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

IN RE TYCO INTERNATIONAL LTD., SECURITIES, DERIVATIVE AND "ERISA" LITIGATION	
OVERBY, *et al.*, Plaintiffs, -against- TYCO INTERNATIONAL LTD., *et al.*, Defendants.	02-MDL-1335-B **ERISA ACTION** Civil Action No. 02-1357-B

REPLY MEMORANDUM OF TYCO INTERNATIONAL LTD., TYCO INTERNATIONAL (US) INC. AND CERTAIN OF THE INDIVIDUAL DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS

Edward A. Haffer
SHEEHAN PHINNEY BASS & GREEN
Hampshire Plaza
1000 Elm Street
Manchester, NH 03105
(603) 627-8115

Francis P. Barron
Stephen S. Madsen
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

July 18, 2003

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This reply memorandum is submitted on behalf of defendants Tyco International Ltd., Tyco International (US) Inc., Robert A. Bent, Kelly Heffernan, Irving Gutin, Jerry R. Boggess and Richard J. Meelia, in further support of their motion to dismiss the consolidated amended complaint ("the Complaint"), pursuant to Rules 12(b)(1) and 12(b)(6).[1]

Preliminary Statement

Plaintiffs' brief opposing our motion to dismiss does not (and cannot) remedy the defects in their claims.

First, plaintiffs have failed to sufficiently allege that any defendant other than the members of the Tyco US Retirement Committee ("the Committee") acted in a fiduciary capacity with respect to the actions that allegedly caused breaches of fiduciary duty. Having failed to meet this threshold requirement as to Tyco International Ltd. ("Tyco" or "Tyco Ltd."), its former Board of Directors ("Tyco Ltd. Directors"), Tyco International (US) Inc. ("Tyco US"), its former Board of Directors ("the Tyco US Board") and defendants Bent and Heffernan, all claims against these defendants should be dismissed.

Second, the Plans satisfy all of the requirements of Section 404(c), ERISA's safe harbor provision, and therefore the Committee is exempt from liability.

Third, plaintiffs have not alleged any conduct by the Committee members that could constitute a breach of fiduciary duty to the Plans. There is no allegation that Committee members played any role in preparing the SEC filings of Tyco Ltd. and, thus, they cannot be held liable under Claim I for alleged misrepresentations or omissions in

[1] Our opening brief and this reply brief are also submitted on behalf of the members of the Tyco US Retirement Committee, named as "John Does," other than named defendant Mark Swartz, who is separately represented.

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those filings. Nor have plaintiffs pleaded facts sufficient to overcome the presumption that offering investment in Tyco stock was prudent. The Committee members, therefore, cannot be held liable under Claim II.

Fourth, plaintiffs do not have standing to assert claims on behalf of Plans I, VI and VII or the participants in those Plans. ERISA clearly limits the ability of plan participants to bring civil actions only with respect to plans in which they are participants. This Court should follow the decisions of the courts that have read the plain statutory language and have reached this conclusion.

Fifth, the relief plaintiffs seek is not authorized under ERISA. The remedial provisions of ERISA represent a delicate balancing by Congress of competing public policy interests. While plaintiffs may wish it otherwise, it is the job of the legislature, not the judiciary, to write and amend statutes. The plain language of ERISA does not permit the remedy plaintiffs seek.

The Complaint should be dismissed.

Argument

I. DEFENDANTS OTHER THAN THE COMMITTEE WERE NOT FIDUCIARIES WITH RESPECT TO PLAINTIFFS' CLAIMS OF BREACH OF FIDUCIARY DUTY UNDER ERISA.

A. Tyco Ltd. Is Not a Fiduciary Under ERISA.

Plaintiffs allege that Tyco Ltd. was a *de facto* fiduciary because of (1) allegedly false SEC filings that were incorporated by reference into plan documents; (2) allegedly false representations made to participants about the Plans; and (3) Tyco Ltd.'s alleged control over Tyco US. (Compl. ¶¶ 55-60; Pls.' Mem. at 13-14.) Plaintiffs have not cited a single case in which a corporate entity that is neither plan sponsor, plan administrator nor

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employer was found to be a *de facto* fiduciary within the meaning of ERISA. They have also failed to allege, even in conclusory terms (which would not be sufficient), that Tyco Ltd. had or exercised any discretionary authority over plan management or administration and, therefore, have insufficiently pleaded fiduciary status as to Tyco Ltd.

1. Preparing and Signing SEC Filings That Are Incorporated by Reference into Plan Documents Does Not Confer Fiduciary Status Under ERISA.

Plaintiffs' allegation that Tyco Ltd. was a fiduciary because it made false representations in its SEC filings, which were incorporated by reference into documents distributed to participants, is insufficient to state a claim of fiduciary status.[2] The same allegation was flatly rejected in a recently decided and factually similar case. *See In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ.4816 DLC, 2003 WL 21385870 (S.D.N.Y. June 17, 2003). The court in *WorldCom* explained and rejected the argument as follows:

> Each of the Director Defendants is alleged to have exercised fiduciary authority through the act of signing or authoring the Section 10(a) prospectus included in the SEC Form S-8 registration statements for WorldCom. The SPD is a part of the Section 10(a) prospectus. The SPD in turn incorporates by reference certain WorldCom SEC filings, including, for example, WorldCom Forms 10-K, 10-Q, and 8-K. This allegation is insufficient to state a claim that the Director Defendants were ERISA fiduciaries.[3]

Id. at *9. The court reached this conclusion because

> ERISA liability arises *only from actions taken or duties breached in the performance of ERISA obligations*. The SEC filings are documents that directors must execute to comply with a corporation's obligations under the 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

[2] Of the documents mentioned here by plaintiffs, only the SPDs were distributed to participants.

[3] The fiduciary status of WorldCom itself, which had filed for bankruptcy, was not at issue in the case because litigation against it was stayed pursuant to the bankruptcy laws.

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transform those documents into a basis for ERISA claims against their signatories.

Id. (emphasis added and citations omitted). We made precisely this argument in our opening brief (at 31 ("[T]he filing of SEC documents is . . . a required action taken in a business or corporate capacity pursuant to the securities laws, not ERISA.")). Plaintiffs have no convincing response.

Contrary to plaintiffs' assertion, *Vivien v. WorldCom, Inc.*, No. C 02-01329 WHA, 2002 WL 31640557 (N.D. Cal. July 26, 2002), does not support their argument. Plaintiffs' discussion of *Vivien* (at 16-17) is based on an erroneous reading of the case. Under the heading "Fiduciary of the Plan," the court in *Vivien* concluded that the two director defendants were fiduciaries because "[s]ignificantly . . . plaintiffs allege that [the director defendants] were fiduciaries by virtue of their discretionary control over the management and administration of the plan." *Id.* at *3-4. In the section analyzing the fiduciary status of the defendants, there is not a single reference to SEC filings or plan documents. Only *after* fiduciary status was determined did the court address, under the heading "Breach of Fiduciary Duty," whether those already deemed to be fiduciaries could be found to have breached their duty by preparing and filing allegedly false SEC documents that they then incorporated by reference into the SPDs they distributed to plan participants on behalf of WorldCom, the named fiduciary. *Id.* at *4-7. Plaintiffs' interpretation of *Vivien* collapses the two separate and distinct questions "who is a fiduciary" and "what constitutes a breach of fiduciary duty."[4] The court's determination

[4] This is clearly demonstrated by the fact that in making their argument that the SEC filings confer fiduciary status, plaintiffs cite from page seven of *Vivien*, the breach section of the decision, and not from pages three and four, the fiduciary status section.

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that the director defendants were fiduciaries was wholly unrelated to the allegedly false SEC filings.

As the *WorldCom* court unequivocally stated, "[t]hose who prepare and sign SEC filings do not become ERISA fiduciaries through those acts." *In re WorldCom*, 2003 WL 21385870, at *15. The *WorldCom* court is not alone. Cases cited in our opening brief (at 31-34) hold that the production of such documents does not constitute ERISA fiduciary activity. *See, e.g., Anoka Orthopaedic Assocs. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1990) ("[P]reparation of reports required by government agencies[] does not entail discretionary authority or responsibility within the meaning of [ERISA]."); *Useden v. Acker*, 947 F.2d 1563, 1576 n.17 (11th Cir. 1991) ("[T]he ministerial preparation of [a federally required form] clearly does not confer fiduciary status needed to bring that breach within the proscription of ERISA."). Plaintiffs do not address these cases at all.

Both *Vivien* and *WorldCom* hold that, in order to establish fiduciary status, a plaintiff must expressly allege that a defendant had or exercised discretionary authority over the management or administration of a plan or its assets. In both of those cases, only defendants who were alleged to have had discretionary authority and to have exercised discretionary control over the administration and management of the Plan were deemed fiduciaries. *Vivien*, 2002 WL 31640557, at *4; *WorldCom*, 2003 WL 21385870, at *8. This is consistent with cases cited in our opening brief (at 26-28). (The Court will search in vain for any mention of these cases in plaintiffs' brief.) Nowhere in the allegations of fiduciary status do plaintiffs here allege that Tyco Ltd. had or exercised discretionary authority or control over the management or administration of the Plans or their assets. (*See* Compl.

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¶¶ 55-60.) Plaintiffs have therefore failed to sufficiently allege that Tyco Ltd. was a fiduciary of the Plans and the claims against it should be dismissed.

Plaintiffs' efforts to minimize the impact of the holding in *Crowley v. Corning, Inc.*, 234 F. Supp. 2d 222 (W.D.N.Y. 2002), are understandable since the facts there were similar to those in this case, and the *Crowley* court dismissed the complaint in its entirety.[5] But those efforts are unavailing. **First**, contrary to plaintiffs' assertion (at 19), the *Crowley* court did not fail to "analyze the impact of th[e] allegation [that SEC filings were incorporated into the SPD] on Corning's fiduciary status." The court expressly acknowledged that the SPD "incorporated by reference all of the documents filed by Corning with the [SEC]," *Crowley*, 234 F. Supp. 2d at 225, but found that an insufficient basis for conferring fiduciary status on Corning because "such statements, regardless of truth or falsity, were not made by Corning in any fiduciary capacity regarding the Plan," *id.* at 228. The court in *WorldCom* reached the same conclusion, 2003 WL 21385870, at *9, and nothing in *Vivien* contradicts that conclusion.

Second, it is not the case that the *Crowley* court "did not even address the issue whether Corning could be a fiduciary by conduct." (Pls.' Mem. at 19.) Since the court noted at the outset that Corning was not a fiduciary pursuant to terms of the Plan, its analysis concerned *only* whether Corning was a fiduciary by conduct, *i.e.*, a *de facto* fiduciary under ERISA. *See Crowley*, 234 F. Supp. 2d at 225 n.3 ("[C]ounsel . . . argue[d] that Corning

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[5] In *Crowley*, defendant Corning -- like Tyco US (but unlike Tyco Ltd.) -- was the employer and plan sponsor, but neither the "named fiduciary" nor the plan administrator; a committee was, as here, both the "named fiduciary" and the plan administrator; and the Corning Board of Directors, like the Tyco US Board of Directors, had the limited fiduciary duty to appoint the Committee members. *Crowley*, 234 F. Supp. 2d at 225.

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and the Board were fiduciaries by virtue of their conduct."). The court concluded that Corning took no actions that rendered it a *de facto* fiduciary.

Third, the *Crowley* court did not "erroneously distinguish[] *Varity*." (Pls.' Mem. at 19.) Rather, the court simply noted that in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the employer and plan sponsor was also the plan administrator, whereas Corning was not, and because plaintiffs did not allege that Corning took any action in a fiduciary capacity -- in contrast to the allegations in *Varity* -- there was no basis on which to find Corning a *de facto* fiduciary under ERISA. *Crowley*, 234 F. Supp. 2d at 228.

Plaintiffs' argument (at 20) that *Hull v. Policy Management Systems Corp.*, No. CIV.A.3:00-778-17, 2001 WL 1836286 (D.S.C. Feb. 9, 2001), is distinguishable on the ground that the misrepresentations alleged therein were made to the "public at large" also fails. The Tyco Ltd. SEC filings on which plaintiffs base their claim of misrepresentation are also statements to the public at large. Whether statements are conveyed to plan participants by being made to the public at large or statements to the public at large are incorporated by reference into plan documents distributed to participants is a meaningless distinction. The point is that general statements made in a corporate capacity about a corporation's financial condition do not confer fiduciary status under ERISA because such statements do not constitute discretionary acts of plan management or administration. *See id.* at *5 ("[E]ven if the allegations of wrongdoing were true, the alleged wrongful acts were not undertaken in the corporate defendants' fiduciary capacity."); *cf. Varity*, 516 U.S. at 505 ("We do not hold . . . that Varity acted as a fiduciary simply because it made statements about its expected financial condition . . . . Instead, we accept the undisputed facts . . . that Varity *intentionally* connected its statements about [the company's] financial health to statements it

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made about the future of benefits, so that its intended communication about the security of benefits was rendered materially misleading." (emphasis in original)).

2. Plaintiffs' Contentions Concerning the Mallinckrodt Update Are Meritless.

Plaintiffs' argument (at 20-22) that Tyco Ltd. made "direct representations" to plan participants in the Mallinckrodt Update reflects a misunderstanding of how ERISA plans are administered. Plaintiffs contend that "fiduciaries . . . disseminate information relating to plan investment options to Participants. For this reason, fiduciaries . . . are liable for breach of fiduciary duty if their fiduciary representations are not accurate. By undertaking this fiduciary obligation, Tyco [Ltd.] assumed the role of fiduciary." (Pls.' Mem. at 21-22 (citations and footnote omitted).) This reasoning -- that "fiduciary representations" demonstrate fiduciary status -- is tautological. One cannot establish that a speaker is a fiduciary by simply declaring that his communications are "fiduciary representations." Moreover, plaintiffs have not alleged a single fact to support their contention that Tyco Ltd. disseminated the Mallinckrodt Update to participants. Plaintiffs' bald assertion (at 22) that it did so is insufficient. *See Useden*, 947 F.2d at 1574 ("[T]he discretionary role needed to support fiduciary status must amount to more than a theoretical contrivance."). There is no basis for plaintiffs' assertion (at 22) that "[d]efendants admit" that Tyco Ltd. was responsible for the dissemination of the Mallinckrodt Update, and there is no factual or legal support for the conclusory allegation that Tyco Ltd. is a *de facto* fiduciary by virtue of the Mallinckrodt Update.

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3. Tyco Ltd. Is Not a Fiduciary Because of Its Alleged "Control" Over Tyco US.

Plaintiffs' Complaint and opposition brief assert that Tyco Ltd. is a fiduciary because of its alleged control of Tyco US. (Compl. ¶¶ 59-60; Pls. Mem. at 22-24.) Plaintiffs are wrong.

Plaintiffs' arguments are premised on mischaracterizations of both our arguments and the relevant case law. Plaintiffs assert (at 23) that "Defendants' statement that the doctrine of ERISA *respondeat superior* has never been applied by any appellate or district court simply is not true." We made no such assertion. Rather, we stated the following (at 42): "No federal court of which we are aware -- either appellate or district -- *has found an employer or a related entity liable* for breach of fiduciary duty under ERISA on the basis of *respondeat superior*." (Emphasis added.) We remain unaware of a single *finding of liability* on the basis of *respondeat superior*, and plaintiffs have not pointed to any. They cite (at 23) a 17-year-old case from the Northern District of Georgia in which the court, addressing "a question of first impression," concluded that *respondeat superior* could, in theory, supply a basis for fiduciary liability under ERISA. *Stanton v. Shearson Lehman/Am. Express, Inc.*, 631 F. Supp. 100, 104 (N.D. Ga. 1986). That court, however, "denie[d] summary judgment for plaintiffs on [the brokerage firm's] 'imputed' liability."

Plaintiffs fail to explain why, if *respondeat superior* liability is as clearly applicable in ERISA actions as they suggest, they cannot find a single case in which fiduciary status was found on this basis. This is particularly surprising when one considers that fiduciaries of ERISA plans will almost always be "employees" or "agents" of a

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corporate entity to which fiduciary status could be imputed under a *respondeat superior* theory of liability.

Rather than address the cases cited in our opening brief (at 42-45), plaintiffs instead assert (at 23) that those cases "do not . . . even use the words '*respondeat superior*' [and stand] for the unremarkable proposition ERISA does not impose fiduciary liability on non-fiduciaries." **First**, while it is true that the cases cited in our opening brief do not use the words "*respondeat superior*," neither does plaintiffs' Complaint, which speaks in terms of "control." **Second**, the well-established proposition that only fiduciaries can be liable for breach of fiduciary duty is far from unremarkable: it explicitly rejects liability based on theories of strict liability, such as the doctrine of *respondeat superior*. While plaintiffs attempt (at 24) to distinguish *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985), they cannot and do not respond to the clear and unequivocal legal conclusion that "the statute imposes liability on the employer only when and to the extent that the employer *himself* exercises the fiduciary responsibility allegedly breached." *Id.* at 1325 (emphasis added).

Plaintiffs contend (at 23-24) that "the doctrine of *respondeat superior* is perfectly compatible with ERISA's recognition of *de facto* fiduciaries who exert control over other fiduciaries." This is simply not true. An individual or entity may take on *de facto* fiduciary status only by taking actions that amount to the exercise of discretionary authority or control over plan management or administration. In contrast, *respondeat superior* liability is a form of strict liability whereby an individual or entity may be held liable without taking any action at all. ERISA's duty of care and prudence under Section 404(a)(1)(B) applies by its terms only to one who is a "fiduciary." 29 U.S.C. § 1104(a)(1) ("[A] *fiduciary* shall discharge his duties with respect to a plan . . . ." (emphasis added)). The concept of

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respondeat superior liability is, thus, inconsistent with the plain language of ERISA. The *WorldCom* court clearly recognized this, concluding that "[t]he plaintiffs' argument goes too far. It would make any supervisor of an ERISA fiduciary also an ERISA fiduciary." *In re Worldcom*, 2003 WL 21385870, at *9.

In any event, because Tyco US is not a fiduciary for the reasons discussed below (at 12-14), there is no liability to "impute" to Tyco Ltd.

B. The Tyco Ltd. Directors Are Not Fiduciaries Under ERISA.

The Complaint's one-paragraph allegation (¶ 61) that the Tyco Ltd. Directors were fiduciaries is also insufficient to state a claim for two simple reasons. **First**, it is based solely on the incorporation by reference of the SEC filings into plan documents, which does not confer fiduciary status for the reasons discussed above (at 3-8).[6] **Second**, plaintiffs have not alleged, even in conclusory terms, that the Tyco Ltd. Directors had or exercised discretionary authority or control over the management or administration of the Plans or their assets, and they therefore fail under *Vivien*, 2002 WL 31640557, at *4, the Ninth Circuit case cited therein, *Concha v. London*, 62 F.3d 1493, 1501-02 (9th Cir. 1995), and under the recently decided *WorldCom* case, 2003 WL 21385870, at *8, to satisfy even the threshold requirement for establishing fiduciary status. (See our opening brief at 37.) The Tyco Ltd. Directors are clearly not fiduciaries to the Plans.

[6] The extended discussion in plaintiffs' brief (at 25-28) of *Confer v. Custom Engineering Co.*, 952 F.2d 34 (3d Cir. 1991), is both misguided and unnecessary. That plaintiffs can point to decisions that take issue with *Confer*'s holding is irrelevant. Our reference to *Confer* was simply intended to demonstrate that some courts refuse to find fiduciary status even where individuals are acting on behalf of the *named corporate fiduciary*. Since Tyco Ltd. is indisputably not a named fiduciary, *Confer* is not on point factually and, thus, does not warrant debate.

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C. Tyco US Is Not a Fiduciary Under ERISA.

The complaint alleges that Tyco US is a fiduciary solely on the basis of a *respondeat superior* theory of liability. (Compl. ¶¶ 52-54.) For the reasons discussed above (at 9-11), this allegation is insufficient to confer fiduciary status within the meaning of ERISA. Plaintiffs now make new assertions regarding the fiduciary status of Tyco US. These additional allegations are not properly before the Court. *See Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (citing cases); *O'Brien v. DiGrazia*, 544 F.2d 543, 545 (1st Cir. 1976). But in any event, they are also deficient.

First, plaintiffs contend (at 30) that "Tyco US operated the Plans directly." The basis for this contention is that plan documents informed participants that "most of your day-to-day questions can be answered through the Tyco Benefits Center." Plaintiffs also state (at 31) that "[s]ignificantly, the Tyco Benefits Center, which is responsible for the day-to-day operation of the Plans, has a different phone number than the Committee, the Plan Administrator." Plaintiffs are grasping at straws. There is nothing "significant[]" about the Tyco Benefits Center having a different telephone number from the Committee. The Plans have over 90,000 participants. The three members of the Committee obviously are not going to answer the day-to-day questions of tens of thousands of participants. Nor are they alone going to process claims or perform other necessary clerical tasks. The fact that the Committee is supported in this way by a staff of people who have not been, and cannot be, alleged to have had any discretionary authority whatsoever does not make their employer a fiduciary to the Plans.

Second, plaintiffs assert (at 31) that "Tyco US and the Committee were never clear in their representations as to who did what." The plan documents show that this

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assertion is baseless. The paragraph in the SPD from which plaintiffs selectively quote begins as follows: "*Plan sponsor and administrator*. Tyco International (US) Inc. is the plan sponsor. While the plan is administered by Tyco's Retirement Committee, most of your day-to-day questions can be answered through the Tyco Benefits Center." (Barron Decl. Ex. 5, at 16.) Thus, what plaintiffs themselves consider the "core disclosure document" (Pls.' Mem. at 7) clearly explains who is the plan sponsor and who is the plan administrator.

Third, plaintiffs contend (at 31-32) that "Tyco US is a fiduciary because of its actual conduct." But they do not mention a single example of any "actual conduct" on the part of Tyco US. Instead, quoting the Plans, they state (at 32) that "'[t]he Plan Sponsor hereunder shall have and exercise all the rights, powers and duties thereof with respect to the Plan and the assets of the Plan,' and that the Plan Sponsor delegates rights and powers to the Committee 'except as such Plan Sponsor may exercise for itself.'" The problem remains, however, that plaintiffs have failed to cite an instance in which Tyco US acted with discretionary authority with respect to plan management. Indeed, plaintiffs have not alleged, even in conclusory terms, that Tyco US had or exercised discretionary authority or control over management or administration of the Plans or their assets. Plaintiffs have therefore again failed to satisfy the threshold requirement for alleging *de facto* fiduciary status.

* * *

Plaintiffs contend (at 16-17, 24) that *Vivien* is directly on point and supports their contention that Tyco Ltd. and its directors and Tyco US are fiduciaries. *Vivien* requires that to establish *de facto* fiduciary status, a plaintiff must expressly allege that a defendant had or exercised discretionary authority or control over the management or administration

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of the plan or its assets. *Vivien*, 2002 WL 31640557, at *4. *WorldCom* requires the same. *In re WorldCom*, 2003 WL 21385870, at *8. In this respect, these two cases are consistent with the cases cited in our opening brief (at 25-26), and not mentioned by plaintiffs. They are also consistent with the express statutory language of ERISA, 29 U.S.C. § 1002(21)(A), quoted in our opening brief (at 25-26). Whatever the alleged activities of Tyco Ltd., the Tyco Ltd. Directors and Tyco US, plaintiffs have failed to allege that any of them had or exercised discretionary authority or control over the management or administration of the Plans or their assets. All claims against Tyco Ltd., the Tyco Ltd. Directors and Tyco US should be dismissed.

D. The Tyco US Board Was Not a Fiduciary with Respect to Plaintiffs' Claims of Breach of Fiduciary Duty.

The Complaint alleges that the Tyco US directors were fiduciaries to the Plans because they appointed the Committee members. (Compl. ¶¶ 50-51.) Plaintiffs make the same assertion in their brief (at 33-35). They contend (at 33) that "[w]ith this appointment power came the duty to monitor the Committee's performance." What plaintiffs repeatedly fail to grasp, however, is that "fiduciary status is not an all or nothing proposition." *See, e.g., Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998). The Tyco US directors are fiduciaries only to the very limited extent that they appointed the Committee members. *See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1460 (5th Cir. 1986) ("[I]f an employer and its board of directors have no power with respect to a plan other than to appoint the plan administrator and the trustees, then their fiduciary duty extends only to those functions."); *Crowley*, 234 F. Supp. 2d at 229 ("The only power the Board had under the Plan was to appoint, retain, or remove members

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of the Committee. Thus, the Board's fiduciary obligations can extend only as to those acts." (citation omitted)). The Tyco US directors had the limited authority to appoint the Committee members and "their authority [over that] matter[] did not make them fiduciaries with respect to matters over which they had no authority." *Sommers*, 793 F.2d at 1460. To find otherwise "would vitiate the notion of limited fiduciary responsibility established by the 'to the extent' language in ERISA." *Id.*

The sole fiduciary function of the Tyco US Board was the appointment of the members of the Committee. As explained at length in our opening brief (at 24-28), the question of fiduciary status is answered by asking "whether the *particular* activity that is alleged to be the breach was an activity undertaken by a *particular* defendant in a fiduciary capacity." Plaintiffs assert two bases for their breach of fiduciary duty claims: (1) misrepresentations and omissions in the Tyco Ltd. SEC filings, and (2) imprudent investment in the Tyco Stock Fund. "To determine fiduciary status, it is necessary to examine the particular activity in question and assess the individual's role with regard to it." *In re McKesson HBOC, Inc. ERISA Litig.*, No. C00-20030RMW, 2002 WL 31431588, at *9 (N.D. Cal. Sept. 30, 2002). The fiduciary duty of the Tyco US Board is unrelated to the particular activities alleged to have caused the breaches. **First**, the Tyco US Board had nothing to do with the SEC filings of Tyco Ltd. and plaintiffs do not allege otherwise. **Second**, the Tyco US Board had nothing to do with investment decisions, and plaintiffs do not, and could not, allege otherwise since such decisions are within the sole authority of the Committee. (Barron Decl. Ex. 1 § 8.4(j).)

Plaintiffs erroneously cite (at 33) a Department of Labor regulation and case law that are inapposite because it deals with the ongoing responsibilities of a plan fiduciary

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who has appointed trustees. These authorities would be relevant if the relationship at issue was that between the Committee and the Plans' trustee. Instead, the regulatory language that is on point reads as follows:

> Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?
>
> A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. *However, their responsibility, and consequently, their liability, is limited to the selection and retention of fiduciaries* . . . .

29 C.F.R. § 2509.75-8(D-4) (emphasis added). Because the Tyco US Board's limited fiduciary responsibility does not encompass Tyco Ltd. SEC filings or investment decisions, it is not "a fiduciary with respect to the particular activit[ies] at issue." *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992).

To the extent that the power to appoint Committee members carries with it the power to monitor and replace those members, this does not equate to an obligation to shadow the Committee or re-evaluate its every decision. To conclude otherwise "would [impermissibly] make any supervisor of an ERISA fiduciary also an ERISA fiduciary." *In re WorldCom*, 2003 WL 21385870, at *9. Thus, to the extent that plaintiffs fault the Tyco US Board for not second-guessing Committee conduct, they are effectively challenging a plan design decision (the allocation of administrative responsibility), which is a settlor function not governed by ERISA's fiduciary standards. (See our opening brief at 30 n.16.)

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The Tyco US Board had no fiduciary obligations with respect to either the alleged negligent misrepresentation and nondisclosure under Claim I, or the alleged imprudent investment decisions under Claim II. Neither claim can be asserted against the Tyco US Board.

E. Bent and Heffernan Are Not Fiduciaries.

The Complaint does not allege that defendants Bent or Heffernan had or exercised any discretionary authority or control over the management or administration of the Plans or their assets. Plaintiffs have therefore failed to sufficiently allege that either Bent or Heffernan were fiduciaries to the Plans. Plaintiffs' assertion in their brief (at 37) that the Complaint alleges that Bent and Heffernan are members of the Committee is disingenuous. The Complaint (¶¶ 18-19) merely identifies Bent and Heffernan as Tyco US employees, and as clerk and authorized signatory, respectively, of the Committee.[7] These allegations do not support a claim of fiduciary status. All claims against them should therefore be dismissed.

II. PLAINTIFFS' ASSERTION THAT ERISA'S SAFE HARBOR PROVISION DOES NOT APPLY IS WRONG.

Plaintiffs assert (at 38) that Section 404(c), ERISA's safe harbor provision, does not apply. They are wrong. Because their allegations and the Plan documents demonstrate that the Committee members have met the requirements of the statute and governing

[7] In fact, neither Bent nor Heffernan was a member of the Committee between August 12, 1998 and February 3, 2003. (*See* Affidavit of Mindy Ebert ("Ebert Aff."), sworn to July 15, 2003.)

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regulation, safe harbor status applies.[8] The Committee members are therefore exempt from liability under ERISA, and the Complaint should be dismissed.

A. The Plans Were Clearly Designated as Section 404(c) Plans as Required by the Regulation.

Plaintiffs contend (at 41-42) that defendants did not "state in the Plans that they are 404(c) plans [which] is fatal to Defendants' defense." Nothing in the governing regulation requires this disclosure in the Plan itself. The regulation requires only that the plan fiduciary provide participants with "[a]n explanation that the plan is intended to constitute a plan described in Section 404(c)." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(i). Here, the SPDs state: "*Your investment decisions are **your** responsibility. Under Department of Labor regulations, the Tyco 401(k) Plan qualifies as a 'Section 404(c) plan,' and neither Tyco nor any of Tyco's representatives are responsible for the consequences of your investment decisions.*" (Barron Decl. Ex. 4, at 8 (emphasis in original).) Similarly, the Prospectus states: "*Remember, your investment decisions are your responsibility. Under the US Department of Labor regulations, each Plan qualifies as a 'Section 404(c) plan,' and neither Tyco, the Retirement Committee nor the Trustee is responsible for the consequences of your investment decisions.*" (Barron Decl. Ex. 8, at 4 (emphasis in original).) These explanations of Section 404(c) status clearly satisfy the regulatory requirement.[9]

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[8] For the reasons discussed above (at 2-17), the only plan fiduciary for purposes of the claims asserted by plaintiffs was the Committee.

[9] Courts have recognized that "SPDs are expected to 'be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary.'" *In re Worldcom*, 2003 WL 21385870, at *12 (quoting *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2d Cir. 1990)); *see also Layaou v. Xerox Corp.*, 238 F.3d 205, 209 (2d Cir. 2001). Plaintiffs themselves correctly recognize (at 7-8) that an SPD is "the core disclosure document prepared by the fiduciaries to describe the essential feature of the Plans."

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Plaintiffs contend (at 42 n.26) that designation in the SPDs is deficient because it creates an "inconsistency" between the SPDs and the Plans. This is nonsense. Since the Plans are silent with respect to Section 404(c) status, there is nothing with which the SPDs or Prospectus is inconsistent. Moreover, while the Plans may not speak to Section 404(c) status explicitly, they clearly state that participants are solely responsible for their own investment decisions.[10] There is no inconsistency between the Plans and the SPDs.

B. Plan Participants Were Provided an Adequate Description of the Risk and Return Characteristics of the Tyco Stock Fund.

In order to qualify as a Section 404(c) plan, fiduciaries must provide participants with the opportunity to exercise control over their individual accounts. 29 C.F.R. § 2550.404c-1(b)(2). One component of a participant's "opportunity to exercise control" is a description of the investment objectives, and risk and return characteristics of each investment alternative. *Id.* § 2550.404c-1(b)(2)(i)(B)(1)(ii). Plaintiffs argue (at 48) that "Defendants failed to provide Participants with an adequate description of the risk and return characteristics of the Tyco Stock Fund." As we have already noted in our opening brief (at 17), Plan documents repeatedly illustrated that the Tyco Stock Fund was the riskiest investment option available. Moreover, Plan documents contained additional language describing the risks associated with a non-diversified fund. (*Id.*; *see also* discussion at 32-33.) The regulation requires that participants be provided with a "*general* description of the investment objectives and risk and return characteristics." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii) (emphasis added). The Plan documents distributed to

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[10] "The Plan Sponsor, the Employer, the Committee and the Trustee shall have no responsibility for the investment elections of the Participants, Beneficiaries and alternate payees and shall incur no liability on account of investing the assets of the Trust in accordance with such elections." (Barron Decl. Ex. 1 § 3.11(f).)

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participants clearly met this standard. Because plaintiffs do not allege any other basis for concluding that participants were not given the opportunity to exercise control over their individual accounts (see our opening brief at 15-16), plaintiffs have failed to allege Committee members did not meet that requirement for safe harbor status.

C. Participants Had "Control in Fact" Over their Individual Accounts.

Under the regulation the opportunity to exercise control can be negated if participants do not exercise "control in fact" over their individual accounts. 29 C.F.R. § 2550.404c-1(c)(1)(i). Plaintiffs themselves recognize that they had control in fact over their accounts: "Participants direct the Plans to purchase investments from among the investment options available in the Plans and allocate them to Participants' individual accounts." (Compl. ¶ 37.) Plaintiffs nevertheless contend (at 42-48) that "control in fact" was negated because of alleged negligent misrepresentation and concealment of material non-public facts, and (at 50) because they were subject to undue influence. Plaintiffs' contentions are untenable.

1. The Committee Did Not Conceal Material Non-Public Facts from Participants.

The regulation states that "control in fact" can be defeated if a "plan fiduciary has *concealed* material non-public facts." 29 C.F.R. § 2550.404c-1(c)(2)(ii) (emphasis added). One cannot "conceal" what one does not know. Because plaintiffs do not sufficiently allege that the Committee members knew that the SEC filings contained alleged negligent misrepresentations,[11] they cannot allege that the Committee members "concealed" such information.

[11] Plaintiffs' conclusory allegation fails to sufficiently allege that Committee members possessed or should have possessed knowledge of the alleged misrepresentations. This is true even as to defendant

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Plaintiffs argue (at 45) that the Committee members, as plan fiduciaries, remain liable for the alleged misrepresentations even if they did *not* know about them; plaintiffs contend that the "disclosure obligation . . . is not limited only to those facts that the fiduciary knows." Plaintiffs are wrong. To suggest that Committee members had an obligation to disclose that which they did not know defies common sense, and is inconsistent with the regulation's use of the word "concealed."

Plaintiffs attempt to construct a no-win situation for fiduciaries of Section 404(c) plans. On the one hand, fiduciaries are required to know and disclose the intricate financial dealings of their employer's parent corporation or lose the protection of the safe harbor provision. On the other hand, if there is any allegedly material information that the fiduciaries do not know, they also lose safe harbor protection under the theory that they *should* have known. By plaintiffs' logic, it is difficult to imagine that any plan could satisfy the requirements of the safe harbor provision, or that any individual would be willing to risk personal liability by acting as a plan's fiduciary.

Plaintiffs cite (at 45) *In re Unisys Savings Plan Litigation*, 74 F.3d 420 (3d Cir. 1996), for the proposition that "fiduciaries [must] disclose all material information to Participants to come within the safe harbor." Plaintiffs fail to mention, however, that *Unisys* only requires a fiduciary "to impart to participants material information *of which it had knowledge.*" *Id.* at 443 (emphasis added). Plaintiffs' attempt to transform what is clearly an "actual knowledge" standard into a "should have known" standard is thus not

Mark Swartz, who was an officer of both Tyco Ltd. and Tyco US, and also a member of the Committee. However, even if the Complaint did allege that Mr. Swartz had knowledge of misrepresentations that he concealed, that allegation would support of a claim against him personally, but not against the other Committee members.

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supported by the statute, the regulation or the case law. Moreover, the *Unisys* court expressly refused to impose a "duty of clairvoyance" on fiduciaries: "[N]or do we hold[] that Unisys was obligated *to give investment advice, to opine on Executive Life's financial condition or to predict Executive Life's eventual demise.*" *Id.* (internal quotation marks and citation omitted; emphasis added). In any event, the basis upon which the *Unisys* court refused to grant summary judgment to the defendant under Section 404(c) was the lack of written plan documents in the record and the significant restrictions on participant control. *Id.* at 447-48.[12] The Plan documents are before the Court in this case, and, as those documents show, no transfer restrictions are imposed on participants.

Plaintiffs' contention that defendants failed to disclose material non-public information to participants, thereby depriving them of the control in fact, also fails because it ignores key language in the regulation. Control in fact is negated if a plan fiduciary conceals material non-public facts, "*unless* the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act." 29 C.F.R. § 2550.404c-1(c)(2)(ii) (emphasis added). As explained below (at 42-44) and in our opening brief (at 20, 65-67), the Committee could not have disclosed the alleged material non-public information to participants without violating the insider trading laws. Plaintiffs do not deny that the

[12] On remand, the district court *did* conclude that the plans at issue satisfied the safe harbor requirements and, thus, defendants were "absolve[d]" of any liability. *In re Unisys Sav. Plan Litig.*, Master File No. 91-3067, 1997 U.S. Dist. LEXIS 19198, at *92 (E.D. Pa. Nov. 24, 1997), *aff'd*, 173 F.3d 145 (3d Cir. 1999). The court reached this conclusion because "the participants admit that they, alone, were responsible for their investment choices and affirmatively elected to stay [invested in a particular investment option] in the face of abundant ongoing public information regarding the problems [relating to that investment option]." *Id.* at *94-95. Plaintiffs here also concede that they were responsible for their investment choices. (Compl. ¶ 37.) It was irrelevant to the *Unisys* court that a committee with sole discretionary authority to select the investment options continued to offer the option in question. *Id.*

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regulation prohibits the Committee from making such disclosures. Instead, they propose (at 45-48) two courses of action the Committee might have pursued: either refrain from purchasing (thereby evading the "purchase or sale" language of the insider trading rules), or disclose and then sell. Both suggestions fail.

As discussed in our opening brief (at 66), the "refrain from purchasing" argument was soundly rejected in *Hull v. Policy Management Systems Corp.*, 2001 WL 1836286. In an effort to circumvent this clear conclusion, plaintiffs erroneously contend (at 47-48) that the *Hull* decision was rejected by the court in *Vivien*, 2002 WL 31640557. Plaintiffs are wrong. *Vivien* does not even mention *Hull*'s conclusion as to the argument that defendants should have ceased to purchase company stock. Thus, *Vivien* does not speak to this question at all. Moreover, to the extent *Vivien* discusses *Hull* at all, it plainly does *not* reject *Hull* but, rather, distinguishes it on the facts. *Vivien*, 2002 WL 31640557, at *7-8.

Plaintiffs' other proposal (at 46) for evading the insider trading laws -- "disclosing the non-public information to the public at large prior to directing the Plan to sell the stock" -- also lacks merit. As the *Hull* court explained, were the Committee members to take such action, they would overstep their bounds and "in any case, likely caus[e] the stock price to drop." *Hull*, 2001 WL 1836286, at *9. In both their Complaint and their brief, plaintiffs advance the implausible theory that, had the Committee disclosed the alleged material non-public facts *earlier*, the price "might have dropped somewhat," but that this "somewhat" "would have been less." (Compl. ¶ 122; Pls.' Mem. at 47.) As explained in our opening brief (at 67), this hypothesis directly conflicts with the efficient market theory upon which securities class actions are based. (*See also infra* at 43-44.)

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We cited *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1261 (N.D. Cal. 2000), in our opening brief (at 67) for the proposition that disclosure followed by sale would not have avoided losses and, thus, plaintiffs suffered no damages as a result of the Committee members' alleged failure to disclose and then sell. Plaintiffs' attempt (at 48) to distinguish this case from *McKesson* fails.[13] Plaintiffs contend (at 48) that *McKesson* is distinguishable because it "involved a single disclosure and a single drop," whereas this case involves "a long term, [sic] course of conduct." Plaintiffs' interpretation of *McKesson*, however, is simply wrong. The alleged misconduct in *McKesson* was "ongoing" and "actively engaged in" at the time that the *McKesson* plaintiffs sought disclosure. *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588, at *2 ("[T]he complaint alleges that the defendants failed to provide . . . Plan participants with . . . disclosure . . . concerning . . . the *ongoing* improper accounting practices." (emphasis added)). In any event, such distinction would be irrelevant under the efficient market theory because "disclosing the information publicly prior to selling the stock would itself have resulted in the same precipitous decline in stock value." *Id.* at *6.

Plaintiffs' suggested alternatives to insider trading fail. The Committee could not have "refus[ed] to purchase," or disclosed and then sold Tyco stock. The allegations of the Complaint do not support the proposition that the Committee concealed information that it could have disclosed without violating the federal securities laws. Plan participants exercised control in fact over their investment decisions.

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[13] Plaintiffs cite to a later decision in the *McKesson* case, *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588 (N.D. Cal. Sept. 30, 2002). The underlying facts are the same in both decisions.

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2. Plan Participants Were Not Subjected to Improper Influence.

Plaintiffs argue (at 50) that eight letters sent by defendant Kozlowski to all Tyco employees constituted undue influence, thereby negating control in fact. They contradict their own Complaint (¶¶ 109(a)-(b)), which recognized that the Kozlowski letters were sent to all *employees*, by now asserting (at 50) that the letters were directed "to Participants." As pointed out in our opening brief (at 21), the letters were sent to all company employees, as conceded by plaintiffs. Moreover, plaintiffs (at 50) erroneously characterize the letters as having "no purpose other than to affect Participant decisions concerning continued Plan investment in the Fund." This is nonsense. The letters were directed to *all* employees, not all of whom are plan participants, and they say nothing at all about the Plans. These were letters from an employer to employees, not from a plan fiduciary to plan participants concerning the plans. They do not support a claim of improper influence negating participants' control in fact.

D. Safe Harbor Status Can and Should Be Resolved on a Motion to Dismiss.

Plaintiffs argue (at 51) that Section 404(c) status is a "Fact Dependant" [sic] defense that should not be resolved on a motion to dismiss. As an initial matter, it is well settled that affirmative defenses can be raised in a motion to dismiss. *See Blackstone Realty LLC v. FDIC*, 244 F.3d 193, 197 (lst Cir. 2001) (collecting cases). In support of their argument, plaintiffs (at 51) cite four cases that simply are not on point. Each decision holds that a fiduciary must show compliance with Section 404(c), and each finds that Section 404(c) does not apply *in that particular case* because of certain factual elements. None of the four cases states, as plaintiffs contend, that fiduciaries can never satisfy their burden on a motion to dismiss. In *Unisys*, the court remanded to the district court the question of the

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plans' safe harbor status because (1) "the record [was] inadequately developed as to critical facts"; (2) "the written documents which establish and maintain the Plans [were] conspicuously missing from the record"; and (3) the significant restrictions on participants' ability to transfer funds were "problematic." *In re Unisys*, 74 F.3d at 446-47. That is not the case here.

In *Allison v. Bank One-Denver*, 289 F.3d 1223, 1238 (10th Cir. 2002), the court found that Section 404(c) did not apply because the fiduciary had "failed to perform the requisite procedures for implementing participant-direction of investments," thus negating participant control. There is no such allegation in this case.[14] Finally, in *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987), and *Donovan v. Cunningham*, 716 F.2d 1455, 1467 n.27 (5th Cir. 1983), the courts merely noted the unremarkable proposition that the burden of establishing an affirmative defense to an alleged fiduciary breach under ERISA lies with the defendant. In neither case did the Court conclude that such a determination could not be made on a motion to dismiss.[15]

In any event, safe harbor status can and should be determined as early as possible because it would defeat the purpose of the provision if every ERISA defendant were forced to litigate all claims in order to prove its immunity from suit. If Section 404(c) merely provided a defense at trial, safe harbor status would be rendered virtually meaningless. *See Am. Communications Ass'n v. Ret. Plan for Employees of RCA Corp. & Subsidiary Cos.*, 488 F. Supp. 479, 483 (S.D.N.Y.), *aff'd* 646 F.2d 559 (2d Cir. 1980) (dismissing

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[14] Indeed, plaintiffs concede participant control. (Compl. ¶ 37.)

[15] Plaintiffs also cite *Vivien*, but the court there merely concluded that, in that case, Section 404(c) status was "better reserved for summary judgment." 2002 WL 31640557, at *6. It did not hold that safe harbor status can never be decided on a motion to dismiss.

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fiduciary breach claims under ERISA based on inadequate pleadings and noting, "[t]his is no matter of technical pleading. Defendants should not be put to the heavy burden and expense of litigation unless a properly pleaded complaint requires them to defend"). Instead, safe harbor status, like other exemptions from liability, is meant to provide protection not only from liability but from litigation itself. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("The entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." (emphasis in original)); *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (same for claims of absolute immunity).[16]

* * *

Plaintiffs fail in both their Complaint and their brief to defeat application of ERISA's safe harbor provision. Participants were clearly informed that the Plans were Section 404(c) plans, and participants exercised control in fact over their investment decisions. Therefore, the Plans plainly comply with the requirements of the Section 404(c), and the Committee members are thereby protected from litigating the question of their liability. The Complaint should be dismissed.

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[16] *See also Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 22 n.6 (1st Cir. 2001) "[P]retrial orders granting or denying Eleventh Amendment [sovereign] immunity are immediately appealable."); *Crippa v. Dukakis*, 905 F.2d 553 (1st Cir. 1990) (same for claims of qualified immunity); *Rogers v. Pendleton*, 249 F.3d 279, 285 (4th Cir. 2001) ("A district court's denial of qualified immunity is immediately appealable . . . because qualified immunity confers immunity from suit and not merely from liability."). In *Kaiter v. Town of Boxford*, 836 F.2d 704 (1st Cir. 1988), the First Circuit held that a denial of qualified immunity at the motion to dismiss stage was not appealable where there was a possibility of presenting an immunity defense at the summary judgment stage. The Supreme Court later concluded that the case was wrongly decided because such an approach would "logically bar *any* appeal at the motion-to-dismiss stage where there is a possibility of presenting an immunity defense on summary judgment." *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996). The same reasoning applies here.

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III. PLAINTIFFS HAVE FAILED TO STATE A CLAIM THAT THE COMMITTEE MEMBERS BREACHED A FIDUCIARY DUTY WITH RESPECT TO ALLEGED MISREPRESENTATIONS AND NONDISCLOSURES IN THE SEC FILINGS OF TYCO LTD.

A. The Committee Members Are Not Responsible for Alleged Misrepresentations or Nondisclosures in the SEC Filings of Tyco Ltd.

The Complaint alleges that the Committee members breached a fiduciary duty under ERISA because of negligent misrepresentations and negligent nondisclosures in the Tyco Ltd. SEC filings, which were incorporated by reference into certain plan documents. (Compl. ¶ 71.)[17] Plaintiffs concede (at 52) that "the Committee did not actually prepare and file the SEC filings" of Tyco Ltd. They have failed, however, in either the Complaint or their brief, to cite a single authority that supports the contention that Committee members were nonetheless responsible for the contents of the Tyco Ltd. SEC filings. Plaintiffs' sole citation (at 53) -- to *Vivien v. WorldCom* -- does not support their argument. *Vivien* did not deal with committee members being held responsible for the contents of a corporation's SEC filings. Rather, it involved the responsibility of two directors (and most senior officers) of the corporation, which was the named fiduciary, for the accuracy of that corporation's SEC filings. *Vivien*, 2002 WL 31640557, at *1. Thus, the conclusion in *Vivien* is not surprising: the corporation's two top executives, acting on behalf

[17] While plaintiffs allege that all defendants breached a fiduciary duty due to false and misleading SEC filings (Compl. ¶ 71), as discussed above (at 4) the analysis of breach of fiduciary duty under ERISA is a two-step process. **First**, the plaintiff must sufficiently allege that each defendant is a fiduciary within the meaning of the Act, and **second**, the plaintiff must then sufficiently allege that those who have been determined to be fiduciaries breached a fiduciary duty with respect to the particular activity alleged to have caused the breach. The claims of breach are therefore applicable only to the Committee because, for the reasons discussed above, it is the only fiduciary in relation to the activities alleged to have caused the breaches.

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of WorldCom, the named fiduciary, could be liable for misrepresentations of which they would have been aware.[18]

In contrast, there is no allegation here that Committee members had an obligation to prepare, or played any role in preparing, the SEC filings of Tyco Ltd., their employer's parent corporation. "In essence then, plaintiff[s] seek[] to hold the Committee defendants liable for the alleged wrongs of others." *Hull*, 2001 WL 1836286, at *9. Since the Committee members are not alleged to have participated in the preparation of the Tyco Ltd. SEC filings, to hold them responsible for misrepresentations or nondisclosures in those filings would be another form of strict liability, for which, as discussed above (at 9-11), there is no support in either the case law or ERISA itself.

Contrary to plaintiffs' assertion (at 52), the incorporation by reference of the Tyco Ltd. SEC filings was not a "discretionary" act. Fiduciaries of Section 404(c) plans are required to disseminate "[c]opies of any prospectuses, financial statements and reports, and [ ] any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(ii). By complying with ERISA regulations, the Committee members did not become the guarantors of the accuracy and completeness of Tyco Ltd.'s financial statements. To conclude otherwise would lead to absurd results. For example, Plan documents advise: "Please be sure to review the latest prospectuses of the Investment Funds before you make your investment decisions. Prospectuses for all funds except the

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[18] At most, *Vivien* would support the contention that an officer or director of Tyco Ltd. who served on the Committee could be held responsible for the accuracy of the Tyco Ltd. SEC filings. To the best of our knowledge, defendant Swartz was the only such person on the Committee.

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Interest Income Fund are available by calling the Tyco Benefits Center . . . ." (Barron Decl. Ex. 8, at 3.) Under plaintiffs' theory, the Committee members would be liable under ERISA for misrepresentations and omissions in the prospectuses or SEC filings of *any* of the investment funds available to participants under the Plans simply because the Committee offered that particular fund as an investment alternative. Such an outcome would be indefensible.

Furthermore, none of the cases cited by plaintiffs in their opposition brief (at 53-55) involved misrepresentations or omissions remotely analogous to those alleged here. In each of them a plan fiduciary made a material misrepresentation or omission to a participant with respect to his or her particular benefits under the plan at issue. *See Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371 (4th Cir. 2001) (reversing summary judgment for employer-sponsor where plan administrator told participant he could take lump sum distribution without incurring tax liability but, before participant so elected, plan administrator learned participant would incur significant tax liability and did not inform participant); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 428 (3d Cir. 1996) (reversing summary judgment for employer-sponsor where communications with participants repeatedly stated that a particular fund had a "guarantee[d] rate of return" and that "your account cannot go down in value," when neither statement was true); *Franklin v. First Union Corp.*, 84 F. Supp. 2d 720 (E.D. Va. 2000) (denying summary judgment for employer-sponsor where SPD expressly stated that participants would be notified if changes were made regarding the investment alternatives offered under the plan; significant changes were made and participants were not notified); *Fischer v. Phila. Elec. Co.*, 994 F.2d 130 (3d Cir. 1993) (reversing summary judgment for employer-sponsor where participants were repeatedly

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told there would be no early retirement incentive plan offered when such plan was offered six months later); *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (finding plan administrator liable for making representations that intentionally tricked participants into surrendering plan benefits); *Jordan v. Fed. Express Corp.*, 116 F.3d 1005 (3d Cir. 1997) (reversing summary judgment for employer-sponsor where plan expressly required plan administrator to furnish participants with information regarding retirement options but administrator failed to inform them that once a retirement election was made, unlike other decisions under the plan, that option was irrevocable); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (finding on interlocutory appeal that termination of medical benefits could constitute a breach of fiduciary duty where the plan sponsor "affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life"); *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir. 2000) (reversing summary judgment for plan administrator where it did not notify participant of severance from plan until almost 8 years after the date of severance where plan terms could easily have led participant to believe he had not been severed); *McCall v. Burlington Northern/Santa Fe Co.*, 237 F.3d 506 (5th Cir. 2000) (affirming summary judgment for employer-sponsor because plan administrator did not breach fiduciary duty when, pursuant to a voluntary separation plan, it told participants that it would not be offering any voluntary separation plans with better benefits in the future, but a plan offered four years later did have better benefits); *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 79 (2d Cir. 2001) (reversing summary judgment for employer-sponsor who drastically reduced

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life insurance benefits after making statements in SPDs that life insurance coverage for participants would continue at a specific level "for the remainder of their lives").[19]

Although plaintiffs select general language from these cases in an effort to support their contention, the particular facts of the cases reveal that the decisions stand for a much narrower proposition than plaintiffs' quotations suggest: each case involves either an explicit misrepresentation of a plan term or a failure to inform a particular participant of a material fact that would directly impact his or her individual benefits. None of the cases supports plaintiffs' argument that Committee members here had a responsibility to disclose or failed to disclose material information in the SEC filings of Tyco Ltd.

B. The Risk Characteristics of the Tyco Stock Fund Were Not Misrepresented to Participants.

Plan documents did not misrepresent the risks involved in investing in the Tyco Stock Fund. (*See* discussion at 19-20.) Plaintiffs do not dispute that all the Plan documents distributed to participants contained repeated and explicit explanations that the Fund, as a single equity holding fund, was more volatile than the other funds. (See Pls.' Mem. at 57.) Their efforts (at 58) to turn what are indisputably true statements into "[h]alf-truths and lies" is unavailing. The statements regarding the risk characteristics of a single stock holding fund are plainly true. To assert, as plaintiffs do (at 58-59), that the Committee was required to disclose that any fraudulent activity at Tyco, or at any of the other

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[19] The remaining cases cited by plaintiffs in this section of their brief (at 54) are irrelevant to the question whether the Committee breached a fiduciary duty because Plan documents referred to the Tyco Ltd. SEC filings. *See John Deere Health Benefit Plan of Salaried Employees v. Chubb*, 45 F. Supp. 2d 1131 (D. Kan. 1999) (denying summary judgment for employer because SPD failed to mention plan's right to seek reimbursement from plan participants); *Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 n.10 (1985) (noting that certain principles developed under trust law apply in the ERISA context).

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investment funds, could negatively affect investment performance is patently absurd. If plaintiffs were correct, such a disclosure would have to appear in the SPD of *every* ERISA plan in existence.

In their opposition brief (at 57-58), plaintiffs raise for the first time some new theories as to why the statements regarding risk were deficient. The Court ought not even consider this new matter. *See Car Carriers*, 745 F.2d at 1107; *O'Brien*, 544 F.2d at 545. In any case, however, plaintiffs' new assertions are without merit. Plaintiffs contend (at 57) that defendants "should have known of -- and disclosed -- the serious risk that Tyco was a 'house of cards' plagued by accounting gimmicks, ready to collapse at any moment." This would not be a "risk characteristic" of the Fund even if it were accurate but, in any case, it is not. The Court can take judicial notice that Tyco (unlike Enron or WorldCom) is a thriving company with nearly $36 billion in annual revenues.

Plaintiffs also contend (at 58) that the Committee members failed to inform participants that "when that single equity is the participant's employer, the participant is exposed to an additional, unique risk -- that in the event the employer fails -- he risks losing both his job and his savings." Unsurprisingly, plaintiffs have no support for the suggestion that, whenever company stock is offered as an investment option, fiduciaries must expressly inform participants of what is an obvious and common-sense risk. None of the cases dealing with investment in employer stock has ever suggested that ERISA requires this particular disclosure. Plan participants were well apprised of the risk characteristics of the Tyco Stock Fund.

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IV. PLAINTIFFS FAIL TO ADEQUATELY PLEAD THAT INVESTMENT OF PLAN ASSETS IN TYCO STOCK WAS IMPRUDENT.

The Complaint's allegations do not make out a claim that the Committee members breached a duty of prudence by maintaining the Tyco Stock Fund as an investment alternative for plan participants.[20]

A. Analysis of the Question Whether a Duty of Prudence Was Breached Is the Same Whether or Not the Plans Are Formally Designated as Employee Stock Ownership Plans.

In their brief (at 61-64), plaintiffs make much of the fact that the Plans are not technically employee stock ownership plans ("ESOPs").[21] This is a distinction without a meaningful difference. Regardless of whether the Plans are (in their entirety) structured as ESOPs, each is without question an eligible individual account plan ("EIAP") of which ESOPs, stock bonus plans, savings plans and similar arrangements are merely subsets. *See* 29 U.S.C. § 1107(d)(3)(A). Plaintiffs concede that the Plans are both "individual account Plans" and 401(k) savings plans. (Compl. ¶¶ 36-37.) Moreover, because the Plans allow participants to take distributions from the Tyco Stock Fund in the form of Tyco stock, that portion of the Plans constitutes a stock bonus plan.[22] Thus, the Plans are EIAPs that include stock bonus plan, and in some cases, ESOP, components.[23]

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[20] Plaintiffs argue (at 60) that defendants other than the Committee members are liable under Claim II "[b]ecause of ERISA's inclusive, functional definition of 'fiduciary.'" For the reasons stated above (at 2-17), however, no other defendant falls within that definition and therefore only the Committee members are fiduciaries of the Plans.

[21] Plaintiffs contend (at 5, 63) that the Tyco Stock Fund was like "a mutual fund." Plan documents distributed to participants make clear that this is not true. (Barron Decl. Ex. 7, at 1, 7 ("[The Tyco Stock Fund] is neither a mutual fund nor a managed investment option.").)

[22] A stock bonus plan is defined as "a plan established and maintained . . . to provide benefits similar to those of a profit-sharing plan" (*i.e.*, benefits that enable employees to participate in the profits of an employer's business), "*except that . . . benefits are distributable in stock of the employer company.*" 26 C.F.R. § 1.401-1(b)(1)(iii) (emphasis added). The Tyco Stock Fund allows both participation in the profits of Tyco

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The reasoning articulated in cases involving ESOPs is equally applicable to the Plans as EIAPs and the Tyco Stock Fund as a stock bonus plan, which is a particular type of EIAP. EIAPs "commonly provide for substantial investments in employer securities." H.R. Rep. No. 93-1280, at 317 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5097. As a result, all EIAPs are subject to the same unique rules adopted by Congress "[i]n recognition of the special purpose of . . . individual account plans." *Id.* In order to encourage investment in employer stock Congress expressly permitted EIAPs to invest up to 100% of their assets in employer stock if the plan terms so allowed. *See* 29 U.S.C. § 1107(b)(1); *see also Foltz v. U.S. News & World Report, Inc.*, 865 F.2d 364, 373 (D.C. Cir. 1989) ("ERISA, far from manifesting any intention to discourage long-term employee ownership, specifically favors that pattern by exempting such plans from ERISA's 10 percent cap on plans' holdings of 'employer securities.'"); S. Rep. No. 93-383, at 33 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4918 ("Since profit-sharing and stock-bonus plans are intended to a large extent to serve as an incentive to employees by allowing them to participate in the profits of the company, the committee bill generally places no restriction on the purchase of employer securities by such plans."). Consistent with the goal of encouraging investment in employer stock, ERISA also provides that the duties of diversification and prudence (to

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(through potentially increased share value) and distribution of benefits in Tyco stock. (Barron Decl. Ex. 1 § 7.1.)

[23] Plaintiffs suggest (at 63 n.32) that the Tyco Stock Fund cannot constitute a separate ESOP because every plan under ERISA must have a separate plan document. This is simply not the case. ERISA requires only that a plan be established and maintained pursuant to a written instrument. 29 U.S.C. § 1102(a)(1). Multiple plans with similar characteristics may be combined in one formal "Plan" for purposes of ERISA. *See* 26 C.F.R. § 1.401(k)-1(a)(1) (providing that a profit-sharing or stock bonus plan will not fail to meet the tax-qualification requirements merely because it is combined with a cash or deferred (*i.e.*, 401(k)) arrangement). This is precisely the case with respect to the Plans here. (*See, e.g.*, Barron Decl. Ex. 1 § 1.19 (referring to ESOP portion of Plan).)

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the extent it requires diversification) do not apply to the acquisition or holding of employer stock by an EIAP. *See* 29 U.S.C. § 1104(a)(2).

Because all types of EIAPs are subject to the same unique rules established by Congress, they are treated the same for purposes of fiduciary duty analysis. *See Wright v. Or. Metallurgical Corp.*, 222 F. Supp. 2d 1224, 1233 (D. Or. 2002) ("Both ESOPs and stock bonus plans are forms of [E]IAPs and are treated the same for the purpose of fiduciary duty analysis." (citing *Foltz*, 865 F.2d at 373-74)). One court has observed that

> [a]s all EIAPs are exempt from the diversification requirement, the competing Congressional interest in employee ownership of company stock and the fiduciary's duty of prudence must be balanced with respect to all EIAPs. This includes the [stock bonus plan] under consideration. Therefore, the reasoning upon which the Sixth and Third Circuits [in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), and *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995)] applied the presumption of prudence to the investment decisions of ESOP fiduciaries not to diversify may equally be applied to the [stock bonus plan] fiduciaries.

Landgraff v. Columbia/HCA Healthcare Corp., No. 3-98-0090, 2000 WL 33726564, at *6 (M.D. Tenn. May 24, 2000). Thus, the legislative intent favoring employee investment in employer stock applies to all types of EIAPs -- like the Plans at issue here -- not just ESOPs.

B. Contrary to Plaintiffs' Assertion, the Committee Did Not Exercise Discretion by Offering the Tyco Stock Fund as an Investment Option.

Plaintiffs contend (at 63) that "the Plans were not required to invest in the Tyco Stock Fund." That is not so. In keeping with the basic principle of trust law, ERISA fiduciaries are generally bound to administer plans according to the plan sponsor's intent.[24] Thus, to the extent the Plans reflect the intent of Tyco US, the plan sponsor and settlor, to

[24] *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989); *Hughes v. 3M Retiree Med. Plan*, 281 F.3d 786, 790 (8th Cir. 2002); *Bock v. Computer Assocs. Int'l, Inc.*, 257 F.3d 700, 704 (7th Cir. 2001); *Moench v. Robertson*, 62 F.3d 553, 570 (3d Cir. 1995).

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offer Tyco Ltd. stock as an investment option, the Committee members were not free to disregard that intent.

Contrary to plaintiffs' suggestions (at 63-64), the Plan documents make clear that the opportunity to invest in Tyco stock through the Tyco Stock Fund was a mandatory -- not discretionary -- part of the Plans. **First**, each Plan provides that "[t]he term 'Investment Fund' *shall* include a fund . . . which shall be invested primarily in common shares" of Tyco Ltd. (Barron Decl. Ex. 1 § 1.23 (emphasis added).) **Second**, the Plans provide that participant investment elections be made "pursuant to such rules and regulations as may be imposed by the Committee from time to time, including limitations on the amounts that may be invested in the Tyco Stock Fund." (*Id.* § 3.11(a).) Thus, while the Committee had discretion to *limit* the amount of a participant's investment in the Tyco Stock Fund (which it did at 25% of a participant's total Plan contributions), the Committee could not *eliminate* that investment option.[25]

Third, the Plan provision governing distributions states: "To the extent that a Participant's account is invested in the Tyco Stock Fund, he may elect to receive his single sum distribution in the form of common shares of Tyco International Ltd. or a combination of cash and common shares of Tyco International Ltd." (Barron Decl. Ex. 1 § 7.1.)[26] For

[25] Notwithstanding these Plan provisions, plaintiffs base their argument solely on the provision that authorizes the Committee "[t]o select appropriate investment vehicles, which may include the Tyco Stock Fund, to constitute the Investment Funds available under the Trust for the investment of plan assets." (Barron Decl. Ex. 1 § 8.4(j).) Plaintiffs misread the provision. That passage does not modify the definition of "Investment Funds," which "*shall* include" the Tyco Stock Fund. (*Id.* § 1.23 (emphasis added).) Rather, it simply provides that, notwithstanding the volatility and risk associated with undiversified investment in a single stock, the Tyco Stock Fund is an "appropriate investment vehicle" that the Committee is permitted to include.

[26] By allowing distributions in the form of Tyco stock (which required investment in the Tyco Stock Fund), the Plans also made available to participants special rules that grant favorable tax status to such

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distributions to be made in the form of Tyco stock, the Committee members were required to offer investment in the Tyco Stock Fund because if it was eliminated, there would be no assets to distribute in the form of Tyco stock. In fact, for most of the class period it would have been illegal for the Committee, Tyco US or anyone else to effectively eliminate this distribution option by eliminating the Tyco Stock Fund as an investment option.[27] Thus, Tyco US, in designing the Plans, clearly intended that the Tyco Stock Fund would be an investment alternative.[28]

C. Plaintiffs Have Failed to Overcome the Presumption That Investment in the Tyco Stock Fund Was Prudent.

"[T]he policies behind ERISA's rules governing pension benefit plans cannot simply override the goals of [ownership of employer stock], and courts must find a way for the competing concerns to coexist." *Moench*, 62 F.3d at 570. Thus, "courts must recognize that if the fiduciary, in what it regards as an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution." *Id.* at 571-72.

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distributions. *See* I.R.C. § 402(e)(4). Were the Tyco Stock Fund to be eliminated as an investment option, these advantages would be eliminated as well.

[27] Prior to 2000, plan sponsors were prohibited from amending a plan to eliminate any optional forms of benefits, including distribution options such as the in-kind distribution available under the Tyco Stock Fund. *See* 26 U.S.C. § 411(d)(6) and 29 U.S.C. § 1054(g). Effective September 6, 2000, the Treasury Department finalized regulations that authorized a defined contribution plan to be amended to eliminate all but a single sum distribution, provided that participants were given 90-days advance written notice. *See* 65 Fed. Reg. 53901-53909.

[28] The Committee also lacked no discretion when it came to purchasing Tyco stock with assets allocated to the Tyco Stock Fund because the Plans direct that the Fund "shall be invested primarily in common shares . . . of Tyco International Ltd. and short-term interest income vehicles." (Barron Decl. Ex. 1 § 1.23.) The authority to invest in "short-term interest income vehicles" was for the limited purpose of maintaining liquidity in the Fund "to allow you to buy or sell every business day without the usual trade settlement period for individual stock transactions." (Barron Decl. Ex. 7, at 1.) Under such circumstances, the Committee had no discretionary authority or control over whether to invest Tyco Stock Fund assets in anything other than Tyco stock. The Plan Information Statement, or Prospectus, provided to participants contains the same information. (Barron Decl. Ex. 8, at 3.)

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Accordingly, to balance ERISA's fiduciary requirements with the congressional intent to encourage investment in employer stock, courts have concluded that "fiduciaries should not be subject to breach-of-duty liability for investing plan assets in the manner and for the . . . purposes that Congress intended." *Id.* at 571 (quoting *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir. 1992) (internal quotation marks omitted)). In *Moench*, the Third Circuit articulated this "presumption of prudence standard" as follows:

> [T]he most logical result is that the fiduciary's decision to continue investing in employer securities should be reviewed for an abuse of discretion. . . . [A] fiduciary who invests the assets in employer stock *is entitled to a presumption that it acted consistently with ERISA by virtue of that decision*. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities.[29]

62 F.3d at 571 (emphasis added). The Sixth Circuit has also adopted the presumption of prudence standard: "*[W]e will presume that a fiduciary's decision to remain invested in employer securities was reasonable.* A plaintiff may then rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper*, 66 F.3d at 1459 (emphasis added). *See also In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588, at *6 ("Following the plan gives rise to a presumption of no breach."). The presumption of prudence standard makes sense because a lower standard "would render meaningless the ERISA provision excepting [such plans] from the duty to diversify," which, in turn, would risk transforming EIAPs into ordinary pension plans, "thus frustrating Congress's desire to encourage employee

[29] Unlike in *Moench* and *Kuper*, here it was the plan participants and not the Committee members who exercised discretion in directing investment in the Tyco Stock Fund from among the Plans' various investment options. (See our opening brief at 68-69.)

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ownership and contravening the intent of the parties." *Kuper*, 66 F.3d at 1458-59 (quoting *Moench*, 62 F.3d at 570).

Moench, *Kuper* and similar decisions illustrate the type of allegations necessary to overcome the presumption favoring continued investment in employer securities. As *Kuper* makes clear, a mere devaluation in an employer's stock even if substantial does not render an EIAP's continued investment in that stock a breach of fiduciary duty. 66 F.3d at 1460. In *Moench*, it took extreme financial devastation of the employer-sponsor, coupled with an almost complete loss of value in its stock, to create even a question whether continued investment in company stock was appropriate. 62 F.3d at 572. Given the unique purpose of EIAPs, even a significant loss in value of employer stock does not render it an improvident investment. *See, e.g., Wright*, 222 F. Supp. 2d at 1233-34 (finding "a decline in value of the employer's stock" does not satisfy the standard where the employer "was at all times a viable concern"); *see also* 29 U.S.C. § 1104(a)(1) (stating that the "prudent man" standard of care must be tailored to the specific "character" and "aims" of the plan in question). The appropriate analysis is not whether employer stock performed well or badly; rather, it is whether the stock became *inherently unsuitable* for investment. The applicable standard, in the words of the *Moench* court, is whether the fiduciary "could not have believed reasonably that continued adherence to the [plan's] direction was in keeping with the settlor's expectations of how a prudent trustee would operate." *Moench*, 62 F.3d at 571.

Applying these principles here, it is plaintiffs' burden to allege facts that would be sufficient, if proved, to establish not simply that there was a drop in the price of

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Tyco stock, but that the Company was on the brink of collapse.[30] Here, while the Complaint offers a repackaging of publicly reported allegations of executive excess and accounting irregularities, it is completely lacking in the type of allegations that would be sufficient -- even if they could be proved -- to suggest that Tyco was no longer a viable business entity. *See In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588, at *6 ("[Plaintiffs'] allegations are insufficient, and are largely conclusory and need not be accepted."); *Landgraff*, 2000 WL 33726564 (dismissing fiduciary breach claim based on investment in employer securities in the absence of a showing that the employer's fundamental condition was unsound). As noted earlier (at 33), Tyco is a thriving business with nearly $36 billion in annual revenue.

Accordingly, plaintiffs' allegations are insufficient to justify departing from the settlor intent to allow investment in Tyco stock through the Fund, particularly where the plan participants were plainly aware that such investment would be volatile, undiversified and risky relative to other investment alternatives. Indeed, to hold otherwise would potentially require the Committee members to preclude investment in the Tyco Stock Fund whenever it appeared that the stock price might decline. Such an approach would re-write the fundamental purpose of the Tyco Stock Fund in complete disregard for the unique benefits, recognized by both Congress and the courts, that result from

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[30] Plaintiffs attempt to excuse themselves from this burden by citing (at 65) *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), for the proposition that "presumptions are matters of proof, not pleading." *Swierkiewicz* dealt with the burden shifting analysis applicable to Title VII and similar civil rights cases under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and rejected the suggestion that such an evidentiary tool should be applied at the pleading stage. Here, in contrast, we merely point out that plaintiffs must at least plead specific facts sufficient (if they are assumed to be true) to satisfy the particular legal standard for a fiduciary breach in the context of an EIAP's investment in employer securities. *See, e.g., Lalonde v. Textron, Inc.*, No. 02-334S, 2003 WL 21517334, at *5 (D.R.I. June 24, 2003) ("[I]n order to state a viable claim, Plaintiffs must plead facts that, if proven at trial, would establish that [Defendants] abused their discretion in failing to diversify [company] stock [held in the EIAP].").

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encouraging EIAP investment in a sponsoring employer's securities.[31] It would also make the Committee members guarantors of a profitable investment, exposing them to potential liability any time the stock price declined. Plaintiffs cannot contend that ERISA's prudence standard requires a fiduciary to divine future stock trends before anyone else in a well-developed and sophisticated market.[32] *See DeBruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) ("The fiduciary duty of care . . . requires prudence, not prescience." (quoting *DeBruyne v. Equitable Life Assurance Soc'y*, 720 F. Supp. 1342 (N.D. Ill. 1989) (internal quotation marks omitted)).

Plaintiffs have failed to overcome the presumption that investment in the Tyco Stock Fund was prudent.

D. The Committee Could Not Legally Have Acted on the Basis of Alleged Inside Information.

It is well established -- and plaintiffs do not dispute -- that those with material non-public or "inside" information are prohibited from trading (*i.e.*, buying or selling) securities on the basis of that information. *See United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997). Nevertheless, plaintiffs suggest (at 46-47) that the Committee should have acted on the basis of alleged inside information.

Even if the Committee members had such information, they were constrained in what they could do with such knowledge. **First**, apart from issues of issuer trading, the

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[31] *See, e.g., Lalonde*, 2003 WL 21517334, at *9 ("Despite the drop in the value of Textron stock, participants in the Plan still received the opportunity to invest for long-term, tax-deferred growth for retirement, matching employer contributions, and the ability to participate in the ownership of their employer.").

[32] As discussed in our opening brief (at 62-63), even the news articles cited by plaintiffs in their Complaint contradict their contention that publicly available information showed Tyco shares to be an imprudent investment. Plaintiffs do not respond to this point.

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Committee members had no authority to force participants to divest their investments in the Tyco Stock Fund. (Barron Decl. Ex. 1 § 3.11(a) ("Each Participant . . . shall elect the manner of investment of all amounts standing to the credit of his accounts in the Trust among the Investment Funds established under the Trust."); *id.* § 3.11(f) ("The Plan Sponsor, the Employer, the Committee and the Trustee shall have no responsibility for the investment elections of Participants, Beneficiaries and alternate payees . . . .").) Thus, the only way the Committee might have divested the Plans of Tyco stock would have been to eliminate the Fund as an investment option altogether, which, as discussed above (at 36-38), the Committee did not have the discretion to do.[33]

Second, the Committee could not legally have taken any actions on the basis of alleged insider information that would have reduced loss to the Plans. Under the federal securities laws, any alleged inside information on which Committee decisions were based would first have to be disclosed to the public at large. *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL 31431588, at *6 ("Nor could the Plan have sold the stock without disclosing what it knew about the [employer's] financial improprieties."). In an "efficient market," such a disclosure (whether accurate or not) would immediately have been reflected in the stock price, resulting in at least the same loss to participants as plaintiffs now allege. (*See* discussion at 23-24, and our opening brief at 65-67.) In fact, the sale of a large block of institutionally held stock following a public announcement of negative inside information would have exacerbated the price decline and, by forcing the Plans to liquidate, would have

[33] To the extent that the Plans could have been amended to eliminate or alter the conditions for including the Tyco Stock Fund as an investment, this is a question of plan design that is beyond ERISA's fiduciary duties. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999).

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locked in an actual, realized loss with no chance that the Plans could benefit from a price rebound as the market digested the information. As one court in this Circuit has recently observed:

> [The Defendants] arguably had fiduciary obligations to the [plan] participants not to change the investment strategy. If [the Defendants] had sold [the employer] common stock in an effort to diversify as the Plaintiffs claim they should have, they surely would have been sued when the stock later appreciated. Moreover, if the Defendants had embarked upon a strategy of dumping [the employer's] stock that act itself may well have triggered a broader sell-off resulting in a stock price decline. This too would no doubt have spurred litigation against the [D]efendants.

Lalonde, 2003 WL 21517334, at *5 (citation omitted)

Third, plaintiffs' suggestion (at 46) that defendants might simply have discontinued investment in the Tyco Stock Fund suffers from similar flaws. Freezing investment in the Fund would have required notice to thousands of participants, which, rather than going unnoticed by the market, would undoubtedly have generated both speculation and suspicion, further driving down the price of Tyco stock (including that still held by the Fund). This too would have foreclosed the opportunity for participants to invest in Tyco stock at a depressed price and thereby gain the potential upside of a longer-term recovery in the stock price. **Finally**, even if the Committee might somehow have stopped the Plans' investment in Tyco stock without precipitating (and, in fact, exacerbating) a drop in the stock price, which it could not have, such conduct would have benefited one subset of shareholders over others on the basis of inside information in violation of the federal securities laws.[34]

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[34] While plaintiffs attempt to draw a distinction between *selling* on the basis of inside information and *precluding further purchases* on the basis of such information, either act would constitute impermissible "tipping" to a subset of shareholders. *See* 17 C.F.R. § 243.100 *et seq*.

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For all these reasons, the Committee members cannot be held liable for breach of a duty of prudence and Claim II should be dismissed.

V. PLAINTIFFS DO NOT HAVE STANDING TO REPRESENT THE ENTIRE CLASS.

Plaintiffs have mooted the standing issue with regard to Plan IV by joining a plaintiff who is a participant in that plan.[35] However, because none of the plaintiffs are participants in Plans I, VI and VII, plaintiffs lack standing to represent these Plans or their participants. (See our opening brief at 11-12.)

No court within the First Circuit has addressed the question whether a participant in one ERISA plan has standing to assert claims on behalf of a plan in which he or she is not a participant, and the courts in other circuits that have addressed this question have reached different results. Plaintiffs cite cases (at 68-70) in which courts held that a participant in one plan has standing as to other plans. All of these cases, however, addressed the specific issue of a participant's ability to represent participants in other plans where the allegations were of miscalculated or erroneously denied benefits. The allegations here are not remotely similar to those advanced in the cases cited by plaintiffs.

In contrast, *Bradshaw v. Jenkins*, No. C83-771R, 1984 U.S. Dist. LEXIS 20013 (W.D. Wash. Jan. 30, 1984), involved precisely the same allegations as those asserted by

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[35] (*See* Pls.' Mostly Assented-to Motion to Join Additional Plaintiffs; Pls.' Mem. at 70 n.37; Ebert Aff. ¶ 5.) Plaintiffs have joined as a plaintiff Karen Wade, a participant in Plan IV. Plaintiffs have also sought to join Eugene Crouch as a participant in Plan IV. Crouch, however, took a distribution on May 27, 2003, and is therefore no longer a participant in any plan. (Ebert Aff. ¶ 4.) Crouch is therefore not a proper plaintiff because "the protections of ERISA are tied to current participants only." *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986).

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plaintiffs here, and the court held that the plaintiff had standing to assert claims only under the plan in which she was a participant. The court explained:

> Bradshaw alleges that she is a participant in the Plan and that defendants breached fiduciary duties imposed by ERISA causing the Plan to suffer losses. ERISA expressly permits a participant to sue on behalf of a plan to enforce the liability imposed on a fiduciary for losses to the plan which result from a breach of fiduciary duty. Bradshaw has clearly alleged facts which demonstrate her standing to sue on behalf of the Plan. Bradshaw's allegations are, however, insufficient to demonstrate her standing to sue on behalf of the Retirement Plan and other employee benefit plans.

Id. at *11-12. The court in *Lee v. Prudential Ins. Co.*, 673 F. Supp. 998, 1003-04 (N.D. Cal. 1987), reached the same conclusion:

> [T]he language authorizing a civil action "by a participant or beneficiary" to recover benefits requires that plaintiff be a participant or beneficiary of the plan under which he claims. While Kwan Lee's claim involves breach of fiduciary duty under section 1132(a)(2), that subsection similarly limits potential plaintiffs using the words "participant" and "beneficiary."

The conclusions reached in *Bradshaw* and *Lee* are consistent with the statutory language of ERISA. Only a limited group of individuals is entitled to bring a civil action under the relevant sections of ERISA: the Secretary of Labor, or a participant, beneficiary or fiduciary of the plan. *See* 29 U.S.C. § 1132(a)(2)-(3). ERISA in turn defines "participant" as "any employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." *Id.* § 1002(7). Thus, by definition, in order to be deemed a participant of a plan, one must be eligible to receive benefits under the plan.

This Court should adopt the reasoning of *Bradshaw* and *Lee*, which is consistent with the plain language of the statute. Plaintiffs are not entitled to receive benefits under Plans I, VI or VII and therefore lack standing to pursue claims on behalf of those Plans or their participants.

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VI. THE RELIEF PLAINTIFFS SEEK IS NOT AUTHORIZED UNDER ERISA.

As explained in our opening brief (at 69-74), the plain language of ERISA and unequivocal Supreme Court precedent demonstrate that the relief plaintiffs are seeking is not authorized by ERISA. Plaintiffs contend (at 74) that defendants' argument creates a "Catch-22." The question, however, is whether a federal court should imply a remedy in ERISA's complex statutory scheme of rights and remedies because these particular plaintiffs would be unable to recover the relief they seek under the plain meaning of the statute and the Supreme Court's interpretation of that language. The Supreme Court explained an analogous situation as follows:

> Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the . . . violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of . . . rights.

Bush v. Lucas, 462 U.S. 367, 388 (1983). The Court declined to imply the remedy plaintiff sought. This Court should reach the same conclusion. As the Supreme Court has explained: "ERISA is a comprehensive and reticulated statute," *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quotation marks omitted), "is enormously complex and detailed," *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quotation marks omitted), and, therefore, "it should not be supplemented by extratextual remedies." *Id.*

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Plaintiffs are unhappy with the result plainly dictated by the statutory language of ERISA and its interpretation by the Supreme Court and other courts. Yet Congress expressly balanced competing interests when drafting ERISA and, without an incentive for employers, there would be no retirement or pension benefits to protect at all. It is the legislature, not the judiciary, that should weigh the competing interests because "Congress is in a better position to decide whether or not the public interest would be served by creating [a remedy]." *Bush*, 462 U.S. at 390. This Court should adhere to the plain language of the statute and leave to Congress the question whether its remedial provisions are insufficient.

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Conclusion

For the foregoing reasons, defendants' motion to dismiss the Complaint should be granted.

July 18, 2003

Respectfully submitted,

SHEEHAN PHINNEY BASS & GREEN

by

/s/ ______________________

Edward A. Haffer (N.H. Bar No. 1052)
Hampshire Plaza
1000 Elm Street
P.O. Box 3701
Manchester, NH 03105
(603) 627-8115

Francis P. Barron
Stephen S. Madsen
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for defendants Tyco International Ltd., Tyco International (US) Inc., Robert A. Bent, Kelly Heffernan, Irving Gutin, Jerry R. Boggess and Richard J. Meelia.

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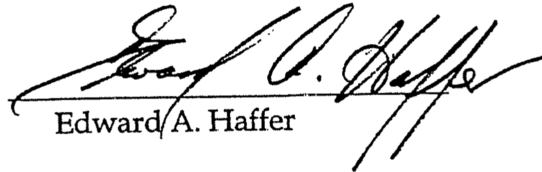
CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent this date to the attached Service List — Kenneth G. Bouchard, Esq., Gordon P. MacDonald, Esq., Michael J. Connolly, Esq. and Richard McNamara, Esq. having been sent copies via hand delivery by Sheehan Phinney Bass & Green, P.A.; Paul McEachern, Esq., Arnold Rosenblatt, Esq. and James E. Townsend, Esq. having been sent copies via overnight mail by Sheehan Phinney Bass & Green, P.A. and the other counsel having been sent copies via overnight mail by Cravath, Swaine & Moore LLP.



Edward A. Haffer

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Service List (ERISA Action)

Kenneth G. Bouchard, Esq.
Bouchard & Kleinman, P.A.
369 Lafayette Road
Hampton, NH 03842
(603) 926-9333

Robert A. Izard, Esq.
Schatz & Nobel, PC
330 Main Street
2nd Floor
Hartford, CT 06106-1851
(860) 493-6292

Edwin J. Mills, Esq.
Stull, Stull & Brody
6 East 45th Street
New York, NY 10017
(212) 687-7230

Gregory A. Markel, Esq.
Cadwalader, Wickersham & Taft, LLP
100 Maiden Lane
New York, NY 10038
(212) 504-6112

Gordon P. MacDonald, Esq.
Nixon Peabody LLP
889 Elm Street
Manchester, NH 03101
(603) 628-4083

William Hassler, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, DC 20036
(202) 429-6469

Laurence Greenwald, Esq.
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038-4982
(212) 806-5652

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Paul McEachern, Esq.
Shaines & McEachern
25 Maplewood Avenue
PO Box 360
Portsmouth, NH 03802-0360
(603) 436-3110

Jody King, Esq.
Stillman & Friedman, PC
425 Park Avenue
New York, NY 10022
(212) 223-0200

Michael J. Connolly, Esq.
Hinckley, Allen & Snyder, LLP
43 North Main Street, 2nd Floor
Concord, NH 03301
(603) 225-4334

Richard McNamara, Esq.
Wiggin & Nourie, P.A.
20 Market Street
PO Box 808
Manchester, NH 03105-0808
(603) 669-2211

Robert N. Shwartz, Esq.
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022-3904
(212) 909-6850

James H.R. Windels, Esq.
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4978

Arnold Rosenblatt, Esq.
Cook, Little, Rosenblatt & Mason, PLLC
650 Elm Street
Manchester, NH 03103
(603) 621-7100

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William R. Maguire, Esq.
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004-1482
(212) 837-6879

James E. Townsend, Esq.
Townsend Law Office
PO Box 1067
Londonderry, NH 03053
(603) 434-5059

Miranda S. Schiller, Esq.
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Paul H. Dawes, Esq.
Latham & Watkins LLP
136 Commonwealth Drive
Menlo Park, CA 94025
(650) 328-4600

Gary P. Naftalis, Esq.
Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, NY 10022
(212) 715-9100

JaneAnne Murray, Esq.
O'Melveny & Myers LLP
Citigroup Center
153 East 53rd Street
New York, NY 10022-4611
(212) 326-1000

Marc Frazier Scholl, Esq.
District Attorney's Office
County of New York
One Hogan Place
New York, NY 10013
(212) 335-9000