UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

_____X		
	:	No. C2-04-643
In re Cardinal Health, Inc.	:	
ERISA Litigation	:	Judge Marbley
	:	
_____ X		Magistrate Judge King

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS OF DEFENDANT PUTNAM FIDUCIARY TRUST COMPANY

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While Putnam contends that it was a directed trustee with no discretion as to the investment of Plan assets in employer stock, the governing Plan document is to the contrary. Under the governing Plan document Putnam had discretion as to whether to maintain an employer stock fund, and the terms of the Plan only allowed for the investment of Plan assets "as required by ERISA." Putnam Tab 1, Section 8.05 (CARDINAL-ERISA 000537; Tab 2, Section 8.05 (CARDINAL-ERISA 000179).

B. The Complaint Alleges Claims Against Putnam Even If It Is a Directed Trustee 6

The Complaint's allegations against Putnam need only satisfy the notice pleading standard of Rule 8(a). Other federal courts have consistently applied Rule 8(a) to deny motions to dismiss filed by directed trustees of defined contribution retirement plans under similar circumstances. *In re WorldCom ERISA Litigation*, 272 F. Supp. 2d 745, 762 (S.D.N.Y. 2003); *In re AOL Time Warner, Inc., Securities and "ERISA" Litigation*, 2005 U.S. Dist. LEXIS 3715 (S.D.N.Y. March 10, 2005) and *In re Sprint Corporation ERISA Litigation*, 2004 U.S. Dist. LEXIS 9622 (D. Kan. May 27, 2004).

C. Neither the Field Bulletin, the Summary Judgment Ruling in the WorldCom ERISA Litigation nor *LaLonde v. Textron, Inc.* Supports Putnam's Motion to Dismiss 8

A recent Field Bulletin of the Department of Labor discussing the duties of directed trustees under ERISA § 403(a)(1) does not support Putnam's motion. Under the governing Plan document Putnam was not a directed trustee and, even if it was, the Field Bulletin expressly acknowledges that even directed trustees may not follow directions that it knows or should know are inconsistent with ERISA or governing plan documents. The First Circuit's opinion in *LaLonde v. Textron* is also inapposite, since there dismissal of claims against a directed trustee was predicated

on the absence of any allegation that the trustee should have known of an artificial inflation in the common stock of the employer entity. The Complaint here adequately alleges this claim against Putnam. *See* Field Assistance Bulletin No. 2004-03, dated December 17, 2004; *LaLonde v. Textron, Inc.*, 369 F.3d 1 (1st Cir. 2004), *aff'g in relevant part*, 270 F. Supp. 2d 272 (D.R.I. 2003).

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I. INTRODUCTION

The Consolidated Amended ERISA Complaint in this action (the "Complaint") alleges that Defendants Cardinal Health, Inc. ("Cardinal"), the Plan Committee and its members and members of the Board of Directors of Cardinal breached their fiduciary duties under ERISA by offering employer (that is, Cardinal) common stock as an investment option under the Cardinal Health 401(k) Savings Plan (the "Plan") when it was imprudent to do so, by failing to disclose material facts regarding Cardinal's accounting and financial improprieties to participants of the Plan and (in the case of Cardinal and the Director Defendants) in failing to properly monitor and inform other fiduciaries who administered the Plan. Each of the above-identified Defendants have filed motions to dismiss on a variety of grounds, and Plaintiffs have separately responded to those motions.[1]

The remaining Defendant, Putnam Fiduciary Trust Company ("Putnam"), identified in the Complaint as the "Trustee Defendant" (¶ 39), has separately moved to dismiss. This Memorandum responds to the Putnam Motion to Dismiss ("D. Mem.").

II. THE COMPLAINT ALLEGATIONS AGAINST PUTNAM

The Complaint charges Putnam with liability only under Count I of the Complaint: negligently permitting the Plan to purchase and hold shares of the Employer Common Stock Fund ("Fund") or the common stock of Cardinal when it was imprudent to do so (¶ 2). The Complaint alleges that the accounting and financial improprieties engaged in by Cardinal during the proposed Class Period in this case (on and after October 24, 2000) rendered the Fund an imprudent investment for the Plan. Significantly, Putnam does not contest the allegations that the Fund was an imprudent investment. Rather, it contends only that it is

[1] Motions to dismiss have been filed separately by Cardinal and the Plan Committee Defendants and Director Defendants, and a separate motion by Cardinal Chief Financial Officer Richard J. Miller.

not responsible. Putnam is wrong in that the Complaint clearly alleges Putnam's responsibility for investment of Plan assets in the Fund as follows:

> ¶ 59. Defendant Putnam was also a fiduciary of the Plan. Under the Plan, the Trust Agreement and ERISA, Putnam was obligated to prevent or preclude Plan investment in Cardinal Health common stock while Cardinal Health common stock was not a prudent investment. (emphasis added).
>
> ¶ 60. Although the Plan authorized the Trustee to offer the Employer Common Stock Fund as an investment option, it did not require it, nor did the Plan documents require Putnam to allow the Plan to invest in Cardinal Health common stock. To the contrary, the Plan and ERISA dictated that Putnam, as trustee, prohibit Plan investment in Cardinal Health common stock when Cardinal Health common stock was not a prudent investment. The obligations imposed on all fiduciaries of the Plan, including the Trustee, trumped any purported obligation to offer Cardinal Health common stock as an investment option under the Plan. See Plan Section 9.10 (CARDINAL-ERISA 000063-64). (emphasis added).
>
> ¶ 61. The trust agreement between Cardinal Health and Putnam (CARDINAL-ERISA 000894 et seq. dated January 2, 2001) also specifically provides that Putnam may not follow the requests or instructions of Cardinal Health, the Plan Committee or any other person if "it is clear on the face of such order, request or instruction that the actions to be taken thereunder would be prohibited by the fiduciary duty rules of ERISA or would be contrary to the terms of the Plans or of this Agreement." (CARDINAL-ERISA 000902 ¶ 10). Thus, Putnam had discretionary authority and was a fiduciary with respect to investments in the Fund.
>
> ¶ 62. Furthermore, the Plan specifically provided that "[i]n no event shall Participants be permitted to direct that such Accounts and/or such additional contributions be invested in the Employer Common Stock Fund until Cardinal Health, Inc, the Plan, the Trustee and all other relevant parties have fully complied with such requirements, including, but not limited to, federal and state securities laws, as the Committee has determined to be applicable." Id. Consequently, the Trustee exercised discretion over Plan investments in the Fund to the extent that there was noncompliance with applicable law.[2] (emphasis added).
>
> * * *

[2] The Complaint allegations of ¶¶ 54(e) and 55(e) are to the same effect.

> ¶ 86. Based on the foregoing, Defendants [including Putnam] knew or should have known that Cardinal stock and the Fund were not prudent investment options throughout the Class Period. As a result, the Plan should have terminated the Fund and Cardinal stock as investment options, halted the purchase of shares of the Fund and Cardinal stock and disclosed all undisclosed materially adverse information. (emphasis added).

Notwithstanding these clear and well-pleaded allegations of Putnam's responsibility for Plan assets and, in particular, the Fund, and the notice pleading standard applicable to the claims against Putnam, Putnam nonetheless contends that it must be dismissed from the case because it was a "directed trustee" which was only following orders with respect to the investment of Plan assets. Putnam further contends, citing a recent Field Bulletin by the Department of Labor regarding directed trustees, and the summary judgment ruling in favor of the directed trustee in the *WorldCom* ERISA litigation, that it must be dismissed on the pleadings here.[3]

Putnam was not a statutory directed trustee. The governing Plan documents gave Putnam substantial authority over the Plan's investment in the Fund. Moreover, even if Putnam was a directed trustee, the Complaint's allegations are sufficient under Rule 8(a). Finally, neither the DOL Field Bulletin nor the summary judgment decision in *WorldCom* have any bearing on whether the Complaint in this case satisfies applicable pleading rules relating to Putnam, and that is all that the Court should decide on the present motion.

III. SUMMARY OF ARGUMENT

Putnam's argument is that it was a "directed trustee," and that as a directed trustee it had no choice but to invest the assets of the Plan in employer stock, when directed to do so by other fiduciaries of the Plan

[3] Putnam also contends that it is not alleged to be a co-fiduciary. That issue is addressed in Plaintiffs' Opposition to the Motion to Dismiss filed by the Cardinal Defendants.

or by the participants of the Plan, no matter how imprudent employer stock was for the retirement accounts under the Plan. Putnam's argument, however, fails as a matter of law, and is inconsistent with the governing Plan document. Under ERISA, fiduciaries may not act imprudently, and imprudent action by a fiduciary is not excused by arguing compliance with the terms of the plan. Here, moreover, the governing Plan document did not require investment of Plan assets in employer stock; indeed, the governing Plan document *prohibited* investment of Plan assets under the circumstances alleged in the Complaint. Finally, the Complaint allegations against Putnam are only required to satisfy the notice pleading standard of Rule 8(a), and other federal courts have consistently denied trustees' motions to dismiss in similar cases in reliance upon Rule 8(a).

IV. ARGUMENT

A. Putnam Was Not A Directed Trustee

Putnam's entire argument is premised on the assumption that it was a directed trustee with no discretionary authority over the Plan's investment in the Fund. That underlying assumption is simply wrong. As the allegations of the Complaint referenced above demonstrate, Putnam had discretionary authority over the Plan's investment in the Fund. Therefore, Putnam's entire argument collapses.

Putnam's authority is confirmed by the plain language of the Plan documents. Section 8.05 of the Cardinal Health Profit Sharing, Retirement and Savings Plan (Putnam Appendix, Tab 1 at CARDINAL-ERISA 000537-8; Tab 2 at CARDINAL-ERISA 000179-80) states that "[t]he Committee and the Trustee shall establish *certain* investment funds. . . ." "Certain" investment funds does not necessarily mean a fund invested primarily or exclusively in Cardinal Health common stock. Accordingly, Putnam, as well as the Committee, had authority and discretion to establish the Fund as well as other types of Funds.

The second paragraph of Section 8.05 of the Plan is to the same effect:

The Trustee is *authorized* to maintain the "Employer Common Stock Fund" as one of the Investment Funds.

The Plan says that "the Trustee is authorized to maintain" the Fund, not that "the Trustee is required by the Plan" to maintain the Fund. Thus, Putnam had the discretion to maintain the Fund as long as it deemed the Fund prudent, and had the authority to terminate the Fund when it became imprudent. It was not required or directed to do so by the Plan or anyone else. Indeed, the governing Plan document makes clear that "[t]he Trustee shall invest . . . the principal and income of each Account in the Trust Fund as required by ERISA. . . ." Section 8.05, Tab 1 at CARDINAL-ERISA 000537; Tab 2 at CARDINAL-ERISA 000179.

Putnam erroneously relies on the provision of the Trust that says that the "Administrator may direct the Trustee" to establish a company stock fund. (1988 TA § 8 (a), Putnam App. Ex. Tab 3.) However, this provision does not state that Putnam did not have the authority to establish the Fund on its own as well. The same is true with respect to the other provision of the Trust on which Putnam relies, which states that Putnam is not liable for following the directions of the Administrator. *Id.* at § 9(b). That provision says nothing about whether Putnam is liable for its own independent acts under the Plan. Thus, while Putnam may have been authorized to follow the direction of the Administrator, it also had its own discretionary authority over the Fund and, therefore, was not a directed trustee.[4]

Putnam also cites to the provision of the Plan that required that assets of the Fund be invested in Cardinal common stock. D. Mem. at 14. While Putnam may have been directed to invest the Fund in

[4] Putnam contends that the service agreement gave it no discretion. D. Mem. at 6. However, Plaintiffs' claim is based on Putnam's fiduciary duties under the Plan. Putnam has a duty to meet those obligations, regardless of any side agreements.

Cardinal common stock, that argument misses the point. Putnam wasn't required to offer the Fund at all. That Putnam was supposed to invest the Fund in Cardinal stock once it made the decision to offer the Fund does not absolve it of its fiduciary decision to select the Fund as an option.

Because this is a pleading motion, all that is required is to provide fair notice to the Trustee of the claim against it. Putnam has more than ample notice of the basis of the claim that it is a fiduciary.

B. The Complaint Alleges Claims Against Putnam Even If It Is a Directed Trustee

It is well settled that a fiduciary which permits the plan to invest imprudently in employer securities thereby violates ERISA. 29 U.S.C. § 1104. In the *WorldCom ERISA Litigation*, the court considered motions to dismiss filed by various alleged fiduciaries, including Merrill Lynch Trust Company, an alleged directed trustee of the WorldCom defined contribution retirement plans. In denying the motions to dismiss, including that of the trustee, the court explained:

> [A] fiduciary may be liable for continuing to offer an investment in the employer's securities, at least where the plaintiff can show that circumstances arose which were not known or anticipated by the settlor of the trust that made a continued investment in the company's stock imprudent, and in effect, impaired the purpose for which the trust was established. *See Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995).

In re WorldCom ERISA Litigation, 272 F. Supp. 2d 745, 762 (S.D.N.Y. 2003). *See also Laborer's Nat. Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir.) (investment manager must disregard plan if investing plan assets as required by plan would violate its duty of prudence) *cert. denied*, 528 U.S. 967 (1999); *In re IKON Office Solutions, Inc. Sec. Litig.*, 86 F. Supp. 2d 481, 492-493 (E.D. Pa. 2000).

It is significant that Putnam fails to address the two leading opinions (other than the *WorldCom ERISA* opinion cited above) which have denied motions to dismiss by alleged, or even determined, directed

trustees, upon allegations very similar to the allegations of the Complaint here against Putnam. Those cases are *In re AOL Time Warner, Inc., Securities and "ERISA" Litigation*, 2005 U.S. Dist. LEXIS 3715 (S.D.N.Y. March 10, 2005) and *In re Sprint Corporation ERISA Litigation*, 2004 U.S. Dist. LEXIS 9622 (D. Kan. May 27, 2004).

In *Time Warner*, the court denied the motion to dismiss by alleged directed trustee, Fidelity Management Trust Company, which argued, as here, that it was, in effect, "only following orders" in investing plan assets in employer stock and that it could not be liable as a result of its limited role. The court denied Fidelity's motion to dismiss, specifically citing Rule 8(a) and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 152 L. Ed. 1 (2002) and noting the sufficiency of plaintiffs' allegation "that Fidelity breached its fiduciary duty by permitting the plans to purchase shares of the AOLTW Stock Fund when the Fund was not a prudent investment." *Id.* at *21.

Similarly, in the *Sprint* ERISA case, the court denied a motion to dismiss by Fidelity where, as here, the ERISA pleading alleged only an imprudent investment claim against the trustee. In *Sprint*, Fidelity "contend[ed] the court should dismiss plaintiffs' imprudent investment claim against Fidelity on the basis that Fidelity, as a directed trustee that did not possess discretion regarding the extent to which the plans were invested in Sprint stock, cannot be held liable for the plans' investment in Sprint stock." *Id.* at *73.

The court concluded:

> The court will assume without deciding for purposes of resolving Fidelity's motion to dismiss that Fidelity is indeed a directed trustee. The issue, then, is whether Fidelity's status as directed trustee is sufficient to absolve it of liability as a matter of law for abiding by the terms of the plans and corresponding directives given by the Sprint defendants in accordance with the terms of the plans. For the reasons explained below, *the court concludes that it is not*. . . . A directed trustee may not comply with directives that the trustee knows or ought to know violate the fiduciary's duties to the beneficiaries, and the trustee must still conform to the prudent person standard of care.

Id. at *74, 76 (emphasis added) (internal citations omitted).

Under Rule 8(a) and such authorities as *Time Warner* and *Sprint*, Putnam's motion to dismiss the one claim asserted against it in this case, the imprudent investment claim, should be denied. At least several of the authorities relied on by Putnam here are clearly inapposite.[5]

C. Neither the Field Bulletin, the Summary Judgment Ruling in the *WorldCom* ERISA Litigation nor *LaLonde v. Textron, Inc.* Supports Putnam's Motion to Dismiss

Neither the Field Bulletin of the Department of Labor regarding directed trustees, the summary judgment ruling in favor of the directed trustee in the *WorldCom* ERISA litigation nor the opinions in

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[5] In *Ershick v. United Missouri Bank*, 948 F.2d 660 (10th Cir. 1991) (D. Mem. at 12 and note 15), the court conducted a trial and determined, on the evidence, that the directed trustee had fulfilled all of its obligations under ERISA by, among other things, properly relying upon certain independent appraisals which established that the company stock in question was properly and fairly valued. 948 F.2d at 665. The appellate court specifically affirmed the trial court's finding of fact that the directed trustee's actions did not violate ERISA on the facts of that case. *Id.* at 669. Leaving aside that *Ershick* was only decided after trial, there is nothing in *Ershick* which supports the proposition that a directed trustee (here, a directed trustee which does not dispute that it was itself a fiduciary) is immunized from ERISA liability for conduct or inaction which would otherwise violate the duty of prudence merely because of the terms of the plan documents.

Grindstaff v. Green, 133 F.3d 416 (6th Cir. 1998) (D. Mem. at 1) involved a very different type of alleged ERISA violation. In that case, "what plaintiffs are alleging as a violation of ERISA is really a form of 'management entrenchment' by which management controls employee pension assets." 133 F.3d at 422. The court found for the defendants in *Grindstaff* because "with respect to ESOP corporations, management 'entrenchment' is actually the rule rather than the exception" and because "Congress specifically recognized and approved of corporate managers serving as ESOP fiduciaries." *Id. Grindstaff* does not support a motion to dismiss, where as here, numerous red flags should have alerted the fiduciary-directed trustee to take action to protect the assets of the Plan.

Herman v. Nationsbank Trust Co., 126 F.3d 1354, 1362 (11th Cir. 1997) (D. Mem. at 12) fails to support Fidelity's position on the motion to dismiss. In fact, *Herman* expressly supports the legal position advanced by Plaintiffs herein, that a fiduciary may not blindly follow plan instructions when such adherence would result in breaches of fiduciary duty and losses to the retirement plans. *See Herman*, 126 F.3d at 1369 and note 15 ("Nationsbank argues that an ERISA trustee must follow a plan provision unless it is facially invalid, or unless following the provision would be an abuse of the trustee's discretion. *We disagree . . . [T]he trustee must disregard the provision*, just like it would have to disregard any other plan provision controlling the disposition of plan assets which leads to an imprudent result.") (Emphasis added) (internal citations omitted).

LaLonde v. Textron, Inc., 369 F.3d 1 (1st Cir. 2004), *aff'g in relevant part*, 270 F. Supp. 2d 272 (D.R.I. 2003), support dismissal.

First, the Field Bulletin only applies to directed trustees and the Plan documents, quoted above, establish that Putnam had investment discretion which is inconsistent with the definition of a directed trustee. Second, the Field Bulletin expressly acknowledges that even directed trustees may be liable under ERISA in that "a directed trustee may not follow a direction that the trustee knows or should know is inconsistent with the terms of the plan." D. Mem. Exhibit A at 3. Here, the well-pleaded facts of the Complaint as to Putnam establish that Putnam at least should have known that it was a violation of the duty of prudence to continue to allow investment of Plan assets in Cardinal stock while Cardinal was systematically engaging in accounting and financial reporting improprieties.[6]

With respect to the ruling in *WorldCom*, that decision, like many of the cases relied upon by Putnam, was for summary judgment after appropriate discovery and the marshaling and presentation of evidence regarding what the trustee knew and what actions the trustee took. There is, moreover, nothing in Judge Cotes' summary judgment opinion in *WorldCom* which in any way undercuts her earlier decision in that litigation which denied the pleading motion which had been brought by Merrill Lynch.

Finally, Putnam's reliance upon *LaLonde v. Textron* is misplaced. As Putnam acknowledges (D. Mem. at 20), the First Circuit sustained the dismissal of the ERISA pleading against Putnam only on the basis that the pleading there lacked any allegation that Putnam had any reason to believe that the price of Textron's common stock was artificially inflated (D. Mem. at 20). Here, by contrast, the Complaint alleges

[6] Putnam also brings up the "impending collapse" theory. D. Mem. at 17-18. That theory is addressed in Plaintiffs' Opposition to the Motion to Dismiss of the Cardinal Defendants.

that Putnam should have known that Cardinal's stock price was artificially inflated – Cardinal was engaging in systemic accounting and financial misreporting which led to several years of restated financials, several government investigations and an ultimate decline in the Company's stock price. Even the district court's opinion in *LaLonde* provides no support for Putnam's motion in this case, since the district court in *LaLonde* found that "if Putnam had done what the plaintiffs [in *LaLonde*] suggests it [Putnam] would have been fired and sued by the Plan." 270 F. Supp. 2d at 282. Here, by contrast, the Plan expressly prohibited the investment of Plan assets in Cardinal stock while Cardinal was in default of its disclosure obligations, which is exactly what the Complaint here alleges. There would have been no reasonable basis for Putnam to be fired or sued here if it had done exactly what Section 9.05 of the Plan said should have been done: no investment of Plan assets in Cardinal stock during the period of noncompliance with applicable legal requirements.

IV. CONCLUSION

For these reasons, Putnam's motion to dismiss should be denied. To the extent the Court grants the Motion, Plaintiffs respectfully request leave to amend.

DATED: October 11, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been electronically filed through the Court's CM/ECF system, which will send notification of such filing to registered counsel electronically. Pursuant to that notification, a true and correct copy of the foregoing was mailed to any party or counsel not receiving electronic service from CM/ECF by first-class U.S. Mail this 11th day of October, 2005.

/s/James E. Arnold
James E. Arnold