UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE CARDINAL HEALTH, INC. ERISA LITIGATION	NO. C2-04-643 Judge Marbley Magistrate Judge King

DEFENDANT PUTNAM FIDUCIARY TRUST COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Like Putnam's[1] motion to dismiss, Plaintiffs' opposition to the motion ("Opposition" or "Opp.") is based significantly on the Plan Documents. The Plan Documents demonstrate that Putnam had no relevant discretion over the Plan's investment in Cardinal common stock through the Stock Fund. The Plan Documents thus show that Putnam, as a directed trustee, had no fiduciary duty regarding that investment, and the claims against Putnam, accordingly, should be dismissed.

Notably, this case is indistinguishable from the recent dismissal of another directed trustee in DiFelice v. US Airways, Inc., ___ F. Supp. 2d ___, 2005 WL 2386227, 35 Employee Benefits Cas. 2281 (E.D.Va. Sept. 27, 2005) (attached hereto as Ex. A), a seminal decision, not cited by Plaintiffs' Opposition, that adds significantly to the weight of recent authority supporting dismissal of claims against directed trustees.

Moreover, Plaintiffs' Opposition has pointed to no facts pleaded in their Complaint which could form the basis of liability against Putnam under any other standard, providing an alternative grounds for dismissal.

[1] The abbreviations and defined terms used herein are the same as those used in Putnam's August 24, 2005 Memorandum in Support of its Motion to Dismiss ("Opening Brief").

I. Plaintiffs' Claims Against Putnam Are Properly Addressed Under Rule 12(b)(6) Where, As Here, Unambiguous Plan Documents Prescribe The Scope Of Putnam's Duty As A Matter Of Law

Both parties agree that the Plan Documents establish the scope of Putnam's duty under ERISA. (Putnam's Opening Brief at 11, 13-15; Opposition at 4-6.)[2] See Grindstaff v. Green, 946 F. Supp. 540, 551-52 (E.D. Tenn. 1996) (dismissing complaint against ERISA trustee that was not allocated discretionary authority by the relevant plan documents), aff'd, 133 F.3d 416 (6th Cir. 1998); Beddall v. State Street Bank and Trust Co., 137 F.3d 12, 19-20 (1st Cir. 1998). Neither party argues that the Plan Documents are ambiguous. Thus, as the scope of Putnam's duty is dependent on these documents, contrary to Plaintiffs' arguments the claims against Putnam are ripe for resolution under Fed. R. Civ. P. 12(b)(6). Indeed, numerous federal courts have disposed of ERISA claims on a motion to dismiss where the governing plan documents did not invest a plan trustee with discretionary authority relevant to the complained of action. See Beddall (affirming dismissal against trustee); US Airways, Inc., ___ F. Supp. 2d ___, 2005 WL 2386227 (dismissing directed trustee); Springate v. Weighmasters Murphy Inc. Money Purchase Plan, 217 F. Supp. 2d 1007 (C.D. Cal. 2002) (same); Grindstaff, 946 F. Supp. 540 (same).[3]

II. Under The Plan Documents, Putnam Was A Directed Trustee: Putnam Did Not Have Discretion To Establish The Stock Fund Or Eliminate The Stock Fund If Putnam Deemed The Fund To Be Imprudent

Plaintiffs argue that "Putnam had the discretion to maintain the [Stock] Fund as long as it deemed the Fund prudent, and had the authority to terminate the Fund when it became

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[2] Aside from their reference to the Plan Documents, Plaintiffs have identified no facts indicating that Putnam possessed or exercised discretion over the investment of Plan assets.

[3] Claims against persons other than trustees have similarly been determined on motions to dismiss for lack of relevant fiduciary status. See Pegram v. Herdrich, 530 U.S. 211 (2000) (affirming dismissal against health maintenance organization); Hughes Aircraft v. Jacobson, 525 U.S. 432 (1999) (affirming dismissal against employer); Lockheed Corp. v. Spink, 517 U.S. 882 (1996) (same); Pappas v. Buck Consultants, Inc., 923 F.2d 531 (7th Cir. 1991) (affirming dismissal against actuary); Crowley v. Corning, Inc., 234 F. Supp. 2d 222 (W.D.N.Y. 2002) (dismissing against employer, directors and other individuals).

imprudent." (Opp. at 5.) But they are not correct. The Plan Documents did not allocate this responsibility to Putnam.

Plaintiffs base their conclusion solely on one clause within Section 8.05 of the Plan document, which states: "[t]he Committee and the Trustee shall establish certain investment funds . . . ." (Opp. at 4-5.)[4] But their reliance on this language omits other relevant language which both reflects the purely procedural nature of this authority and makes clear that ultimate discretion resides with someone other than Putnam. The full paragraph reads:

> The Committee and the Trustee shall establish certain investment funds (the "Investment Funds"), rules governing the administration of the Investment Funds, and **procedures** for directing the investment of Participant Accounts among the Investment Funds. The Trustee shall invest and reinvest the principal and income of each Account in the Trust Fund as required by ERISA and **as directed by Participants. The Committee and the Employer reserve the right to change the investment options available under the Plan and the rules governing investment designations at any time and from time to time.** (App. Ex. Tabs 1 and 2, at §8.05, first para.) (Emphasis added.)

The Trust Agreements further confirm that exclusive responsibility for the investment of Plan assets was held by designated Cardinal officials, Plan participants and any investment manager selected by Cardinal -- not by Putnam:

- "The Trustee shall transfer to each such Investment Fund such portion of the assets of the Trust **as the Administrator or Plan members direct** in accordance with the specific provisions of the Plan and in the manner provided in the Service Agreement." (App. Ex. Tab 3, 1998 TA §8(a).) (Emphasis added.)

- "The **Trustee shall not be responsible** for the investment or reinvestment of the assets of the Master Trust, which investment and reinvestment shall be the responsibility of the investment manager as delegated by the

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[4] Plaintiffs also refer to entirely conclusory allegations in their Complaint alleging that Putnam had discretion. (See Opp. at 2.) But these conclusory allegations are not binding upon the Court. See Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998) ("the Court need not accept as true legal conclusions or unwarranted factual inferences") (citing Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987); Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976); Blackburn v. Fisk University, 443 F.2d 121, 124 (6th Cir. 1971)).

> Administrator as provided in Section 4 hereof, and if not so delegated, of the Administrator." (App. Ex. Tab 4, 2001 TA §1.) (Emphasis added.)[5]

The Service Agreements are entirely consistent. In addition to listing the options that Cardinal selected for investment of Plan assets, including the Stock Fund, the Service Agreements each disclaim any discretionary responsibility for investment decisions on Putnam's part: "The Employer/Cardinal specifically intends that Putnam have no discretionary authority to determine the investment of the Trust Assets."[6]

As such, the allocation of responsibility embodied in the Plan Documents is indistinguishable from cases where Putnam and others have been held to be "directed trustees," subject to the directions of the sponsoring employer or its designee. For example, where a trust agreement provided that the trustee "shall have no responsibility for the determination of Investment Funds," a directed trustee relationship had been formed. US Airways, ___ F. Supp. 2d ___, 2005 WL 2386227, at *7. Here, the 2001 Trust Agreement is designed to reach the same result: "The Trustee shall not be responsible for the investment or reinvestment of the assets of the Master Trust . . . ." (2001 TA §1, App. Ex. Tab 4.) Indeed, in one recent case Putnam has been held to be a directed trustee based on the exact language found in the 1998 Trust Agreement: "The Trustee shall transfer to each such Investment Fund such portion of the assets

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[5] In determining Putnam's duties as trustee, the Trust Agreements are paramount. The 1998 and 2001 Trust Agreements both state: "The duties of the Trustee shall be only those specifically undertaken by the Trustee pursuant to this Trust Agreement." (App. Ex. Tab 3, 1998 TA, §18, 1st sentence; App. Ex. Tab 4, 2001 TA, §15, 2d sentence.) The 1998 Trust Agreement further states: "The provisions of this Agreement shall supersede and take precedence over any provision of the Plan and any later signed amendments thereto which deal with the Trustee's responsibilities and/or which may conflict in any way with the Trust." (App. Ex. Tab 3, 1998 TA, §15, 2d sentence.)

[6] Plaintiffs attempt to minimize the import of the Service Agreements by stating that they are mere "side agreements." (Opp. at 5 n.4.) But the Service Agreements are central to the responsibilities of Putnam with respect to investment of Plan assets, as indicated by the language quoted in the first bullet point in the text above and other provisions of the Trust Agreements, such as the requirement that "[p]ending investment in the Investment Funds in accordance with the directions of the Administrator or the Plan members, **the Trustee shall invest assets of the Trust as provided in the Service Agreement** . . . ." (App. Ex. Tab 3, 1998 TA §8(a), 3d para., 1st sentence.) (Emphasis added.)

of the Trust as the Administrator or Plan members direct in accordance with the specific provisions of the Plan and in the manner provided in the Service Agreement." (App. Ex. Tab 3, 1998 TA, §8(a), 1st para., 2d sentence). See LaLonde v. Textron, Inc., 270 F. Supp. 2d 272, 282 (D.R.I. 2003) (quoting and relying on identical language in §6 of that plan's trust agreement in holding that Putnam was a directed trustee), aff'd on other grounds, 369 F.3d 1 (1st Cir. 2004). Indeed, based on the same allocation of responsibilities in the LaLonde case, Judge Smith held:

> Plaintiffs contend that Putnam should have overridden or vetoed the directions of the Plan Administrator to invest in Textron stock, and reinvested those assets already invested in Textron stock. Nothing in the Plan can be reasonably read to give Putnam this authority. Moreover, the suggestion that a directed trustee should act in this way turns the relationship between the Plan and the Trustee on its head. If Putnam had done what the Plaintiffs suggest it would have been fired and sued by the Plan.

Id., 270 F. Supp. 2d at 282.[7]

III. As A Directed Trustee, Putnam Cannot Be Liable For Following Directions To Continue Investing Plan Assets In The Stock Fund

Because it is a directed trustee, Putnam cannot be liable to Plaintiffs for the reasons set forth in Putnam's Opening Brief, at 11-18. The cases cited by Plaintiffs (Opp. at 6-8) do not change this result, as is evident by the most comprehensive district court opinion addressing a relevant motion to dismiss brought by a directed trustee since the Department of Labor issued its authoritative Field Assistance Bulletin 2004-03 on December 17, 2004 ("FAB"), DiFelice v. US

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[7] Plaintiffs discount the last sentence of this quote, arguing that because the "Plan expressly prohibited the investment of Plan assets in Cardinal stock while Cardinal was in default of its disclosure obligations," Putnam would not have been fired or sued for failing to comply with directions to invest in the Stock Fund. (Opp. at 10.) But as described in greater detail below, Plaintiffs do not allege, nor could they, that Putnam had any knowledge of Cardinal's alleged failure to comply with its disclosure obligations under the federal securities laws. Indeed, the very essence of Cardinal's alleged violation -- nondisclosure -- is such that Putnam could not and would not have known about it. Thus, Putnam would have had no reason to know that it would not have been fired or sued for disregarding directions to invest in Cardinal common stock.

Airways, Inc., ____ F. Supp. 2d ___, 2005 WL 2386227, 35 Employee Benefits Cas. 2281 (E.D. Va. Sept. 27, 2005).[8]

In US Airways, plaintiff alleged, as do Plaintiffs here, that a directed trustee should be liable for breach of ERISA fiduciary duty for allowing the continued investment of plan assets in the stock of the participant's employer and plan sponsor, where such investment was made pursuant to directions from the plan's named fiduciary and participants, and was consistent with the terms of the plan. In a comprehensive 17 page reported decision, Judge Ellis of the Eastern District of Virginia granted in full the directed trustee's motion to dismiss the claims against it.

In ordering dismissal, Judge Ellis followed the reasoning advocated by Putnam in its Opening Brief. The court held that ERISA §403(a), 29 U.S.C. §1103(a), clearly establishes a different standard for directed trustees than the standard for front-line fiduciaries and that to hold a directed trustee liable for following directions to invest plan assets in allegedly imprudent investments "would effectively eviscerate §403(a) by eliminating any distinction between the duty of a directed trustee under §403(a) and the duty of the ERISA named fiduciary with investment authority, who has the duty of ordinary care and prudence prescribed in [ERISA] §404(a)." ___ F. Supp. 2d at ___, 2005 WL 2386227, at *10. Judge Ellis concluded that a directed trustee has no duty to weigh the merits of the investments chosen by the directing fiduciary:

> To sum up, then, §403(a), by its terms and context, plays an appropriately distinctive role in the ERISA scheme: It prescribes the duties of an ERISA fiduciary acting as a directed trustee. Specifically, §403(a) requires a directed trustee to comply with the directions of a named fiduciary. And importantly, **a directed trustee under §403(a) has no duty to assess the merits of a named fiduciary's direction and to reject that direction, if, in the exercise of the directed trustee's independent**

[8] US Airways was issued after Putnam substantiated its Opening Brief. Nonetheless, although it was issued before Plaintiffs filed their Opposition, Plaintiffs failed to cite the opinion or present argument on it.

> **judgment, the direction is imprudent.** Indeed, the directed trustee has no discretion to do so and hence incurs no liability for complying with a direction simply because it may arguably be imprudent.

Id., 2005 WL 2386227, at *12. (Emphasis added.) The Court's conclusions found "firm support" in the FAB. Id.

In dismissing the directed trustee under Fed. R. Civ. P. 12(b)(6), Judge Ellis in US Airways specifically relied, as did Putnam's Opening Brief, on the decision granting summary judgment in In re WorldCom, Inc. ERISA Litigation, 354 F. Supp. 2d 423 (S.D.N.Y. 2005). As Judge Ellis also recognized, the applicable legal principles apply at the threshold pleading stage. Thus, the summary judgment decision in WorldCom is more authoritative precedent on this motion to dismiss than the earlier WorldCom decision cited by Plaintiffs, a decision that was issued prior to the FAB and thus did not consider the Department of Labor's views as to directed trustees.

Moreover, Judge Ellis persuasively distinguished other authority relied on by Plaintiffs. For example, he distinguished another case pre-dating the FAB relied upon by Plaintiffs, the unreported decision in In re Sprint Corp. ERISA Litig., No. 03-2202, 2004 U.S. Dist. LEXIS 9622 (D. Kan. May 27, 2004), on the grounds that it improperly applied caselaw from the Eighth Circuit. See US Airways, 2005 WL 2386227, at *14, n.29. Similarly, the final directed trustee case relied upon by Plaintiffs, another unreported decision, In re AOL Time Warner, Inc. Securities and "ERISA" Litigation, No. 02 Civ. 8853, 2005 U.S. Dist. LEXIS 3715 (S.D.N.Y. March 10, 2005), did not address the FAB or explain the rationale for its conclusion in the one paragraph of the opinion addressing directed trustee liability. Unlike the thorough and well-

reasoned opinion in US Airways, the In re Sprint and AOL decisions are not persuasive and should not be relied upon here.[9]

IV. Regardless Of The Standard To Be Applied To Putnam's Conduct, Plaintiffs Fail To State A Claim Because They Have Not Made A Single Fact Allegation Indicating That Putnam Knew Or Should Have Known That Cardinal Stock Was Imprudent

Plaintiffs' final argument is also without merit. Quite simply, Plaintiffs have not, nor could they, identify a single fact allegation in the Complaint that would support their conclusory assertion that Putnam had a duty to reject directions to invest Plan assets in Cardinal stock because it knew or should have known such investment was imprudent. (See Opp. at 9-10.) Indeed, the crux of Plaintiffs' argument as to imprudence is based on alleged **undisclosed** "accounting and financial misreporting" that purportedly distorted the information available to the public about Cardinal stock. (Opp. at 10; Compl. ¶94 (allegedly false public filings).)[10] Moreover, there is no fact allegation anywhere in the Complaint, nor does the Opposition point to any, that indicates that Putnam knew about this alleged fraud. Thus, this case is identical to LaLonde v. Textron, 369 F.3d 1, 8 (1st Cir. 2004), in which the First Circuit affirmed dismissal as to Putnam where, as here, the claim of imprudence was grounded on allegedly undisclosed fraud by the sponsor, and where, as here, "Putnam is not alleged to have knowledge of any

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[9] Plaintiffs' two remaining cases, Laborer's Nat. Pension Fund v. Northern Trust Quantitative Advisors, 173 F.3d 313 (5th Cir. 1999), and In re IKON Office Solutions, Inc. Sec. Litig., 86 F. Supp. 2d 481 (E.D. Pa. 2000), are irrelevant as they do not involve claims against any trustee, directed or otherwise.

[10] Plaintiffs also point to the alleged government investigations of Cardinal and decline in stock price, presumably as further indicia of imprudence. (See Opp. at 10.) But these facts are unavailing. First, the Complaint's bare allegation of an SEC inquiry (see Compl. ¶78) does not indicate whether Putnam knew of such inquiry and thus it is irrelevant as to Putnam. But even if Putnam did know, such knowledge would not be determinative of liability; consistent with the presumption of innocence, the Department of Labor recognizes that "[n]othing in the [FAB] should be read to suggest that a directed trustee would have a heightened duty whenever a regulatory body opens an investigation of a company whose securities are the subject of a direction, merely based on the bare fact of the investigation." FAB at 6, n.7. Second, a drop in stock price is insufficient to ground a determination of imprudence. See Textron, 369 F.3d at 7. Indeed, as described in Certain Defendants' Motion to Dismiss, at 16-17, Cardinal stock fell by an unremarkable 5% during the purported class period; as such, it actually outperformed the broader market. Outperforming the market surely is not a public indicator of imprudence. There simply were no "red flags" as argued by Plaintiffs. (Opp. at 8 n.5.)

malfeasance . . . ." Id. Consequently, for the alternative reasons set forth in Putnam's Opening Brief at 19-21, the Complaint should be dismissed as to Putnam.[11]

V. Conclusion

For the foregoing reasons, and those set forth in Putnam's Opening Brief, the Consolidated Amended ERISA Complaint and Jury Demand should be dismissed with prejudice as against Putnam Fiduciary Trust Company.

Respectfully submitted,

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[11] For purposes of this argument, Putnam does not concede that Cardinal stock was an imprudent investment for the Plan or its participants. Putnam is arguing simply that at the pleading stage, as a directed trustee, Putnam had no responsibility to make prudence determinations, nor is there any fact allegation even indicating that Putnam knew or should have known of such alleged imprudence.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 10, 2005, a true and accurate copy of Defendant Putnam Fiduciary Trust Company's Reply in Support of its Motion to Dismiss was filed electronically. Notice of this filing will be sent today to all parties, by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. Copies of this filing will also be sent via regular mail to:

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