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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

IN RE TYCO INTERNATIONAL, LTD. SECURITIES LITIGATION

OVERBY, *et al.*,

Plaintiffs,

v.

TYCO INTERNATIONAL LTD., *et al.*,

Defendants.

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

THE TYCO INTERNATIONAL LTD. DIRECTOR DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE CONSOLIDATED ERISA CLASS ACTION COMPLAINT

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THE TYCO INTERNATIONAL LTD. DIRECTOR DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE CONSOLIDATED ERISA CLASS ACTION COMPLAINT

This reply memorandum of law is respectfully submitted on behalf of defendants Michael A. Ashcroft, Joshua M. Berman, John F. Fort, III, Stephen W. Foss, James S. Pasman, Jr., and W. Peter Slusser (the "Director Defendants") in support of their motion to dismiss the consolidated amended ERISA class action complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6).[1]

Preliminary Statement

In their opposition brief, plaintiffs concede, as they must, that the Plan neither names nor otherwise designates the Director Defendants as fiduciaries nor gives them any function or role at all with respect to the Plan, let alone one that could render them ERISA fiduciaries. Yet, plaintiffs continue to assert that the Director Defendants somehow became

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[1] In our opening brief, Joseph F. Welch was inadvertently included as one of the Director Defendants. Mr. Welch is not named as a defendant in the ERISA action.

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ERISA fiduciaries by signing SEC Form S-8 Registration Statements and certain other SEC filings (collectively, "SEC filings") as required by the federal securities laws. Plaintiffs claim that because these SEC filings were provided by a Plan representative to Plan participants — since the Tyco International, Ltd. ("Tyco") Stock Fund was an investment option — the Director Defendants can be deemed ERISA fiduciaries. (Compl. ¶ 61.)

As explained in our opening brief, however, this theory of fiduciary duty is fatally flawed as to the Director Defendants, because they signed these registration statements only by reason of obligations imposed on them by the securities laws in their capacity as directors of Tyco — which was not even the Plan sponsor, but merely the parent of the Plan sponsor, Tyco International (US) Inc. ("Tyco US"). The signing of the Form S-8 registration statements was not done because of any discretionary authority or responsibility with respect to the Plan given either by the Plan document or ERISA. But, discretionary authority under the Plan is needed to render an individual a fiduciary. Accordingly, acts by persons without any such authority, in order to comply with obligations imposed by laws other than ERISA, and by reason of corporate positions rather than Plan positions, cannot render the Director Defendants fiduciaries.

Plaintiffs' response — in contradiction of well-settled Supreme Court precedent that the capacity in which the Director Defendants signed the Form S-8s is "irrelevant" — is incorrect. This precise argument was rejected by Judge Cote in her recent *WorldCom* decision, where plaintiffs also attempted to impose fiduciary duties on directors based on their signing of Form S-8s. *In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816, 2003 WL 21385870, at *3 (S.D.N.Y. June 17, 2003). As Judge Cote held in dismissing fiduciary duty claims predicated on the signing of Form S-8s and as explained in the decision and in the authorities cited in the Director Defendants' opening brief, a person becomes a *de facto* fiduciary under ERISA only "to

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the extent," and thus only if, he exercises discretion or control over the ERISA plan. Accordingly, as the Supreme Court has made clear, the capacity in which an individual acts — as a corporate director versus a plan fiduciary — is not only relevant, it is the "threshold" question to any determination of whether a fiduciary duty exists. *Pegram v. Hendrich*, 530 U.S. 211, 226 (2000).

Here, the Director Defendants signed the Form S-8s solely to register securities pursuant to SEC regulations, and not because they had any responsibility for plan administration. Nothing in the complaint or plaintiffs' brief controverts the purely corporate nature of the Director Defendants' actions in signing any SEC filings; nor does the alleged incorporation of certain SEC filings into a Section 10(a) prospectus or summary plan description ("SPD") make the Director Defendants' corporate act an act of an ERISA fiduciary.

Argument

THE COMPLAINT SHOULD BE DISMISSED AS TO THE DIRECTOR DEFENDANTS BECAUSE IT FAILS TO ALLEGE ANY FACTS THAT RENDER THE DIRECTOR DEFENDANTS ERISA FIDUCIARIES

At the heart of plaintiffs' fiduciary duty claims as to the Director Defendants is the notion that their alleged signing of certain SEC filings converts the Director Defendants into ERISA fiduciaries because a Plan representative references the SEC filings in a Section 10(a) prospectus or SPD that the Plan representative distributes to Plan participants. Plaintiffs pursue this theory despite the fact that the Director Defendants had no interaction with or control over the Plan. Such allegations fail, as a matter of law, to give rise to a fiduciary duty under ERISA. Indeed, Judge Cote in her *WorldCom* decision expressly rejected this argument.

WorldCom was an ERISA class action brought against, among others, WorldCom (the plan's designated fiduciary and sponsor), its officers, directors, and certain employees. *In re WorldCom*, 2003 WL 21385870, at **3-5. As in the complaint here, the only acts the complaint

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alleged that the WorldCom director defendants took with respect to the plan were that they signed or authored "the Section 10(a) prospectus included in the SEC Form S-8 registration statements for WorldCom," and that certain WorldCom SEC filings, including WorldCom Forms 10-K, 10-Q, and 8-K, were incorporated by reference. *Id.* at *9. Judge Cote rejected this effort to impose fiduciary duties based on the signing of SEC disclosure and registration materials and dismissed the complaint as to the director defendants. She explained that "[a] corporation and its board may wear two 'hats' — that of employer and of ERISA fiduciary. ERISA liability arises only from actions taken or duties breached in the performance of ERISA obligations." *Id.* (citation omitted).[2]

Turning to plaintiffs' reliance on the Form S-8s and other SEC filings signed by the director defendants, the court held that such materials, just as the SEC filings here, were signed solely in a corporate capacity, precluding any inference that the director defendants "functioned" as fiduciaries. *Id.* at **6 & 9. The court held, in words equally applicable to this case, that "[t]he SEC filings are documents that directors must execute *to comply with a corporation's obligations under federal securities laws*. Although the SPD incorporates SEC filings by reference and is part of the Section 10(a) prospectus, those connections are insufficient to transform those documents into a basis for ERISA claims against their signatories." *Id.* at *9 (emphasis added). Judge Cote's analysis is directly on point and dispositive of plaintiffs' claims

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2 Notably, the facts here represent an even more attenuated effort to connect SEC disclosures to ERISA than those in *WorldCom* because the Director Defendants were not on the board of the Plan sponsor, here Tyco US, and the Director Defendants had no fiduciary duties under the Plan, whereas the *WorldCom* directors were on the board of the plan sponsor and designated fiduciary — WorldCom itself in that case.

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against the Director Defendants. As in *WorldCom*, defendants' mere signing of Form S-8s cannot transform them into ERISA fiduciaries.[3]

The *WorldCom* decision as to the Director Defendants was solidly grounded in the Supreme Court's admonition that "[i]n every case charging breach of ERISA 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*, 530 U.S. at 226. In other words, it is essential, as Judge Cote did in *WorldCom*, to consider whether the Director Defendants functioned in a corporate or in a fiduciary capacity when they signed the Form S-8s at issue. This requirement stems from ERISA's edict that to become a "functional" or "*de facto*" fiduciary an individual must exercise discretion or control over the Plan. *Id.* at 225-26.[4]

WorldCom's dismissal as to the director defendants is consistent with the holdings in *Crowley v. Corning, Inc.*, 234 F. Supp. 2d 222 (W.D.N.Y. 2002),[5] and *Hull v. Policy Mgmt.*

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3 Judge Cote's decision that the incorporation by reference of SEC filings into disclosures to plan participants made by plan representatives does not render the signing of such filings a fiduciary act is consistent with the regulations on participant-directed account plans. The regulations that describe how such plans come within ERISA Section 404(c) distinguish between the person who provides information describing securities that the plan offers as a participant investment option, who is not a fiduciary, and the person responsible for plan administration who communicates that information to plan participants, who is a fiduciary. *E.g.*, 29 C.F.R. § 2550.404c-1(b)(2)(B)(2).

4 Thus, plaintiffs' contention that it is "irrelevant" whether or not the Director Defendants acted in a corporate capacity, Pls.' Br. at 28, is contrary to Supreme Court precedent and to the statutory provisions of ERISA. 29 U.S.C. § 1002(21)(A).

5 Plaintiffs attempt to evade *Crowley* by contending that the decision failed to *consider* that a person can become a *de facto* fiduciary through acts such as participating in SEC filings that plan fiduciaries incorporate by reference into an SPD. Pls.' Br. at 19. But plaintiffs misread *Crowley*. The *Crowley* court expressly considered and rejected the notion that the incorporation of alleged misrepresentations in SEC filings into the SPD could transform a person signing the SEC filings into an ERISA fiduciary. Accordingly, in dismissing plaintiffs' claims based on the

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Sys. Corp., No. Civ. A. 3:00-778-17, 2001 WL 1836286 (D.S.C. Feb. 9, 2001).[6] These decisions make clear that a director's participation in the filing of SEC disclosure materials does not render him an ERISA fiduciary because those disclosures allegedly had a collateral effect on the plan when distributed, by a Plan representative, to participants. Director Defs.' Br. at 10-11. This is so because the mere act of signing SEC disclosure materials is purely corporate in nature and entirely divorced from ERISA.

Plaintiffs' reliance on *Vivien v. WorldCom, Inc.*, No. C. 02-01329 WHA, 2002 WL 31640557 (N.D. Cal. July 26, 2002), an earlier decision in the WorldCom matters, prior to their transfer and consolidation before Judge Cote, is particularly misplaced in light of its subsequent history. It is also inapt because the *Vivien* complaint did not contain any claims against the non-management director defendants, who were later named in the consolidated amended *WorldCom* complaint and then dismissed by Judge Cote. Instead, the plaintiff in *Vivien*

SEC filings as to Corning and the board of directors, the court held that it was "apparent from the amended complaint that [the alleged misrepresentations], regardless of truth or falsity, were not made by Corning [or by the directors] in any fiduciary capacity regarding the Plan." *Crowley*, 234 F. Supp. 2d at 228. Driving home the point that signing SEC filings on behalf of the corporation did not make the board members *de facto* fiduciaries, the *Crowley* court concluded that the complaint contained "no factual allegations which support a claim that the Board had *de facto* control over the Committee members [the plan's named fiduciaries]." *Id.* at 229.

6 Plaintiffs contend that *Hull* is "not relevant" because the allegations in that case did not specifically center on Form S-8 registration statements. Pls.' Br. at 20. The rule laid down in *Hull*, however, encompasses plaintiffs' Form S-8 allegations. The *Hull* court dismissed *de facto* fiduciary duty claims as to an officer-director premised on an alleged failure to disclose material information in public disclosures precisely because those statements were made in a *corporate* capacity, just like the Director Defendants' execution of the Form S-8s here. The *Hull* court held that the allegations against the officer-director failed because "even if the allegations of wrongdoing were true, the alleged wrongful acts were not undertaken in [his] fiduciary capacity," and his mere act of engaging in public disclosures that allegedly had a collateral effect on the plan did not render him a "*de facto*" fiduciary. *Id.* at **5 & 7. In so holding, the *Hull* court expressly acknowledged the distinction — which plaintiffs here fail to acknowledge — between business communications made in a corporate capacity to the public at large and those specifically directed toward the plan or its beneficiaries. *Id.* at *4.

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sued WorldCom's President and CEO, and the CFO. The *Vivien* complaint did not seek to impose fiduciary status on these defendants based on actions taken by them in a corporate capacity. Rather, the complaint made specific allegations that WorldCom's CEO and CFO "exercised discretionary . . . control respecting management of the Plans, . . . management or disposition of the Plans' assets, and/or . . . in the administration of the Plans." *Id.* at *4. The *Vivien* court looked to these particularized allegations reflecting the exercise by the two defendants of control over the plans to infer the potential existence of a fiduciary relationship. Only then did the court find that the fact that these defendants were already fiduciaries precluded a ruling, on a motion to dismiss, on the effect, if any, of the SEC disclosures by them as to the participants. The *Vivien* court did not infer the existence of fiduciary duties under ERISA based on mere signatures on SEC filings.[7]

The complaint here alleges only that the Director Defendants signed the Form S-8s and "many of" the securities law materials incorporated by reference. (Comp. ¶ 61.)[8] As Judge Cote explained in dismissing the plaintiffs' (including Vivien's) ERISA claims against the

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7 The court reasoned that if the officer-director defendants were already fiduciaries based on the other allegations in the complaint, then allegedly false and misleading statements (if made and distributed in that fiduciary capacity) were potentially relevant under ERISA. *Id.* at *7. Judge Cote, like the court in *Vivien*, denied the WorldCom CEO's motion to dismiss. *WorldCom*, 2003 WL 21385870, at *8.

8 Contrary to plaintiffs' contention (Pls.' Br. at 10), such conclusory allegations are insufficient to survive a motion to dismiss. The Supreme Court's decision in *Swierkewicz v. Sorema*, 534 U.S. 506 (2002), "did not alter the basic pleading requirement that plaintiff set forth facts sufficient to allege each element of his claim." *Dickinson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 2605 (2003); *see also Davidson v. Cao*, 211 F. Supp. 2d 264, 289 (D. Mass. 2002) (holding that complaints must contain factual allegations "respecting each material element necessary to sustain recovery under some actionable legal theory"). Indeed, the *Swierkewicz* Court did no more than follow this well-settled principle by holding that the heightened *McDonnell Douglas* shifting burden evidentiary standard could not be applied at the pleading stage. *Swierkewicz*, 534 U.S. at 511.

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WorldCom director defendants, such an allegation is legally insufficient to sustain a claim for breach of fiduciary duty because there is no basis to infer that the Director Defendants were acting in a fiduciary capacity when they signed the SEC forms.

Plaintiffs' reference to *Varity Corp. v. Howe*, 516 U.S. 489 (1996), is misplaced for the same reason as its reliance on *Vivien*. *Varity* did not address whether the signing of SEC forms to comply with the securities laws can, standing alone, render an individual a fiduciary. Instead, *Varity* dealt with a different question from that here, i.e., whether statements made by a fiduciary corporation expressly relating to plan benefits, at a meeting dealing with the plan benefits, could nevertheless be treated as made solely in a corporate capacity because the meeting also concerned a business transaction. *Id.* at 494 & 498. Notably, at this meeting, extensive materials were distributed and discussed regarding plan benefits and the effect on those benefits if participants agreed to transfer to the new subsidiary.

In light of these targeted communications to plan participants and the company's designated fiduciary role, the Court held that Varity, which was without dispute a fiduciary because it was plan administrator and had actual control over plan administration, was wearing its "fiduciary hat" when it intentionally provided false information directly to plan participants in the context of a meeting specifically relating to the plan. *Id.* at 502-05. The Court expressly rejected the notion that Varity could be viewed as acting as a fiduciary based simply on "statements about its expected financial condition" or because of the impact of "an ordinary business decision" on the plan. *Id.* at 505. To the contrary, the Court noted that Varity had acted in its fiduciary capacity only because it had "*intentionally* connected its statements" to communicating information about the plan in its role as the plan's administrator in the context of a benefits meeting. *Id.* at 505 (emphasis in original). *Varity* does not support — and indeed

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made clear it would reject — plaintiffs' attempt here to treat the signing of SEC filings — a corporate business function — by individuals with no plan administrative responsibility as converting those individuals into fiduciaries.[9]

Finally, as the Director Defendants pointed out in their opening brief, the instructions to and purpose of Form S-8s make clear that the Director Defendants signed the Form S-8s only in their corporate capacity as directors of Tyco. Director Defs.' Br. at 6-9. Consistent with these instructions, the Director Defendants signed the Form S-8s (and related SEC filings, if any) in order to register securities to conform with "the requirements of the Securities Act of 1933" on behalf of Tyco, i.e., in a corporate capacity. Form S-8, Fed. Sec. L. Rep. (CCH) ¶ 7197, at 6337 (Signatures, Instr. 1). As the court recognized in *WorldCom*, the Director Defendants' signatures on the Form S-8s, or on any SEC materials incorporated by reference therein were, accordingly, acts performed solely for the purpose of complying with the securities laws. Such acts thereby preclude the imposition of a fiduciary duty under ERISA on the Director Defendants.[10]

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9 Unlike Varity, the Director Defendants had no designated fiduciary duty under the Plan, were not members of the Committee that served as the Plan's administrator, and did not even sit on the board of the Plan's sponsor, Tyco US. To this end, as distinguished from Varity, the Director Defendants never had a fiduciary hat to don and never made a communication specifically to Plan participants.

10 Accordingly, plaintiffs' reliance (Pls.' Br. at 16) on the instruction in Item I to Part I of Form S-8, including the requirement that "material information regarding the plan" be delivered to participants, is of no moment as to the Director Defendants. Contrary to plaintiffs' assertion that these instructions reflect the "purpose" of a Form S-8, these instructions specifically relate to what information should be included in the Section 10(a) prospectus delivered by a Plan representative to participants, which has nothing to do with the Director Defendants. As discussed, Form S-8s are securities law documents designed to facilitate the registration of the interest of the company and of the Plan's separate interest in the stock being offered. *See also* Director Defs.' Br. at 7-9.

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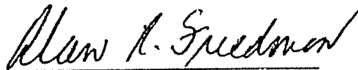
Conclusion

For all of the foregoing reasons, it is respectfully submitted that the Court should grant the Director Defendants' motion to dismiss.

Dated: July 31, 2003

Respectfully submitted,



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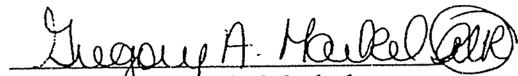

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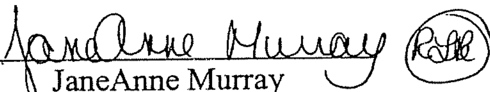

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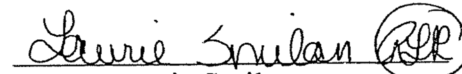

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CERTIFICATE OF SERVICE

I, Alan R. Friedman, certify that on July 31, 2003, I caused true and correct copies of The Tyco International Ltd. Director Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss the Consolidated ERISA Class Action Complaint to be served upon counsel on the attached service list by First Class U.S. Mail, unless otherwise indicated by overnight mail.

Alan R. Friedman