Mr. Kozlowski had any role or responsibilities whatsoever – much less "authority" or "control" – respecting the Tyco Inc. Plans or their management, administration or assets. And the Plan documents themselves confirm that he did not. *See* Exs. 1-3 (Tyco Inc. Plans II, III and V, at Sections 8.1 and 8.4). On their face, Mr. Kozlowski's alleged wrongful acts – signing of allegedly misleading SEC filings and making of allegedly

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3 A defendant can acquire fiduciary status under ERISA in one of only three ways: (1) by being named as a fiduciary in plan documents, (2) by being named as a fiduciary pursuant to plan-specified procedures, or (3) by performing fiduciary functions *de facto*. *See* 29 U.S.C. §§ 1002(21)(A), 1102(a)(2); *accord Beddall*, 137 F.3d at 18. Plaintiffs do not allege that Mr. Kozlowski was named in any Tyco Inc. Plan documents or pursuant to any Tyco Inc. Plan procedures. Instead, plaintiffs rely solely (and unavailingly) on the "*de facto*" test of ERISA fiduciary status. *See* Complaint ¶ 49.

4 The statute itself, 29 U.S.C. § 1002(21)(A), provides that "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 discretionary authority or discretionary responsibility in the administration of such plan."

misleading company-wide statements – have nothing remotely to do with managing, administrating or advising the Plans.

As set forth below, moreover, Mr. Kozlowski's alleged actions clearly were performed in his capacity as a Tyco Ltd. officer and director, and not in any capacity as an advisor to or administrator or manager of the Tyco Inc. Plans. *See Campbell v. BankBoston, N.A.*, No. 02-1695, 2003 WL 834720, at *4 (1st Cir. Mar. 7, 2003) ("the existence of [an ERISA fiduciary] duty turns not on who acts but on the nature of the action"); *Beddall*, 137 F.3d at 18 ("fiduciary liability [under ERISA] arises in specific increments correlated to the vesting or performance of particular fiduciary functions in service of the plan, not in broad, general terms"); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999) ("the statute and case law make clear that only discretionary acts of plan management or administration, or those acts designed to carry out the very purposes of the plan, are subject to ERISA's fiduciary duties"); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) (a defendant acts as a fiduciary only when and to the extent that [it] function[s] in [its] capacity as plan administrator").

1. **SEC Filings.**

It should go without saying that the signing and submission of SEC filings, such as 10-Ks, 14As and proxy statements, are a routine aspect of the management of public companies regulated by the federal securities laws. Plaintiffs do not allege (nor could they allege) that Mr. Kozlowski's signing of SEC filings on behalf of Tyco Ltd. is a function governed by ERISA or performed pursuant to any responsibilities or authority relating to the Tyco Inc. Plans.

Because Mr. Kozlowski's alleged activity does not relate in any way to the administration or management of the Plans, it cannot give rise to ERISA fiduciary liability. *See Crowley*, 234 F. Supp. 2d at 228-29 (dismissing breach of ERISA fiduciary duty claims against members of the board of directors, who allegedly made misleading statements about the company's finances in various SEC filings that were incorporated by reference in ERISA plan documents, because "such statements, regardless of truth or falsity, were not made . . . in any fiduciary capacity regarding the Plan"); *Hull*, 2001 WL 1836286, at *7-*8 (dismissing breach of ERISA fiduciary duty claims against CEO and others where the alleged misstatements did not relate specifically to the ERISA plan or its participants, but rather related to the company's finances generally). *See also Akers v. Palmer*, 71 F.3d 226, 229 (6th Cir. 1995), *cert. denied*, 518 U.S. 1004 (1996) ("ERISA is designed to accomplish many worthwhile objectives, but the regulation of purely corporate behavior is not one of them").

Plaintiffs' allegation that the SEC filings were "incorporated by reference" in Tyco Ltd.'s Form S-8s and, "on information and belief," in Summary Plan Descriptions and Plan Prospectuses, *see* Complaint ¶ 77, is insufficient to transform Mr. Kozlowski's purely corporate activities (and obligations under the federal securities laws) into ERISA fiduciary functions. Plaintiffs do not (and cannot) allege that Mr. Kozlowski had any role or responsibility respecting preparation or dissemination of the Summary Plan Descriptions or the Plan Prospectuses or respecting the Committee's decision to incorporate SEC filings by reference in those documents. The Tyco Inc. Plan documents themselves confirm that all such responsibilities rested solely with the Committee. *See* Exs. 1-3 (Tyco Inc. Plans II, III and V, at Sections 8.1 and 8.4). Moreover, the Summary Plan Descriptions and other Plan-related documents do not mention Mr.

Kozlowski at all. *See* Exs. 4-10. Absent any role or responsibility concerning the Plan-related documents themselves, Mr. Kozlowski's signing of SEC filings that were subsequently incorporated in Plan-related documents is insufficient to give rise to ERISA fiduciary obligations. *See Crowley*, 234 F. Supp. 2d at 228-30; *Hull*, 2001 WL 1836286, at *8.

Plaintiffs' allegation that misrepresentations contained in the SEC filings harmed Plan participants is also insufficient to transform the signing of those filings into an ERISA fiduciary function. That is because the "question is not whether the actions of [defendant] . . . adversely affected a plan beneficiary's interest, but whether [defendant] was acting as a fiduciary." *Pegram*, 530 U.S. at 226; *accord Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 718 (6th Cir. 2000) (to assess the sufficiency of an ERISA fiduciary breach claim, the Court "must examine the conduct at issue to determine whether it constitutes management or administration of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary standards") (internal quotation marks omitted). Here, alleged misstatements contained in Tyco Ltd. SEC filings, if such misstatements existed at all, could have harmed all investors with a beneficial interest in Tyco Ltd. stock, including Tyco Inc. Plan participants, but that fact clearly does not transform the signing of those filings into an act of Tyco Inc. Plan management or administration.

2. **Company-Wide Statements.**

Mr. Kozlowski made certain company-wide statements in his capacity as CEO and Chairman of the Board of Tyco Ltd., but not pursuant to any ERISA- or Tyco Inc. Plan-related responsibilities. *See* Complaint ¶¶ 109(a)-(h). Plaintiffs do not allege (nor could they allege)

that these communications were directed specifically at Plan participants, made in the context of a discussion of Plan benefits, or specifically related in any way to the Plans.

Because these statements did not relate in any way to the administration or management of the Plans, they cannot give rise to ERISA fiduciary liability. *See Crowley*, 234 F. Supp. 2d at 230 (dismissing breach of ERISA fiduciary duty claims against members of the board of directors, who allegedly made misleading statements about the company's finances which were widely disseminated, because the defendants were "not charged under the Plan with the duty of communicating information to the Plan participants or beneficiaries"); *Hull*, 2001 WL 1836286, at *7-*8 (dismissing breach of ERISA fiduciary duty claims against CEO and others alleged to have made misleading statements to investors because the alleged misstatements "do not relate to matters as to which the defendant owed or assumed a duty to the Plan any different from the duties owed to all other shareholders").

The Supreme Court's discussion of fiduciary status in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), is instructive. In *Varity*, the defendant-employer (which was also the administrator of the plan) called the plan participants together at a special presentation at which it attempted to persuade the participants to voluntarily switch their retirement benefits from the corporate subsidiary currently administering the plan to a different subsidiary. *Id.*, at 493-94. During the presentation, the defendant-employer made misleading statements about the general financial condition of the subsidiary to which it hoped participants would switch. *Id.* The Court held that the defendant was acting as an ERISA fiduciary during this presentation and could therefore be held liable for breach of ERISA fiduciary duties arising out of its misleading statements. *Id.*, at

501. The Court, however, explicitly limited its holding to circumstances in which alleged misstatements by an employer are specifically linked to a discussion of plan benefits:

> We do not hold . . . that [defendant] acted as a fiduciary simply because it made statements about its expected financial condition or because an ordinary business decision turned out to have an adverse impact on the plan. Instead, we accept the undisputed facts found, and factual inferences drawn, by the District Court, namely, that [defendant] *intentionally* connected its statements about [the subsidiary's] financial health to statements it made about the future of benefits, so that its intended communication about the security of benefits was rendered materially misleading. . . . And we hold that making intentional representations about the future of plan benefits in that context is an act of plan administration."

Id., at 505 (emphasis in original) (internal citations and quotations omitted); *accord Hull*, 2001 WL 1836286, at *4 (noting that the Supreme Court in *Varity* "left intact the distinction between the ordinary business decisions made by an employer which might have an adverse collateral effect on a plan and actions specifically directed toward the plan or its beneficiaries").

Plaintiffs' allegations in this case are insufficient under the Supreme Court's reasoning in *Varity*. Here, Mr. Kozlowski is not the Plan administrator or the employer. Moreover, his alleged statements (even assuming they were misleading) were not made in the context of a discussion specifically focused on the Plans or Plan benefits. Instead, this case involves statements made in the ordinary course of business by the President, CEO and Chairman of a public company about the financial condition of the company. The statements, therefore, fall squarely within the category of statements explicitly carved out of the *Varity* holding, which do not give rise to ERISA fiduciary obligations.

II.

MR. KOZLOWSKI PLAYED NO ROLE AND HAD NO RESPONSIBILITY RESPECTING INVESTMENT OPTIONS UNDER THE TYCO INC. PLANS.

Although the Complaint (in Claim II) purports to assert liability against all 22 named and 30 "John Doe" "Defendants" generally for negligently permitting the Tyco Stock Fund to be available as an investment option under the Plans, *see* Complaint ¶ 118, it alleges no facts concerning Mr. Kozlowski specifically. This cause of action in the Complaint therefore cannot be read to state a valid claim against him. *See* James W. Moore et al., 2 *Moore's Federal Practice—Civil*, § 10.03[2][b] (3d ed. 2001) (if a claim involves multiple defending parties, a claimant may not group all wrongdoers together in a single set of allegations); *see also In re Tyco Int'l Ltd. Sec. Litig.*, 185 F. Supp. 2d at 112-15.

Plaintiffs allege that the Committee had responsibility for the investment options under the Tyco Inc. Plans, *see* Complaint ¶ 42, but they do not allege (nor could they allege) that Mr. Kozlowski was a member of the Committee or that he had any responsibility for investment options. Similarly, plaintiffs allege that the directors of Tyco Inc. had a duty to monitor the Committee, *see id.*, ¶¶ 123-24, but they do not allege (nor could they allege) that Mr. Kozlowski was a director of Tyco Inc. or had any duties whatsoever respecting the Committee or its activities. *See id.*, ¶ 23. The Plan documents themselves confirm that responsibility for the investment options rested solely with the Committee. *See* Exs. 1-3 (Tyco Inc. Plans II, III and V, at Section 8.4(j)).

In any event, Mr. Kozlowski's alleged conduct – signing SEC filings and making company-wide statements – have nothing to do with the selection, maintenance or termination of

Tyco Inc. Plan investment options. Accordingly, that conduct is insufficient to subject Mr. Kozlowski to liability based on the availability of the Tyco Stock Fund as an investment option under the Plans. *See Crowley*, 234 F. Supp. 2d at 230 (dismissing claim that director defendants imprudently offered participants the option to invest in company stock because defendants, who allegedly made misrepresentations in SEC filings, were not alleged to have discretion or control respecting the plan's investment options); *Hull*, 2001 WL 1836286, at *5-*8 (allegation that CEO and others disseminated misleading information about company's financial condition was insufficient to state a claim for breach of ERISA fiduciary duties respecting the alleged imprudence of offering company stock as an investment option under the plan).[5]

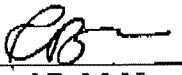
[5] The Complaint should be dismissed for two additional reasons. ***First***, because participants in the Plans had the sole discretion, authority and responsibility for investing the assets in their individual Plan accounts, the Tyco Inc. Plans are "self-directed" ERISA plans falling within the "safe harbor" provision of Section 404(c), 29 U.S.C. § 1104(c), and cannot give rise to fiduciary liability. *See* Tyco Brief at Section II, pp. 13-23. ***Second***, neither of the provisions on which plaintiffs rely, Sections 502(a)(2) and 502(a)(3), 29 U.S.C. § 1132(a)(2)-(3), authorizes the relief plaintiffs seek. *See* Tyco Brief at Section V, pp. 69-74. ERISA does not permit recovery for individual loss or money damages, but authorizes plaintiffs only to seek relief on behalf of the plan as a whole or other equitable relief. *See id.*

CONCLUSION

For all the foregoing reasons, defendant L. Dennis Kozlowski, by his undersigned counsel, respectfully requests that the Court dismiss the Consolidated Amended Complaint in the ERISA Action as to him.

Dated: April 25, 2003

Respectfully submitted,



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