11-21-03

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AOL TIME WARNER ERISA LITIGATION	Civil Action No. 02 CV 8853 (SWK)
THIS DOCUMENT RELATES TO: ALL ACTIONS	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS OF ALL DEFENDANTS OTHER THAN FIDELITY TRUST MANAGEMENT COMPANY

SCHATZ & NOBEL, P.C.
Robert A. Izard
Todd A. Higgins
Wayne T. Boulton
330 Main Street
Hartford, CT 06106
(860) 493-6292

SCHIFFRIN & BARROWAY, LLP
Richard S. Schiffrin
Joseph J. Meltzer
Lee D. Rudy
Three Bala Cynwyd Plaza East, Suite 400
Bala Cynwyd, PA 19004
(610) 667-7706

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

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . iii

I. INTRODUCTION . . . 1

II. STATEMENT OF FACTS . . . 5

III. ARGUMENT . . . 9

A. PLAINTIFFS NEED ONLY ALLEGE A SHORT PLAIN STATEMENT OF THEIR CLAIMS . . . 9

B. DEFENDANTS WERE FIDUCIARIES OF THE PLANS . . . 12

1. AOLTW Was A Fiduciary of the Plans . . . 16

a. AOLTW Controlled Plan Investments In AOLTW Stock . . . 17

b. AOLTW made fiduciary communications to Participants . . . 17

c. AOLTW was a fiduciary because its representations were incorporated into plan communications . . . 18

d. AOLTW was a *de facto* fiduciary because it exercised total control over the named fiduciaries . . . 21

2. TWE Was A Named Fiduciary Of The TWC Plan . . . 21

3. Defendants Bogart And Bressler Were *De Facto* Fiduciaries . . . 22

4. The Board Defendants were named fiduciaries of the Savings Plan and the Thrift Plan . . . 22

C. RESPONDEAT SUPERIOR APPLIES TO ERISA . . . 23

D. CLAIM ONE STATES A CLAIM FOR IMPRUDENT INVESTMENT OF PLAN ASSETS . . . 29

1. The Plans Do Not Require That The Company Stock Fund Be Offered As An Investment Option . . . 29

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

a. The Terms of the Plans Did Not Require That The Company Stock Fund Be Offered 31

b. Even if the Plans Required That The Company Stock Fund Be Offered, ERISA Required That the Fund Be Terminated As An Investment Option 32

2. Defendants Allowed The Plans To Hold Shares Of The Company Stock Fund When It Was Imprudent To Do So 33

a. The Plans Were Not Required To Purchase and Hold Fund Shares 34

b. Even if The Plans Required Investment In The Company Stock Fund, ERISA Required That The Plans Halt Purchases And Sell Existing Shares 35

3. Defendants Could Have Met Their Fiduciary Obligations Without Violating Insider Trading Rules 36

E. COUNT 2 SUFFICIENTLY ALLEGES THAT DEFENDANTS NEGLIGENTLY MISREPRESENTED AND FAILED TO DISCLOSE MATERIAL INFORMATION 40

1. Defendants Are Fiduciaries With Respect To The Portions Of The SPD and Form S-8 Which Incorporate SEC Filings 40

2. The SEC Filings Are Fiduciary Representations 43

3. Plaintiffs have Adequately Alleged Director Defendants Breached Their Fiduciary Duties In Their Failure To Appoint And Monitor Other Fiduciaries 45

a. Director Defendants Failed in Their Duty to Appoint and Monitor The Committees 45

b. Director Defendants Failed to Provide Material Information to Their Appointees 47

4. Plaintiffs have Adequately Alleged Breach of the Duty of Loyalty ... 48

IV. CONCLUSION 50

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

TABLE OF AUTHORITIES

CASES **Page**

Anderson v. International Union, United Plant Guard Workers of Am.,
150 F.3d 590 (6th Cir. 1998) 25

American Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life,
841 F.2d 658 (5th Cir. 1988) 21

American Society of Mechanical Engineers, Inc.,
456 U.S. 556 (1982) 24

American Tel. and Tel. Co. v. Winback and Conserve Program, Inc.,
42 F.3d 1421 (3d Cir. 1994) 25, 26, 28

Arizona State Carpenters Pension Trust Fund v. Citibank (Ariz.),
125 F.3d 715 (9th Cir. 1997) 13

Bannistor v. Ullman,
287 F.3d 394 (5th Cir. 2002) 25, 28

Becher v. Long Island Lighting,
164 F.R.D. 144 (E.D.N.Y. 1996) 19

Black & Decker Disability Plan v. Nord,
123 S.Ct. 1965 (2003) 14

Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of N.J. Welfare Fund v. Wettlin Assoc., Inc.,
237 F.3d 270 (3d Cir.2001) 14, 16

Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.,
467 U.S. 837 (1984) 14

Chiarelli v. United States,
445 U.S. 222 (1980) 36

Cileck v. Inova Health Sys. Servs.,
115 F.3d 256 (4th Cir. 1997) 25

Concha v. London,
62 F.3d 1493 (9th Cir. 1995) 9

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Condus v. Howard Sav. Bank,
781 F. Supp. 1052 (D.N.J. 1992) 36

Coyne & Delany Co. v. Selman,
98 F.3d 1457 (4th Cir.1996) 21

Crowley v. Corning Inc.,
234 F. Supp. 2d (W.D.N.Y. 2002) 20, 27, 28

Curcio v. John Hancock Mut. Life Ins. Co.,
33 F.3d 226 (3d Cir. 1994) 27

Donovan v. Bierwirth,
538 F. Supp. 463 (E.D.N.Y. 1981) 2, 48

Gelardi v. Pertee Computer Corp.,
761 F.2d 1323 (9th Cir. 1985) 27

Glaziers v. Newbridge Sec., Inc.,
93 F.3d 1171 (3d Cir. 1996) 47

Gleason v. Seaborard Air Line Ry. Co.,
278 U.S. 349 (1929) 24, 28

Grant v. Wallingford Bd. of Educ.,
69 F.3d 669 (2d Cir. 1995) 10

Hamilton v. Carell,
243 F.3d 992 (6th Cir. 2002) 26

Hickman v. Tosco Corp.,
840 F.2d 564 (8th Cir.1988) 21

Higgins v. Metro-North R. Co.,
318 F.3d 422 (2d Cir. 2003) 24-25

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 30

Hull v. Policy Mgmt Sys Corp.,
2001 WL 1836286 (D.S.C. Feb. 9, 2001) 38, 39, 40, 44

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

In re Am. Express Co. Shareholder Litig.,
39 F. 3d 395 (2d Cir. 1994) 11

In re Enron Corp., Sec., Derivative & "ERISA" Litig.,
2003 WL 22245394, – F. Supp. 2d – (S.D. Tex Sept. 30, 2003) . . . . *passim.*

In re Fruehauf Trailer Corp.,
250 B.R. 168 (D.Del.2000) 15

In re McKesson HBOC ERISA Litig.,
2002 WL 31431588 (N.D.Cal. Sept. 30, 2002) 38, 39, 47

In re Providian Fin. Corp. ERISA Litig.,
2002 WL 31785044 (N.D. Cal. Nov. 14, 2002) 43

In re Williams Cos. ERISA Litig.,
271 F. Supp. 2d 1328 (N.D. Okla. 2003) 20, 22

In re Waste Management, Inc. Sec. Litig.,
H-99-2183 (S.D. Tex. Apr. 29, 2002) 5

In re WorldCom ERISA Litig.,
263 F. Supp. 2d 745 (S.D.N.Y. June 17, 2003) . . . . *passim.*

IT Corp. v. General Am. Life Ins. Co.,
107 F.3d 1415 (9th Cir.1997) 14

John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank,
510 U.S. 86 (1993) 13

Kayes v. Pacific Lumber Co.,
51 F.3d 1461 (9th Cir.1995) 16

Lalonde v. Textron, Inc.,
270 F. Supp. 2d 272 (D.R.I. 2002) 16

Landry v. Air Line Pilots Ass'n Inter. AFL-CIO,
901 F.2d 404 (5th Cir. 1990) 14

Leigh v. Engel,
727 F.2d 113 (7th Cir. 1984) 21, 46

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Liss v. Smith,
991 F. Supp. 278 (S.D.N.Y. 1998) 21-22, 23

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 30

LoPresti v. Terwilliger,
126 F.3d 34 (2d Cir. 1997) 12-13

Mack v. Otis Elevator Co.,
326 F.3d 116 (2d Cir. 2003) 24

McCauley v. IBM,
165 F.3d 1038 (6th Cir. 1999) 19

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 13

Meyer v. Berkshire Life Ins. Co.,
250 F. Supp. 2d 544 (D. Md. 2003) 26

Moriarty v. Glueckert Funeral Home, LTD.,
155 F.3d 859 (7th Cir. 1998) 25

National Football Scouting Inc., v. Coninental Assurance Co.,
931 F.2d 646 (10th Cir. 1991) 25-26

Nelson v. IPALCO Enter., Inc.,
2003 Dist. LEXIS 4580 (S.D. Ind. February 13, 2003) 10

Newport News Industrial v. Dynamic Testing, Inc.,
130 F. Supp. 2d 745 (E.D. Va. 2001) 28

Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n,
298 F.3d 768 (9th Cir. 2002) 25

Oliveria v. Frito-Lay, Inc.,
251 F.3d 56 (2d Cir. 2001) 10

Papasan v. Allain,
478 U.S. 265 (1986) 11

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Rankin v. Rots,
2003 WL 21995176 (E.D. Mich. 2003) . . . . *passim.*

Richstone v. Chubb Colonial Life Ins.,
1999 WL 287332 (S.D.N.Y. May 7, 1999) 9

Schwartz v. Gordon,
761 F.2d 864 (2d. Cir. 1985) 14

Shaw v. Delta Airlines, Inc.,
463 U.S. 85 (1983) 1

Sheuer v. Rhodes,
416 U.S. 232 (1974) 10

Simmons v. Abruzzo,
49 F.3d 83 (2d Cir. 1995) 9

Smith v. Local 819 I.B.T. Pension Plan,
291 F.3d 236 (2d Cir. 2002). 10, 11

Sony Corp of Am. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 26

S.S. Silberblatt, Inc. v. East Harlem Pilot Block -- Building 1 Housing Dev. Fund Co., Inc.,
608 F.2d 28 (2d Cir. 1979) 43

Stanton v. Shearson Lehman/American Express,
631 F. Supp. 100 (N.D. Ga. 1986) 26, 28

Stein v. Smith, No. CN.A.-01-10500-RCL,
2003 WL 21513207 (D. Mass. July 3, 2003) 5, 20, 47

Swierkiewicz v. Sorema N.A.,
534 U.S. 506, 508 (2002) 9, 11, 30, 34

Taylor v. Peoples Natural Gas Co.,
49 F.3d 982 (3d Cir. 1995) 25

Taylor v. Vermont Dept. of Ed.,
313 F.3d 768 (2d Cir. 2002) 10

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Toussie v. Powell,
323 F.3d 178 (2d Cir. 2003) 9

Walsh v. Emerson,
1990 WL 47319 (D. Or. Jan. 19, 1990) 27
Varity Corp. v. Howe,
516 U.S. 489 (1996) 18, 19, 20

Vivien v. WorldCom,
2002 WL 31640557 (N.D.Cal 2002) 38, 39, 44

STATUTES, RULES AND REGULATIONS

Page

29 U.S.C.
§1001(b) 1
§1002(a) 12, 19
§1104(a) 29, 48
§1109(a) 2

29 C.F.R.
§2509.75-8 46
§2550.404c 37

Federal Rules of Civil Procedure
Rule 8 . . . . *passim*
Rule 9(b) 9, 10, 40
Rule 12(b) 10
Rule 15(a) 50

OTHER AUTHORITIES **Page**

Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss, In re Enron Securities, Derivative & "ERISA" Litig.,
Civil Action No. H-01-3913 (S.D. Tex) 13, 38

Amended Brief of the Secretary of Labor as Amicus Curiae Supporting the Plaintiffs' Motion for Reconsideration, In re Williams Company ERISA Litigation,
02-CV-153-H(M) (N.D. Okla.) 13, 22

Employee Benefit Plans,
Securities Act of 1933 Release No. 33-6188, 19 S.E.C. Docket 465,
1980 WL 29482 (Feb. 1, 1980) 5

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

In the Matter of Cady, Roberts & Co.,
Exchange Act Release No. 24-6668, 40 S.E.C. 907,
1961 WL 60638 (Nov. 8, 1961) 37

Restatement of Agency (2d), § 219 25

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Plaintiffs Barbara Grant, Rita Roberts and Steven Winfield ("Plaintiffs") respectfully submit this Memorandum of Law in Opposition to the Motion to Dismiss of all Defendants other than Fidelity Trust Management Company. All Defendants have moved to dismiss the Consolidated ERISA Complaint ("Complaint"). Plaintiffs are responding by separate Memorandum to the Fidelity Trust Management Company's Motion to Dismiss.

I. INTRODUCTION

Plaintiffs bring this action for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") to recover losses suffered by the AOL Time Warner Savings Plan ("Savings Plan"), the AOL Time Warner Thrift Plan ("Thrift Plan") and the TWC Savings Plan ("TWC Plan") (collectively the "Plans") which contain the retirement savings of the employees of AOL Time Warner, Inc. ("AOLTW") and Time Warner Entertainment Company, L.P. ("TWE"). The Plans, and concomitantly their Participants, lost massive amounts as a result of the breaches of fiduciary duty by the Plans' fiduciaries.

Plaintiffs' Complaint is the paradigmatic example of an ERISA breach of fiduciary duty case. The principal object of ERISA is to protect plan participants and beneficiaries. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983). The statute's goal is to safeguard employee retirement savings by requiring full disclosure of financial information and to ensure the prudent management of retirement plan assets. 29 U.S.C. § 1001(b).[1] To fulfill this goal, ERISA requires that retirement plans be managed by fiduciaries, whose duties to retirement plans and

[1] "It is hereby declared to be the policy of this chapter [ERISA] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

their participants are among the highest known to law. Donovan v. Bierwirth, 538 F. Supp. 463, 468 (E.D.N.Y. 1981).

All of the Defendants in this case were fiduciaries. These Defendants breached their fiduciary duties by offering the AOLTW Stock Fund ("Company Stock Fund" or "Fund") as an investment option under the Plans and by permitting the Plans to purchase and hold shares in the Fund when it was imprudent to do so. The Complaint sets forth many facts of which any fiduciary should have been aware in the exercise of normal prudence and diligence which rendered the Fund an imprudent retirement investment during the proposed Class Period (September 30, 2000 to the Present). See Complaint, ¶¶ 1, 3, 105-140. Defendants are further alleged to have compounded their breach of fiduciary duty by negligently failing to disclose and negligently misrepresenting information that was essential to Participants' decisions to direct the Plans to invest in the Fund. Defendants also breached their duties to appoint, monitor and inform other fiduciaries to ensure that all fiduciaries had the knowledge, experience and information necessary to protect the Plans and the Participants. Finally, rather than act in the best interests of the Plans and the Participants as required under ERISA, Defendants put their interests first and sold substantial amounts of their own AOLTW stock while leaving the Plans and the Participants "holding the bag." Under 29 U.S.C. § 1109, Defendants are personally liable for all of the losses caused by these breaches.

Defendants argue that no one was a fiduciary with respect to the wrongs alleged or, alternatively, if one was, that no one breached any fiduciary duties under ERISA.[2] Defendants do

---

[2] For obvious reasons, Defendants do not challenge the claim that investment of the Plans' assets in the Company Stock Fund was imprudent. As the Complaint alleges, the Company Stock Fund was a high risk and imprudent investment that was not appropriate for the Plans.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

not contest that the AOLTW Board of Directors had the fiduciary duty (1) to appoint other fiduciaries with the knowledge, skill and expertise necessary to manage Plan assets; (2) to monitor those fiduciaries; and (3) to provide necessary information to those fiduciaries. They also do not contest the claim that the Administrative and Investment Committees were responsible for Plan administration and Plan investments. However, according to Defendants, none of these fiduciaries had any responsibility to ensure that Plan assets were properly invested, or that representations to Participants concerning Plan investments were complete and accurate. These positions are diametrically opposed.

On the one hand, Defendants argue that the Board is not liable because its fiduciary duty was limited to the appointment of the Investment and Administrative Committees and that only the Administrative and Investment Committees were Plan fiduciaries responsible for the prudent management of Plan assets. On the other hand, Defendants argue that the Committees are not liable because they should not have been aware of the information that Plaintiffs allege would have informed Defendants that the Company Stock Fund was an imprudent investment and that the Committees should not have been able to determine the accuracy of communications to Participants concerning Plan investments. These arguments cannot be reconciled in that, under ERISA, someone is charged with responsibility. Either the Board failed to appoint fiduciaries with the knowledge, skill and experience necessary to manage Plan assets prudently and failed to provide those fiduciaries with the information necessary to do their jobs, in which case the Board is liable for breaching its fiduciary duty to appoint, monitor and provide information to the Plan fiduciaries, <u>or</u> the Committees had adequate knowledge, skill and experience, but failed to manage the investment of Plan assets prudently and failed to disclose accurate information to

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Participants. Defendants cannot have it both ways. Under ERISA, someone is responsible for "minding the store."

Second, Defendants try to hide behind the strict language of the Plans in arguing that no one - and particularly not AOLTW and TWE - is responsible for anything. In making these arguments, Defendants ignore the fact that the definition of fiduciary is based on conduct, not on the specific, self-serving language of the Plans. In this case, Defendants are alleged to have engaged in conduct that makes them fiduciaries, regardless of the strict language of the Plans.

Third, Defendant try to hide behind the securities laws - contending that this case is nothing more than a disguised securities fraud case. Defendants are wrong, and their argument reflects their inability to accept their responsibilities under ERISA. This case involves factual and legal issues which are substantially different from those raised in the AOLTW securities fraud case. Count I of the Complaint alleges that Defendants improperly offered the Company Stock Fund as an investment option under the Plans and imprudently invested Plan assets in that Fund. Consequently, this claim includes not only imprudent purchases, but also imprudent holdings. More to the point, these claims have nothing to do with a claim of fraud in connection with the purchase or sale of securities. The same is true as to Counts III and IV, which allege breach of the duty to appoint and monitor and breach of the duty of loyalty. Even as to Count II, while some–but only some– of Defendants' misrepresentations might also be a basis for a securities fraud claim, that fact does not cancel out duties owed under ERISA; just as a criminal may be liable for both theft and income tax evasion, Defendants can be liable for violating both

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

ERISA and the securities laws.[3] The fact that investment in the Company Stock Fund was imprudent in part because of conduct that may also subject some Defendants to claims for securities fraud is of no consequence. Under ERISA, Defendants are responsible to make the Plans and Participants whole for losses caused by their breaches of fiduciary duties whether or not they are also liable for securities fraud. Indeed, Defendants' arguments were raised and recently rejected in In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745 (S.D.N.Y June 17, 2003) in which the court expressly stated that the potential liability for violations of the securities laws "cannot shield [a defendant] from suit over his alleged failure to perform his quite separate and independent ERISA obligations." See also, Stein v. Smith, 2003 WL 21513207 * 5 (D. Mass. July 3, 2003).

Defendants cannot reasonably dispute the fact that Plaintiffs have more than alleged a short, plain statement of their claims, which is all that is required under Rule 8. Therefore, the Motion to Dismiss should be denied.

II. STATEMENT OF FACTS

The employee benefit plans in this case are typical 401(k) retirement plans, the purpose of which is to provide income for AOLTW employees when they retire.[4] As required under ERISA, the Plans are managed by plan fiduciaries who are alleged to be the Defendants identified in the

---

[3] Moreover, under the terms of the Plans, neither the Participants nor the Plans invested directly in AOLTW stock. Rather, the Participants held an interest in the Plans which held an interest in a Master Trust which held an interest in AOLTW stock. As a result, the Participants may have a "direct, substantial, legally protectable interest" in the securities fraud case. In re Waste Management Inc. Sec. Litig., H-99-2183 (S.D.Tex. Apr. 29, 2002), attached to the Declaration of Edwin J. Mills, filed herewith ("Mills Declaration") as Exhibit A (denying plan participant's motion to intervene); Employee Benefit Plans, Securities Act of 1933 Release No. 33-6188, 19 S.E.C. Docket 465 at 466, 1980 WL 29482 at *2 (describing types of "securities" unique to employee benefit plans).

[4] The term "401(k)" refers to a provision of the Tax Code and has no real meaning under ERISA. However, since "401(k)" is a familiar term, Plaintiff uses it to mean a self-directed individual account plan in the ERISA context.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Complaint. Complaint, ¶¶ 10-56, 75-76, 78-87. These fiduciaries are responsible for administering the Plans and managing Plan assets and are required to discharge their "duties with respect to the Plan solely in the interest of the Participants and their Beneficiaries . . . with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." Savings Plan, § 14.14 (a); Thrift Plan § 14.14(a); TWC Plan, § 12.4.

AOLTW is the Sponsor of the Savings Plan and the Thrift Plan and TWE is the sponsor of the TWC Plan. Under the Savings Plan,[5] the Savings Plan Administrative Committee serves as the Plan Administrator within the meaning of ERISA and is comprised of committee members who are appointed by and serve at the pleasure of AOLTW's Board of Directors. Savings Plan §§ 14.1, 14.4. The Savings Plan Administrative Committee is granted all "powers necessary to administer the Plan except to the extent any such powers are vested in any other Fiduciary by the Plan or by the Administrative Committee." Savings Plan, § 14.4. Similarly, the Savings Plan provides for an Investment Committee comprised of members that are appointed by and who serve at the pleasure of AOLTW's Board of Directors. The Savings Plan Investment Committee is responsible for selecting "Investment Managers and recommending to the Board such changes in the Trustee as it shall deem necessary . . . ." Id. at § 14.11. However, the Board of Directors of AOLTW retains "authority to establish the overall investment policy" for the Savings Plan.

[5] Defendants concede that the Thrift Plan "is identical to the Savings Plan in all relevant respects." Defendants' Memorandum of Law In Support of Motion To Dismiss ("Def. Br.") at 9. Consequently, Plaintiffs discuss the relevant Savings Plan provisions.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Id. [6]

Under all of the Plans, employees are generally permitted to contribute up to 16% of their eligible pre and post-tax earnings for retirement savings. Complaint, ¶ 68. The Company then provides a matching contribution based on a percentage of the employee's contribution depending on the particular Plan. Complaint, ¶ 70. These contributions become part of the Trust Fund administered by the Trustee for the Plans, and are "held and disbursed by the Trustee in accordance with the provisions of the Plan and Trust Agreement." Savings Plan, § 6.1. Fidelity Management Trust Company ("Fidelity") has served as the trustee for the Plans at all times relevant to this case. Complaint, ¶ 57.

The Trust Fund is "segregated into separate Investment Funds, each to be held for the exclusive benefit of participants and former Participants." Savings Plan, § 6.2. However, Participants do not own the underlying assets in these Investment Funds. Rather, "Participant's proportional interest in the Investment Funds shall be measured in units of participation, rather than shares." Trust Agreement, § 4(e). With respect to the Investment Funds, the Savings Plan provides that "the investment power and authority shall be held by the Trustee to the extent provided in the Trust Agreement" Savings Plan, § 14.11. In turn, the Trust Agreement provides that the Investment Committee chooses the Investment Funds and directs the Trustee as to "the Investment Funds in which Participants may invest . . ." Trust Agreement, § 4(a)(b) (emphasis added). Plan fiduciaries therefore have discretion to determine which Investment Funds are

[6] In addition, AOLTW indemnifies "each director, officer, or employee of the Company and member of the Committees" for liability under ERISA "whether civil, criminal, administrative or investigative in nature or otherwise in which such person may be involved by reason of the fact that he is or was serving" the Plans in any capacity. Savings Plan, § 14.15

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

offered or open to Participants' investments. Id.

Among the Investment Funds made available to Participants under the Plans is the Company Stock Fund whose investment objective is to invest primarily in AOLTW stock. Savings Plan, § 6.2. However, notwithstanding its investment objective, each of the Investment Funds, including the Company Stock Fund, "may make such other investments or retain balances in interest-bearing cash equivalents pending investment for the funds . . . ." Savings Plan, § 6.2; Trust Agreement, 4(e). Indeed, the Company Stock Fund consists of employer securities and short-term investments, and includes a cash target agreed to by AOLTW and Trustee "in a separate letter executed by the Trustee and the Company from time to time." Trust Agreement, 4(e). Under the terms of the Plan, all of the Company matching contributions are required to be deposited into the AOLTW Stock Fund. The TWC Plan differs in that employer matching contributions were made in cash and invested by the Trustee in accordance with Participant's investment election. TWC Plan, § 4.4.

The TWC Plan is very similar to the Savings Plan and Thrift Plan. Like those Plans, the TWC Plan is managed by the TWC Administrative Committee and the TWC Investment Committee. TWC Plan, §§ 11.1, 15.2. These Committees are comprised of committee members that are appointed and serve at the pleasure of TWE. TWC Plan, §§ 11.1, 15.2. Under the TWC Plan, "[i]nvestment guidelines and investment alternatives shall be determined by the Investment Committee." Id. at § 15.2. The Investment Committee has full authority "to determine the investment policy for the Plan, to select, monitor, retain, or eliminate any investment alternative available under the Plan, and to perform any acts necessary to exercise its authority." Id.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

III. ARGUMENT

A. PLAINTIFFS NEED ONLY ALLEGE A SHORT PLAIN STATEMENT OF THEIR CLAIMS

The Complaint gives Defendants adequate notice of Plaintiffs' claims. Fed. R. of Civ. Proc. 8 only requires a short and plain statement of the claim showing that the pleader is entitled to relief that provides the defendant with fair notice of the claim against him. A complaint need not allege specific facts to set forth a *prima facie* case. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002).[7] Conclusory allegations are sufficient. Swierkiewicz, 534 U.S. at 514-515; Toussie v. Powell, 323 F.3d 178, 185 n.3 (2d Cir. 2003) (recognizing that previous rule requiring more than conclusory allegations may no longer be valid in light of Swierkiewicz).

The Second Circuit has long interpreted the pleading standard strongly in favor of plaintiffs, reserving dismissal for failure to comply with Fed. R. Civ. P. 8 "for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." Simmons v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995) (citation and quotation omitted); see also Richstone v. Chubb Colonial Life Ins., 1999 WL 287332, at *2 (S.D.N.Y. May 7, 1999) (applying the Simmons "unintelligible" standard to ERISA claim).[8]

---

[7] The Supreme Court stated that Rule 8(a)(2) provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . .Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts." Swierkiewicz, 534 U.S. at 512-513 (citations omitted).

[8] There is no basis to apply a higher Rule 9(b) standard to this ERISA breach of fiduciary duty claim. Concha v. London, 62 F.3d 1493, 1503 (9th Cir. 1995) ("[T]he circumstances surrounding alleged breaches of fiduciary duty may frequently defy particularized identification at the pleading stage. Where a fiduciary exercises discretionary control over a plan, and assumes the responsibilities that this control entails, the victim of his misconduct often will not, at the time he files the complaint be in a position to describe with particularity the events

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Only those complaints which on their face show a bar to relief may be dismissed under Rule 12(b)(6). See, e.g., Oliveria v. Frito-Lay, Inc., 251 F.3d 56, 63-64 (2d Cir. 2001). Indeed, a Rule 12(b)(6) dismissal is unwarranted even if the district court is of the opinion that a plaintiff is unlikely to prevail on the merits. See Sheuer v. Rhodes, 416 U.S. 232, 236 (1974); Taylor v. Vermont Dept. of Educ., 313 F.3d 768, 788 (2d Cir. 2002); Grant v. Wallingford Bd. of Educ, 69 F.3d 669, 673 (2d Cir. 1995) ("it may appear on the face of the pleading that a recovery is very remote but that is not the test") (citations omitted).

The Rule 8 standard clearly applies to this ERISA action. See WorldCom., 263 F. Supp. 2d at 759-60 ("Although the Complaint's allegations against Ebbers do little more than track the statutory definition of a fiduciary, similar allegations have been found sufficient to satisfy the Rule 8 pleading standard."; "Miller contends that the Complaint fails to state a claim even as to her because it pleads boilerplate and conclusory allegations without pleading facts to support those allegations. 'Rule 8(a)'s simplified pleading standard' applies here"), *citing* Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 241 (2d Cir. 2002). Indeed, courts within this district have upheld allegations which merely track the statutory language of ERISA. Id. Plaintiffs' allegations are substantially more detailed and clearly satisfy the pleading requirements.

Defendants' very detailed arguments demonstrate that they have adequate notice of Plaintiffs' claims. Nevertheless, Defendants quote two non-ERISA cases decided before

---

constituting the alleged misconduct. These facts will frequently be in the exclusive possession of the breaching fiduciary. Even in cases where fraud is alleged, we relax pleading requirements when the relevant facts are known only to the defendant"); *accord* Nelson v. IPALCO Enter., Inc., 2003 WL 402253 *4 (S.D. Ind. Feb. 13, 2003) ("the 'wrongful promotion' claim asserted in this [breach of ERISA fiduciary duty] case does not necessarily sound in fraud. It concerns instead alleged breach of duties of loyalty and prudence, as well as alleged failures to disclose information to plan participants and beneficiaries. Such allegations are not subject to Rule 9(b)").

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Swierkiewicz for the proposition that conclusory allegations are somehow insufficient: Papasan v. Allain, 478 U.S. 265 (1986) (discrimination in public school funding), and In re Am. Express Co. Shareholder Litig., 39 F. 3d 395 (2d Cir. 1994) (shareholder RICO claim). Def. Br. at 12-13. These cases are not relevant to the pleading standard for an ERISA claim and, to the extent that they are, they have been overruled by Swierkiewicz. E.g., Smith, 291 F.3d at 241 (finding insurance company was an ERISA fiduciary when complaint alleged only that insurer "exercised discretionary authority and control with respect to administration of the Fund and management and disposition of the Fund's assets").

In this case, Plaintiffs have gone far beyond the requirement that they merely give notice of their claims under Rule 8. The Complaint contains both the required allegations that each Defendant is a fiduciary, plus substantial factual allegations concerning the fiduciary status of each defendant: AOL Time Warner, Inc. ("AOLTW"), Complaint, ¶¶ 78, 83, 92, 95-102; Time Warner Entertainment Company, L.P. ("TWE"), Complaint, ¶¶ 78, 83, 102; Administrative Committee Defendants, Complaint, ¶¶ 78, 80, 83-85, 95-102; Investment Committee Defendants, Complaint, ¶¶ 78, 80, 86, 102; and the Board of Directors Defendants, Complaint, ¶¶ 78, 87, 95-102. Likewise, Plaintiffs plead not only the required allegations that each Defendant was negligent, but also substantial factual allegations concerning their negligent misrepresentations and negligent omissions: Complaint, ¶¶ 3b, 114-125 (pre-merger misrepresentations); Complaint, ¶¶ 110-136, 156-163 (misrepresentations concerning online advertising sales); Complaint, ¶¶ 127-136 (post-merger misrepresentations); Complaint, ¶¶ 164-167 (misrepresentations in SEC filings); Complaint, ¶ 171 (misrepresentations concerning the risk characteristics of the Stock Fund); Complaint, ¶ 172 (misrepresentations in correspondence to Participants). Moreover,

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Plaintiffs plead not only the required allegations that investing in the AOL Stock Fund was imprudent, but also substantial factual allegations demonstrating why that was so the case. Complaint, ¶¶ 3a, 103-104, 105-109 (AOL and Time Warner's misguided merger); Complaint, ¶¶ 110-136 (collapse of online advertising revenue).

In seeking dismissal, Defendants do not contend that they do not have notice of the claims against them. Rather, Defendants mischaracterize both the clear terms of ERISA and the plain allegations of the Complaint. The factual allegations, which Defendants cannot refute and which are presumed to be true, clearly satisfy the appropriate pleading standard and easily withstand Defendants' challenge. Defendants' motion should be denied.

B. DEFENDANTS WERE FIDUCIARIES OF THE PLANS

The Complaint alleges that Defendants were fiduciaries because they were identified as fiduciaries in the Plan documents and/or because they performed fiduciary functions. ERISA recognizes both "named" fiduciaries (a person specifically given responsibilities by the plan document) and "*de facto*" fiduciaries (an entity performing a fiduciary function, though not named by the plan). See Def. Br. at 13 ("A person may be a fiduciary by virtue of being named as such or by acting in a fiduciary capacity in regard to an ERISA plan."). Accordingly, a person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i) and (iii); 29 U.S.C. § 1002 (a)(21)(A)(i) and (iii). The term "fiduciary" is liberally construed in keeping with the remedial purpose of ERISA. LoPresti v. Terwilliger, 126 F.3d 34, 40 (2d Cir. 1997) ("Congress

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

intended ERISA's definition of fiduciary to be broadly construed"). "'Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives,' and is defined 'in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties - and to damages - under § 409(a).'" In re Enron Corp. Sec., Derivative & "ERISA" Litig., 2003 WL 22245394, * 7; – F. Supp. 2d – (S.D.Tex Sept. 30, 2003)[9] *quoting* Arizona State Carpenters Pension Trust Fund v. Citibank (Ariz.), 125 F.3d 715, 720 (9th Cir. 1997), *citing* John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96 (1993), and *quoting* Mertens v. Hewitt Assoc., 508 U.S. 248, 262 (1993).

Thus, fiduciary status is defined not only by reference to particular titles, but also by the authority which a particular person actually exercises over an employee benefit plan. Id. ("ERISA, however, defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan"); LoPresti, 126 F.3d at 40 ("Unlike the common law definition under which fiduciary status is determined by virtue of the position a person holds, ERISA's definition is functional") (internal citations omitted); WorldCom, 263 F. Supp. 2d at 757 ("'ERISA defines a fiduciary 'in functional terms of control and authority over the plan,'" *quoting* Mertens, 508 U.S. at 262; DOL Enron Br. at 3-5.[10] "Fiduciary status is to be determined

---

[9] Enron provides an excellent and detailed overview and analysis of the law concerning almost all of the issues raised in this case. 2003 WL 22245394 **6-63.

[10] "DOL Enron Br." refers to the Amended Brief of the Secretary of Labor as *Amicus Curiae* Opposing the Motions to Dismiss filed in Enron. Civil Action No. H-01-3913. "DOL Williams Br." (cited *infra*) refers to the Amended Brief of the Secretary of Labor as Amicus Curiae Supporting the Plaintiffs' Motion for Reconsideration filed in In re Williams Company ERISA Litigation, 02-CV-153-H(M), pending in the United States District Court for the Northern District of Oklahoma. Copies of these briefs are attached to the Mills Declaration at Exhibit B and Exhibit C, respectively.

As the Department of Labor is the agency charged with administrative responsibility for ERISA, deference should be given to its interpretation of matters within its regulatory limit. See Enron , 2003 WL 22245394 at *45 (deferring to DOL position expressed in *amicus* brief, "The Supreme Court has held that when an agency, authorized by statute to interpret and enforce that statute, construes the statute that it administers, a court must defer to that

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

by looking at the *actual* authority or power demonstrated, as well as the formal title and duties of the parties at issue." Enron, at *7; *quoting* Landry v. Air Line Pilots Ass'n Inter. AFL-CIO, 901 F.2d 404, 418 (5th Cir. 1990).

Critically, although a person managing a plan is a fiduciary to the extent he has discretionary authority, a person with any authority or control over plan assets is automatically an ERISA fiduciary regardless of whether the power was discretionary. See Enron, at * 7 ("where the person exercises any authority or control over the management or disposition of the assets of the plan, discretion is not required of a fiduciary"), *citing* Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assoc., Inc., 237 F.3d 270, 273 (3d Cir.2001), *quoting* IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415, 1421 (9th Cir.1997) ("any control over disposition of plan money makes the person who has control a fiduciary"). Despite this key distinction, Defendants erroneously argue that AOLTW, TWE and the AOLTW Board of Directors did not "exercise discretionary authority or control over the Plans' management, disposition of assets or administration." Def. Br. at 14, 16 (emphasis added). Defendants' argument misses the point because Defendants had control or authority over Plan assets and whether that power was "discretionary" is not relevant.

The Complaint alleges that all of the Defendants were fiduciaries because they were named fiduciaries under the Plan documents and/or because they engaged in fiduciary conduct with respect to the Plans and the Participants. Defendants admit that the Administrative

---

interpretation if Congress has not spoken directly on the matter and if the agency's interpretation 'is based on a permissible construction of the statute.'"), *quoting* Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 843 (1984); The Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1972 (2003) (adopting DOL policy on ERISA issue, "Deference is due that view"); Schwartz v. Gordon,761 F.2d 864, 686 (2d. Cir. 1985) (according "considerable deference" to DOL's interpretation of ERISA).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Committee and Investment Committee Defendants were Plan fiduciaries. However, Defendants ask the court to make a finding of fact that defendants AOLTW, TWE, the Board of Director Defendants and two Senior Officer Defendants could not be fiduciaries. Such findings of fact are inappropriate for this stage of the case. In re Fruehauf Trailer Corp., 250 B.R. 168, 204 (D.Del 2000) ("Determining whether someone is a fiduciary is a very fact specific inquiry which is difficult to solve on a motion to dismiss."). Defendants' Motion should be denied because the Complaint alleges that all Defendants were fiduciaries of the Plans - either as "named fiduciaries" or "*de facto* fiduciaries."

In response to the clear allegations in the Complaint, Defendants make "fiduciary" arguments that are nothing more than a "shell game" intended to shuffle fiduciary responsibility between different entities so that in the end, nobody is responsible. Because the internal workings of the Plans' administration are within the exclusive possession of Defendants, that effort should fail. Specifically, the Rankin court noted that when:

> Plan Documents imbue all of the Defendants with some degree of authority ...[T]he manner in which each Defendant...operated is [at the motion to dismiss stage of the case] something of a black box. To expect a Plaintiff to be able to turn on the light and point to the particular individuals who exercised decision making authority is simply too much to require at this stage... To accept Defendants' positions that they are not fiduciaries would mean that there was no one responsible for discretionary decision making. Their position is reminiscent of the "old shell game."

Rankin v. Rots, 2003 WL 21995176, *70 (E.D. Mich. Aug. 20, 2003). Defendants would have the Court look only at the Plan Documents and ignore the actual administration of the Plan. However, that analysis would ignore ERISA's functional definition of *de facto* fiduciary.

Because the determination of fiduciary status is so dependant on the specific actions of each Defendant - regardless of the definitions in the Plan Documents - resolution of whether or

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

not a defendant was a Plan fiduciary is particularly inappropriate for resolution on a motion to dismiss. See Lalonde v. Textron, Inc., 270 F. Supp. 2d 272, 277 n.4 (D.R.I. 2003) ("The fiduciary status of an entity in the ERISA context is highly fact specific. As a result, this Court cannot reach this fact intensive issue on a motion to dismiss"), *citing* Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Assocs., Inc., 237 F.3d 270, 275 (3d Cir.2001) (fiduciary status is mixed question of law and fact), and Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1461 (9th Cir.1995) (fiduciary status is "based on questions of fact regarding discretionary duty and control that must be determined at trial").

1. AOLTW Was A Fiduciary of the Plans

AOLTW has more than ample notice of the claim that it was a fiduciary under ERISA's functional definition of fiduciary. Plaintiffs allege that AOLTW performed fiduciary functions when it (1) determined the amount of Plan assets to be invested in AOLTW stock; (2) communicated with Participants directly concerning the Stock Fund and its expected performance, Complaint, ¶ 102; (3) made fiduciary representations to Participants in its Form S-8 Registration Statement and SEC filings that were a part of and incorporated into the Summary Plan Description ("SPD") and distributed to all Participants, Complaint, ¶¶ 95-101; and (4) exercised control over the Plans through its employees and other agents who were named fiduciaries under the Plans, Complaint, ¶ 92. Defendants do not directly challenge Plaintiffs' allegation that AOLTW was a *de facto* fiduciary. Rather, they erroneously argue that AOLTW can avoid its responsibilities because the doctrine of respondeat superior should not apply. However, this is a "red herring." Whether or not the respondeat superior doctrine applies (which

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

it does) will not change the fact that AOLTW meets ERISA's definition of a *de facto* fiduciary.[11]

a. AOLTW Controlled Plan Investments In AOLTW Stock

AOLTW was a fiduciary because of its duties under the Time Warner Defined Contribution Plans Master Trust ("Trust"). Section 4(e) of the Trust establishes the composition of the Company Stock Fund, requiring that a specified portion of Fund assets be invested in cash and the rest be invested in AOLTW stock. After establishing the Company Stock Fund, AOLTW maintained an active role in the management of the Fund. For instance, the Trust states, "A cash target range shall be maintained in the Time Warner Inc. Stock Fund. Such target range shall be set forth in a separate letter executed by the Trustee and the Company from time to time." Id. In other words, AOLTW determined the proportion of Fund assets to be invested in AOLTW stock. AOLTW could have assigned a larger percentage of Fund assets to cash and thus liquidated the Plan holdings in AOLTW stock when those investments became imprudent. This was a fiduciary responsibility. See Enron, 2003 WL 22245394 at **7-8, 114 (power over percentage of ESOP plan assets invested in company stock "provides the plan fiduciaries with considerable discretion;" any authority over plan assets or investments satisfies *de facto* fiduciary definition).

b. AOLTW Made Fiduciary Communications to Participants

Plaintiffs also allege that AOLTW was a fiduciary because it communicated Plan benefit information directly to Participants. Complaint, ¶ 172. For example, on April 1, 2002, AOLTW sent all "AOL Time Warner Savings and Thrift Plan Participants" a letter advising them of their ability to direct the Plans to transfer investments out of the Stock Fund. Complaint, ¶ 81. This

---

[11] As set forth below at pp. 23-28 *infra.*, AOLTW is also responsible for its employee's actions under the doctrine of *respondeat superior* separately and independently from its status as a *de facto* fiduciary.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

letter relates to present and future Plan benefits - specifically the investment and management of Plan assets which determine the amount of such benefits. These communications are fiduciary acts and bestow fiduciary status on the communicator. Varity Corp. v. Howe, 516 U.S. 589, 502 (1996) ("Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose," and, therefore, a fiduciary representation); see Enron, 2003 WL 22245394 at **20-21 (representations made at company-wide employee meetings found similar to Varity representations). The letter concludes by stating, "The information contained herein has been provided by AOL Time Warner Inc., and is the sole responsibility of AOL Time Warner Inc." More to the point, Plaintiffs allege that AOLTW was a *de facto* Plan fiduciary as a result of these types of fiduciary communications. While the Complaint may not list each such communication, such specificity is not required at the pleading stage under Rule 8. Defendants have more than ample notice of this claim.

c. AOLTW Was a Fiduciary Because its Representations Were Incorporated into Plan Communications

AOLTW was also a fiduciary because it made representations which were part of Plan documents used by Participants in making decisions concerning Plan investments in the Stock Fund. These representations were contained in the SPD and Form S-8 Registration Statements distributed to Participants in connection with Plan administration. Included in these fiduciary representations were AOLTW's SEC filings which were incorporated by reference. Specifically, the Complaint alleges that AOLTW was responsible for these representations that were intended to be used by Participants to understand Plan benefits and to make informed decisions in regard

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

to Plan participation. Complaint, ¶¶ 95-101. Based on these allegations, AOLTW has ample notice of Plaintiffs' claim.

An SPD is a fiduciary representation because it is the medium through which material plan information is deemed to be conveyed to plan participants. 29 U.S.C. § 1022(a); see McCauley v. IBM, 165 F.3d 1038, 1046 (6th Cir. 1999) (statements in SPD subject to fiduciary duties); Becher v. Long Island Lighting, 164 F.R.D. 144, 150 (E.D.N.Y. 1996) (certifying breach of fiduciary duty class in case involving allegations of misrepresentations made in summary plan descriptions).[12] Because it is the principal vehicle for delivering plan benefits information, the SPD is a *per se* fiduciary communication. See, e.g., Varity, 516 U.S. at 532 n.10 (1996) (using the SPD as an example of a fiduciary communication mandated by ERISA).

The same is true with respect to the Form S-8 Registration Statement. The purpose of the Form S-8 was to provide Participants with information concerning the likely risks and rewards of the Company Stock Fund as an investment, thereby enabling Participants to make informed investment decisions and safeguard their future benefits. Indeed, the instructions to Form S-8 expressly state that the purpose of Form S-8 is to convey "material information regarding the plan and its operations that will enable participants to make an informed decision regarding investment in the plan." Complaint ¶ 105; SEC 1398 (8-01), Item 1, p. 6 (Exhibit D to Mills Declaration). This language is materially identical to the definition of a fiduciary communication set by the Supreme Court. Varity, 516 U.S. at 502 ("[c]onveying information about the likely

[12] "A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a) (emphasis added).

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation.")

Varity held that a person or entity acquires status as a functional fiduciary by engaging in communications that convey information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation. 516 U.S. at 502. That was exactly what the SPD and Form S-8 were intended to communicate; i.e., information concerning the investment of Plan assets in the Company Stock Fund and the resulting future of Plan benefits. Accordingly, both the SPD and the Form S-8 were fiduciary representations, and AOLTW performed a fiduciary function when making those communications.

The allegations in the Complaint are factually distinguishable from cases where statements in SEC filings were not found to have been made in a fiduciary capacity. Defendants rely primarily on WorldCom, where the plaintiffs alleged that such communications alone transformed the signatory into an ERISA fiduciary. The Court found that merely signing an SEC filing does not make someone a fiduciary. However, the Court also held that a person who was already a fiduciary, can be liable under ERISA for misrepresentations in SEC filings that are incorporated into an SPD. Defendants also cite Stein, 270 F. Supp. 2d 157, In re Williams Cos. ERISA Litig., 271 F. Supp. 2d 1328 (N.D. Okla. 2003), and Crowley v. Corning Inc., 234 F. Supp. 2d (W.D.N.Y. 2002), as additional support. However, none of these cases considered the instructions to Form S-8 which demonstrate that the Form S-8 signed and issued by AOLTW is a fiduciary representation by AOLTW.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

d. AOLTW Was a *De Facto* Fiduciary Because it Exercised Total Control Over the Named Fiduciaries

Defendants have notice that the Complaint alleges AOLTW exercised ultimate control over all of the fiduciary functions related to the Plan. Complaint, ¶ 93. For example, the Complaint alleges that AOLTW's officers and employees managed and administered the Plan as part of their employment by AOLTW. Consequently, AOLTW is a fiduciary in that a person who controls a named fiduciary should be recognized as a *de facto* fiduciary regardless of the legal fiction employed to limit the controlling person's liability. See Leigh v. Engel, 727 F.2d 113, 135 (7th Cir. 1984) (defendants "could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust"); Enron, 2003 WL 22245394 at *25 (corporation may exercise authority and control of plan through its corporate officers).

2. TWE Was A Named Fiduciary Of The TWC Plan

TWE was a named fiduciary under the TWC Plan and was also responsible for appointing, monitoring and removing the Trustee and the members of the Administrative and Investment Committee. TWC Plan, §§ 1.83, 11.1, 15.2; Def. Br. at 14 n.11. Defendants admit that the exercise of this authority was a fiduciary act. Id.[13]

---

[13] It is well-settled that the power to appoint fiduciaries makes the appointing party a fiduciary. See Enron, 2003 WL 22245394 at * 14 ("A person or entity that has the power to appoint, retain and/or remove a plan fiduciary from his position has discretionary authority or control over the management or administration of a plan and is a fiduciary to the extent that he or it exercises that power."), *citing* Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir.1996) ("the power ... to appoint, retain and remove plan fiduciaries constitutes 'discretionary authority' over the management or administration of a plan within the meaning of § 1002(21)(A)"); Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir.1988) ("Tosco is a fiduciary within the meaning of ERISA ... because it appoints and removes the members of the administrative committee that administers the pension plan."); American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc. of the U.S., 841 F.2d 658, 665 (5th Cir.1988) ("Liability for failure to adequately train and supervise an ERISA fiduciary arises where the person exercising supervisory authority is in a position to appoint or remove plan administrators and monitor their activities."); Liss v. Smith, 991 F. Supp. 278, 310, 311 (S.D.N.Y.1998) ("It is by now well-established that the

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Defendants argue that the Complaint has not alleged a claim against TWE with sufficient detail. However, the fact that Defendants cite TWE's fiduciary responsibility is demonstrative of Defendants' notice of Plaintiffs' claim. Nothing further is required under Rule 8.

Defendants' reliance on Williams is misplaced. First, unlike Williams, the Complaint includes a specific claim that fiduciary duties were breached by appointing unqualified committee members and failing to convey information the committee members needed to perform their fiduciary obligations. Complaint, ¶¶ 173-174. Second, to the extent that Williams requires more than Plaintiffs' have provided, the Department of Labor has rejected Williams' position on this point. DOL Williams Br. at 2-10 (Exhibit C to Mills Declaration). However, to the extent that the Court finds that this claim against TWE is not properly pled in sufficient detail, Plaintiffs request leave to amend.

3. Defendants Bogart And Bressler Were *De Facto* Fiduciaries

Bogart and Bressler communicated with employees concerning future plan benefits. Contrary to Defendants' claim, both of these defendants signed the Form S-8 Registration Statement for the Plan in connection with the merger of AOL and Time Warner. (Exhibit E to Mills Declaration at 8). Accordingly, as set forth above in regard to AOLTW, Bogart and Bressler were fiduciaries to the extent that issuing this Plan benefits communication was a fiduciary function. See pp. 18 to 20, *supra*.

4. The Board Defendants Were Named Fiduciaries of the Savings Plan and Thrift Plan

The members of the AOLTW Board of Directors were named fiduciaries of the Savings

---

power to appoint plan trustees confers fiduciary status"; "[t]he duty to monitor carries with it, of course, the duty to take action upon discovery that the appointed fiduciaries are not performing properly").

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Plan and the Thrift Plan. The Director Defendants were responsible for the Plans' investments and for appointing the committee members who exercised day to day control over the Plan.[14] Defendants do not argue to the contrary; they only argue that the Board Defendants were not fiduciaries of the TWC Plan.

A cursory review of the Plan documents themselves establishes the Board's fiduciary status. The Board of Directors has the "the authority to establish the overall investment policy for the Plan." Savings Plan, § 14.11; Thrift Plan, § 14.11; see also Complaint, at ¶ 87. The Board of Directors had the power to appoint and remove the members of the Administrative and Investment Committees. Savings Plan, § 14.1, 14.8; Thrift Plan § 14.1, 14.8; see also Complaint, ¶ 87. The Board also had the power to appoint and remove the Plans' Trustee. Id. This power alone confers fiduciary status on the Board. See, e.g., Liss v. Smith, 991 F. Supp. 278, 310-311 (S.D.N.Y. 1998) ("The duty to monitor carries with it, of course, the duty to take action upon discovery that the appointed fiduciaries are not performing properly"). Moreover, the Board was charged with the responsibility of establishing "the overall investment policy for the Plans." Plan, § 14.11. Thus the Board of Directors were fiduciaries of the Savings Plan and Thrift Plan.

C. RESPONDEAT SUPERIOR APPLIES TO ERISA

Plaintiffs allege that under the doctrine of "respondeat superior," AOLTW is responsible for the breaches of fiduciary duty by the Administrative Committees, the Investment Committees and the Board of Directors because these "entities" were actually comprised of AOLTW

---

[14] "The Board shall have the authority to establish overall investment policy for the Plan." Savings Plan, §§ 1.1, 14.8; Def. Br. at 7-8. The Board appointed the members of the Administrative Committee and the Investment Committee, and could remove them at any time. Savings Plan, §§ 14.1, 14.8; Def. Br. at 8; Liss v. Smith, 991 F. Supp. 278, 310-311 (S.D.N.Y. 1998) ("It is by now well-established that the power to appoint plan trustees confers fiduciary status"; "The power to appoint and remove trustees carries with it the concomitant duty to monitor those trustees' performance.")

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

employees or agents acting within the scope of their employment or agency with, and under the direction of AOLTW. Complaint, ¶ 92. Under the doctrine of respondeat superior, employers are subject to liability for the torts of employees committed while acting within the scope of their employment. Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 356 (1929) ("[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy"). Defendants erroneously argue that ERISA is a comprehensive and reticulated statute and would have expressly provided for respondeat superior liability if Congress had so intended. Id. Defendants contend that since ERISA does not expressly permit a non-fiduciary employer to be held liable for the fiduciary actions of its employees, "[t]here is no reason for the Court to recognize an implied ERISA cause of action under the doctrine of respondeat superior liability." Def. Br. at 17.

Defendants have it backwards. Agency principles, including the doctrine of respondeat superior, are thoroughly entrenched in our legal landscape and have been applied by courts in many different contexts, *including* to statutory claims where the doctrine is not mentioned in the statute. See, e.g., American Society of Mechanical Engineers, Inc., 456 U.S. 556, 568 (1982) (Applying principles of vicarious liability to federal antitrust claims and noting that "[i]n a wide variety of areas, the federal courts, like this Court in Gleason, have imposed liability upon principals for the misdeeds of agents"); Mack v. Otis Elevator Co., 326 F.3d 116, 123 (2d Cir. 2003) (Respondeat superior applies to Title VII hostile work environment action; employers face liability where "supervisor with immediate (or successively higher) authority over the employee has engaged in the complained of conduct"); Higgins v. Metro-North R. Co., 318 F.3d 422, 426 (2d Cir. 2003) (Respondeat superior applies to claim based on violation of the Federal

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Employers' Liability Act); Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n, 298 F.3d 768, 775 (9th Cir. 2002) (Respondeat superior applies to claim for violation of Racketeer Influenced and Corrupt Organizations Act); American Tel. and Tel. Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1430-31 (3d Cir. 1994) (Respondeat superior applies to claim for violation of Lanham Act).

Likewise, courts have repeatedly interpreted ERISA to include common law agency principles. Moriarty v. Glueckert Funeral Home, LTD., 155 F.3d 859, 866 fn.15 (7th Cir. 1998) ("Because this case arises under ERISA . . . we look to the federal common law of agency to supply the governing principles of law"); Anderson v. International Union United Plant Guard Workers of Am., 150 F.3d 590, 592-93 (6th Cir. 1998) (In ERISA action, "we are guided by the law of agency as developed and interpreted as a matter of federal common law"); Taylor v. Peoples Natural Gas Co., 49 F.3d 982, 988 (3d Cir. 1995) (Under ERISA, "we are governed by the law of agency"). Of course, under the common law of agency, employers are liable for the torts of their employees. See Restatement of Agency (Second), § 219; Cileck v. Inova Health Sys. Servs., 115 F.3d 256, 259-60 (4th Cir. 1997) (To determine the general common law of agency, the Supreme Court has "traditionally looked to sources such as the Restatement of Agency").

Not surprisingly, virtually all of the courts to consider whether respondeat superior applies to ERISA actions have determined that it does. See Banistor v. Ullman, 287 F.3d 394, 408 (5th Cir. 2002) (Clarifying that "[i]n the context of respondeat superior liability [under ERISA], the issue is whether the principal, by virtue of its de facto control over the agent, had control over the disposition of plan assets"); National Football Scouting Inc., v. Coninental

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Assurance Co., 931 F.2d 646, 649-50 (10th Cir. 1991) (Applying respondeat superior and finding that question of fact concerning agency relationship precluded summary judgment on Plaintiff's ERISA claim); see also Hamilton v. Carell, 243 F.3d 992, 1002-03 (6th Cir. 2002) (Noting that respondeat superior did not apply to ERISA action because employee was not acting within the course and scope of his employment); Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544, 563-64 (D. Md. 2003) (Applying respondeat superior and finding that employer, "having had de facto control over [its employee] also had control over the disposition of the plans' assets"); Stanton v. Shearson Lehman/American Express, 631 F. Supp. 100, 104-05 (N.D. Ga. 1986) (Applying respondeat superior to ERISA claim).

These cases demonstrate that common law principles of agency, including employer liability for employee wrongdoing, are the rule, not the exception – whether or not a governing statute expressly provides for such liability. See Sony Corp of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984) (The absence of express "language in the copyright statute does not precluded the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law"). There is nothing in the language of ERISA to suggest that this bedrock principle of agency law should somehow be set aside in the context of employee benefit plans. To the contrary, Congress expressly drew upon agency principles in ERISA by permitting a corporate entity to be a fiduciary under the Act. See American Tel. and Tel. Co., 42 F.3d at 1430-31 (Liability "cannot be imposed without reference to agency principles – a corporation can only act through its agents, and therefore only can be bound through application of agency principles").

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Against the great weight of authority, however, Defendants rely on dicta from a Ninth Circuit case to support the contention that respondeat superior does not apply to ERISA actions. In Gelardi v. Pertee Computer Corp.,761 F.2d 1323 (9th Cir. 1985), the Ninth Circuit commented in passing that an employer is not a fiduciary with respect to a Committee's fiduciary acts simply because its employees sit on that Committee. Id. 1325. The question before the Court was whether the defendants (the employer and the plan administrator) were directly liable for breach of fiduciary duty. The Court concluded that the employer was not directly liable because it was not a fiduciary once it relinquished its discretionary control over the disposition of claims by hiring an outside corporation to administer the plan. Id.[15] Consequently, Gelardi did not address whether the doctrine of respondeat superior applies under ERISA. In any event, any reading of Gelardi suggesting that respondeat superior does not apply to ERISA is plainly inconsistent with Supreme Court precedent applying principles of agency, including respondeat superior, to federal statutory claims, and to all of the appellate cases applying agency law (including principles of respondeat superior) to ERISA.

In addition to citing Walsh v. Emerson, 1990 WL 47319 (D. Or. Jan. 19, 1990), a district court case that followed Gelardi as Ninth Circuit precedent, Defendants erroneously rely on WorldCom, 263 F. Supp. 2d 745 and Crowley v. Corning, Inc., 234 F. Supp. 2d 222 (W.D.N.Y. 2002). WorldCom, however, had nothing to do with respondeat superior liability under ERISA and simply addressed the question of whether individual board members were fiduciaries because

[15] The Court in Gelardi also inexplicably concluded that the outside plan administrator was not a fiduciary either because it did not "exercise fiduciary responsibilities in the consideration of claims." 761 F.2d 1325. In other words, the Ninth Circuit essentially held that nobody was a fiduciary with respect to the determination of participant claims. Not surprisingly, Gelardi's analysis of fiduciary status under ERISA has been soundly criticized. Eg., Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 234 (3d Cir. 1994) (Emphasizing that the Ninth Circuit in Gelardi "failed to analyze the definitional section of fiduciary pertaining to the plan's administration").

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

of their control over the Company. The citation to Crowley is even more puzzling because Crowley *applies* the doctrine of respondeat superior. 234 F. Supp. 2d at 228 (citing Banistor, 287 F.3d 394 and holding that the Complaint contained "no factual allegations which support a claim that Corning had de facto control over the Committee members").

Defendants only real argument against respondeat superior liability is that it "grafts" a new cause of action onto the ERISA statute. Def. Br. at 17-18. That is not the case. Respondeat superior "is a legal precept that presupposes the existence of an underlying claim and assesses liability not because of the act giving rise to the claim but because of a certain status." Newport News Indus. v. Dynamic Testing, Inc., 130 F. Supp. 2d 745, 751 (E.D. Va. 2001). As the Third Circuit explained in American Tel. and Tel. Co., "[c]ourts imposing liability on agency theories are not expanding the category of affirmative conduct proscribed by the relevant statute; rather, they are deciding on whose shoulders to place responsibility for conduct indisputably proscribed by the relevant statute." American Tel. and Tel. Co., 42 F.3d at 1430-31.

Respondeat superior furthers the important Congressional objective of ensuring that employee benefit plans are protected. See Stanton v. Shearson Lehman/American Express, 631 F. Supp. 100, 103-04 (N.D. Ga. 1986) ("Applying common law agency principles [of respondeat superior] in ERISA actions would further Congress's intent to protect retirement plans from self-dealing, imprudent investing and misappropriation of plan funds"). Holding employers liable for the wrongful acts of their employees under ERISA places responsibility for wrongful conduct in the hands of those who benefit from and are therefore in the best position to prevent wrongful employee conduct. Gleason, 278 U.S. 349, 356 (1929).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

D. CLAIM ONE STATES A CLAIM FOR IMPRUDENT INVESTMENT OF PLAN ASSETS

As ERISA fiduciaries, Defendants are liable for the imprudent investment of Plan assets. ERISA requires fiduciaries to perform their obligations "solely in the interest of the participants and beneficiaries" of the plans. 29 U.S.C. § 1104(a)(1). Accordingly, a fiduciary must act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). The Complaint alleges that Defendants breached their fiduciary duty to act with "prudence" by (1) allowing the Plans to continue to offer the Company Stock Fund as an investment option under the Plans; and (2) allowing the Plans to purchase and hold shares in the Company Stock Fund when it was imprudent to do so. Complaint, ¶¶ 145-53.

Defendants argue that they cannot be liable for allowing the Plans to offer the Company Stock Fund because doing so was a matter of plan design. According to Defendants, "the existence of the Stock Fund is an element of the Savings and Thrift Plans by design" so that Defendants were powerless to terminate the Stock Fund as an investment option. Def. Br. at 19. In making this argument, Defendants completely ignore the claim that it was imprudent for the Plans to invest in the Fund, regardless of whether it was imprudent to initially offer the Fund as an investment option. Moreover, Defendants' argument does little to alter the conclusion that Plaintiffs have sufficiently alleged that Plan investments in the Fund were imprudent.

1. The Plans Do Not Require That The Company Stock Fund Be Offered As An Investment Option

Plaintiffs do not allege that Defendants are liable on the basis of the Plans' designs.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Indeed, there is no dispute that matters of plan design are not subject to challenge under ERISA for breach of fiduciary duty. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443-44 (1999). To the contrary, the gravamen of Plaintiffs' allegations is that Defendants were empowered with and exercised authority over the administration of the Plans and investment of the Plan assets. Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996).

Plaintiffs allege that all of the Defendants were authorized by the Plans and/or in fact exercised authority with respect to the Plans' assets. Complaint, ¶¶ 78-102. For example, the Complaint alleges that the "Investment Committee monitored the performance of each of the Plans' investments, and had the ability to foreclose various investment options to Plan participants, depending on the prudence of such investments." Id. at 75. Likewise, the Complaint alleges that "[a]long with the Investment Committee, [the Board of Directors] had the responsibility to select investment options under [the] plans." Id. Finally, the Complaint alleges that AOLTW "was in fact the ultimate decision maker with respect to all fiduciary functions" and was responsible for the "selection of investment options for the Plan." Id. at 93. Defendants' assertions to the contrary cannot diminish Plaintiff's pleading at this stage in the proceedings. Swierkiewicz, 534 U.S. at 510-511. Consequently, Defendants should be precluded from attempting to disprove these factual allegations. Id.

Defendants are also wrong based on the plain language of the Plans. The Plans do not require that the Company Stock Fund be offered as an investment option. Defendants erroneously rely on a single provision in the Plan that states that the Trust fund is divided into separate Investment Funds and that "[o]ne such Investment Fund shall be designated the Time Warner Inc. Stock Fund . . . ." Savings Plan, § 6.2. From this language, Defendants extrapolate

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

that they were always required to offer the Company Stock Fund as an investment option under the Plans, no matter what the circumstances. Such an extrapolation is absurd.

The Savings Plan states that "[w]ith respect to the Investment Funds, the investment power and authority shall be held by the Trustee to the extent provided in the Trust Agreement." Plan, § 14.11. In turn, the Trust Agreement indicates that "[t]he Investment Committee has chosen as investment funds, certain funds (the "Fidelity Funds") and the Time Warner Inc. Stock Fund . . . ." Trust Agreement, § 4 (a) (emphasis added). In addition, the Trust Agreement provides that "[t]he Investment Committee shall direct the Trustee . . . [as to] the Investment Funds in which Participants may invest . . . ." Id. at 4 (b). Finally, the Plans vest unqualified authority in the Board of Directors (or the Investment Committee in the case of the TWC Plan) "to establish the overall investment policy for the plans." Savings Plan, § 14.11; TWC Plan, § 15.2.

a. The Terms of the Plans Did Not Require That The Company Stock Fund Be Offered

The plain language of the Plans gives fiduciaries unlimited discretion with respect to the Investment Funds, including the Company Stock Fund. Indeed, the TWC Plan makes clear that the Investment Committee has full authority "to determine the investment policy for the Plan, to select, monitor, retain, or eliminate any investment alternative available under the Plan, and to perform any acts necessary to exercise its authority." TWC Plan, § 15.1. Consequently, even if Defendants were right that the Plans contemplated the existence of the Company Stock Fund at inception, there is nothing in the language of the Plans or the Trust Agreement to suggest that the Plans' fiduciaries could not subsequently suspend or terminate the Company Stock Fund as an

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

investment option if circumstances changed. The Trust Agreement makes clear that the Fund was "chosen" by Plan fiduciaries as an investment option, and that Defendants retained the right to direct the trustee as to the Investment Fund options in "which Participants may invest," all according to the investment policy adopted by the Board. Trust Agreement, § 4 (a). Consequently, Defendants were not precluded by "plan design" from removing the Company Stock Fund as an investment option if a change in circumstances thereafter warranted it.

Defendants also blur the distinction between mandatory Employer Matching Contributions and voluntary Participant contributions. While the Savings and Thrift Plans, but not the TWC Plan, indicate that mandatory Employer Matching Contributions (and only those contributions) should be invested in company stock (not the Company Stock Fund), nowhere do these Plans suggest that the Company Stock Fund was required to be an investment option for Participants' voluntary contributions. At most, the Company Stock Fund could be construed as a required investment option with respect to the mandatory Employer Matching Contribution. In other words, even under Defendants' erroneous theory, terminating the Company Stock Fund as an investment option for Participants' voluntary contributions while maintaining that Fund for mandatory Employer Matching Contributions would not require Defendants to override any Savings or Thrift Plan terms.

b. Even if the Plans Required That The Company Stock Fund Be Offered, ERISA Required That the Fund Be Terminated As An Investment Option

In any event, whether or not the Plans required Defendants to offer the Company Stock Fund as an investment option under the Plans in perpetuity, Defendant's paramount statutory

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

duty was to protect the Plans. Enron, 2003 WL 22245394 at *11 (ERISA fiduciary has a duty to ignore plan documents if necessary to fulfill ERISA's fiduciary duties); Rankin, 2003 WL 21995176 at *113-114 ("[A] fiduciary is not required to blindly follow the Plan's terms. Indeed, 'a fiduciary must also act 'in accordance with the documents and instruments governing the plan,' insofar as those documents are consistent with the provisions of ERISA'"); WorldCom, 263 F. Supp. 2d at 764 (Even though a plan "is designed to offer the opportunity solely to invest in the employer's stock, a fiduciary may be liable for continuing to offer an investment in the employer's securities" where imprudent). ERISA's overriding goal of ensuring that employee benefit plans are prudently administered takes precedence over the Plans' language. Consequently, regardless of the Plans, Defendants were required by ERISA to terminate the Funds as an investment option if they became imprudent. Moreover, this issue should not be resolved on a motion to dismiss. Rankin, 2003 WL 21995176 at *22.

2. Defendants Allowed The Plans To Hold Shares Of The Company Stock Fund When It Was Imprudent To Do So

Plaintiffs' imprudent investment claim is also based on Defendants' failure to prevent additional purchases of the Company Stock Fund and to sell existing shares of the Fund or shares of AOLTW stock in the Fund once it became an imprudent investment. Complaint, ¶ 151. Although Defendants argue that offering the Company Stock Fund as an investment option was a matter of plan design, Defendants are silent with respect to their failure to halt additional purchases and to sell existing shares once the Fund became an imprudent investment. Indeed, Defendants make only the bare assertion that "none of the Defendants, acting as fiduciaries, had the discretion to do this." Def. Br. at 18. Defendants are wrong.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

For one thing, Defendants' contentions again impermissibly contradict the well-plead allegations in the Complaint. Swierkiewicz, 534 U.S. at 510-511. Plaintiff has alleged that each of the Defendants had power over the investment of Plan assets in the Company Stock Fund. Complaint, ¶¶ 78-102. The Complaint makes clear that Defendants should have but failed to halt investment in the Company Stock Fund and sell existing positions of the Fund. Id. at 151.

a. The Plans Were Not Required To Purchase and Hold Fund Shares

Defendants' argument is also contrary to the language of the Plans. Defendants do not cite to a single provision in the Plans that restricts the ability of Plan fiduciaries to halt purchases in the Company Stock Fund and/or sell existing shares. The only provision Defendants identify states that "[t]he investment Committee shall not exercise any investment power or authority with respect to common stock of the Company ." Savings Plan § 14.11 (emphasis added). This provision does not apply to any Defendant other than the Investment Committee and, in particular, does not apply to the Board which is responsible for the Plans' overall investment policy. Plan § 14.11.[16] Moreover, it does not limit the Investment Committee's ability to take action with respect to the Company Stock Fund. Indeed, Participants do not own shares of "common stock of the Company," they own units of participation in the Company Stock Fund, an Investment Fund offered by the Plans. Trust Agreement, § 4 (e) ("Each participating Plan's and Participant's proportional interest in the [Company Stock Fund] shall be measured in units of participation, rather than shares"). Consequently, the Investment Committee was free to halt purchases and sell existing shares of the Company Stock Fund.

---

[16] Defendants acknowledge that this provision does not apply to the TWC Plan. Def. Br. at 19.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

The Plans also empower the Plans' fiduciaries to preserve plan assets invested in the Company Stock Fund if investment in AOLTW stock became imprudent. The Plans state that notwithstanding the investment objective, the Company Stock Fund "may make such other investments or retain balances in interest-bearing cash equivalents pending investment for the fund[] . . . ." Savings Plan, § 6.2; Trust Agreement, § 4 (b) (emphasis added). Likewise, the Trust Agreement states that the Company Stock Fund consists of employer securities and short-term investments, "as agreed to by the Company and Trustee." Trust Agreement, § 4 (e). More to the point, the Trust Agreement explains that "a cash target range shall be maintained" in the Company Stock Fund, and that "[s]uch target range shall be set forth in a separate letter executed by the Trustee and the Company from time to time." Id.

Plan fiduciaries could, therefore, have protected Participants from the imprudent investment of Plan assets by halting additional purchases of AOLTW stock in the Company Stock Fund and directing that the Company Stock Fund be invested into short-term liquid investments. AOLTW could have raised the "cash target range" in the Company Stock Fund to 100 percent "pending investment" for the Fund–in other words–until such time as company stock became a prudent investment. If the Defendants had done so, much of the Plans' losses in this case could have been avoided. Enron, 2003 WL 22245394 at *114 (Plan provision that investment was to be primarily in employer stock "provides plan fiduciaries with considerable discretion, which they allegedly did not exercise prudently or loyally").

b. Even if The Plans Required Investment In The Company Stock Fund, ERISA Required That The Plans Halt Purchases And Sell Existing Shares

Finally, to the extent Defendants suggest that investment in the Company Stock Funds

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

was as a matter of plan design, Defendants were obligated to disregard the Plans' documents in favor of ERISA's overarching obligations if those investments were imprudent. Moreover, this issue should not be resolved on a motion to dismiss. See, pp. 9-12, *supra*.

3. Defendants Could Have Met Their Fiduciary Obligations Without Violating Insider Trading Rules

Defendants' fiduciary obligations are entirely consistent with securities laws prohibiting insider trading. "Insider trading" rules merely preclude someone from buying or selling stock with knowledge of material, non-public information; the party must refrain from trading until the information becomes public. Chiarelli v. United States, 445 U.S. 222 (1980). However, Defendants' duty to "disclose or abstain" under the securities laws does not immunize them from a claim that they failed in their conduct as ERISA fiduciaries. Enron, 2003 WL 22245394 at *21-24; WorldCom, 263 F. Supp. 2d at 765-767. Nothing in the securities laws prevented Defendants from refusing to purchase more shares of the Stock Fund or to discontinue the Stock Fund as an investment option. Such actions would not have been a purchase, but a decision not to purchase. Since the insider trading rules require corporate insiders to refrain from buying or selling stock if they have material, nonpublic information about the stock, the "disclose or abstain" securities law rule is entirely consistent with, and indeed contemplates, a decision not to buy or sell more stock. See Condus v. Howard Sav. Bank, 781 F. Supp. 1052, 1056 (D.N.J. 1992) (it is perfectly legal to retain stock based on inside information; violation of insider trading requires buying or selling of stock).

Moreover, Plaintiffs do not contend that Defendants should have disclosed confidential information to Participants prior to disclosing it to the public. Nothing in the securities laws

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

would have prohibited defendants from disclosing the non-public information to the public at large prior to sharing the information with other fiduciaries and Plan Participants and selling Plan investments in the Stock Fund. See In the Matter of Cady, Roberts & Co., Exchange Act Release No. 34-6668, 40 S.E.C. 907, 1961 WL 60638, at *3 (Nov. 8, 1961). Indeed, ERISA contemplates that fiduciaries take such action in keeping with their obligation to disclose all material non-public information that they are not precluded from disclosing under other applicable law. 29 C.F.R. §2550.404c-1(c)(2)(ii). Defendants had a choice – either disclose the information and fulfill their fiduciary duties to the Plan and Participants, or withhold the information, refrain from trading, and assume liability for imprudent investments. As noted in Enron, to the extent that disclosure of this adverse information was also required by the securities laws - independent of ERISA - Defendants had the choice of concealing the information and violating both the securities laws and their ERISA obligations or they could publically disclose the information and invest plan assets prudently to the satisfaction of both sets of laws:

> Defendants' argument that despite the duty of loyalty, a fiduciary should make no disclosure to the plan participants, because under the securities laws he cannot selectively disclose nonpublic information, translates in essence into an argument that the fiduciary should both breach his duty under ERISA and, in violation of the securities laws, become part of the alleged fraudulent scheme to conceal Enron's financial condition to the continuing detriment of current and prospective Enron shareholders, which include his plan's participants. This Court does not believe that Congress, ERISA or the federal securities statutes sanction such conduct or such a solution, i.e., violating all the statutes and conning the public. As a matter of public policy, the statutes should be interpreted to require that persons follow the laws, not undermine them. They should be construed not to cancel out the disclosure obligations under both statutes or to mandate concealment, which would only serve to make the harm more widespread; the statutes should be construed to require, as they do, disclosure by Enron officials and plan fiduciaries of Enron's concealed, material financial status to the investing public generally, including plan participants, whether "impractical" or not, because continued silence and deceit would only encourage the alleged fraud and increase the extent of injury.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Enron, 2003 WL 22245394 at **22-23.

Arguments of plan fiduciaries that the securities laws precluded their acting have been soundly rejected. See Enron, 2003 WL 22245394 at *21-24; WorldCom, 263 F. Supp. 2d at 765-767; Rankin, 2003 WL 21995176 at **18-19. Likewise, the Department of Labor has taken the position that these ERISA fiduciary obligations are not in conflict with the federal securities laws. Enron DOL Br. at 24-26.

Defendants rely exclusively on two unreported decisions, In re McKesson HBOC ERISA Litig., 2002 WL 31431588 (N.D.Cal. Sept. 30, 2002), and Hull v. Policy Mgmt. Sys Corp., 2001 WL 1836286 (D.S.C. Feb. 9, 2001). The reasoning of those decisions was rejected: expressly by Enron, 2003 WL 22245394, **22-23 ("the Court finds that the McKesson court's rational is misguided"); Rankin, 2003 WL 21995176 at *21 ("The better view is expressed in the WorldCom opinion and in the Department of Labor's Amicus Brief"), and implicitly by WorldCom, 263 F. Supp. 2d at 767 ("In any event, the existence of duties under one federal statute does not, absent express congressional intent to the contrary, preclude the imposition of overlapping duties under another federal statutory scheme"). Hull has similarly been rejected. Vivien v. WorldCom, 2002 WL 31640557, **7-8 (N.D.Cal. 2002). The Department of Labor also rejected the reasoning in Hull in its *amicus* brief submitted in Enron. Enron DOL Br. at 28.

Furthermore, McKesson involved a factually distinguishable scenario. In that case, McKesson merged with HBOC. HBOC had substantial accounting irregularities which occurred before the merger but which affected the value of the merged companies. The court held that the McKesson plan had no damages as a result of its failure to sell the stock post-merger because the price of the stock would have dropped upon the required single disclosure of the negative

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

information prior to the sale. 2002 WL 31431588 at *6. This case, on the other hand, alleges a long term course of conduct. Had the truth been disclosed at each step along the way, the price of the stock would have declined moderately and the Plans could have sold at much higher prices. Therefore, unlike the facts in McKesson, which involved a single disclosure and a single drop, Plaintiffs have damages from the failure to sell at the appropriate time. In any event, this argument raises factual issues that should not be resolved on a motion to dismiss.

Hull, is also distinguishable. Hull noted that the plaintiffs did not allege that the fiduciaries (i) had any knowledge of any misinformation concerning the company stock, (ii) participated in the dissemination of information they knew or should have known was misleading, or (iii) knew such investment was imprudent. 2001 WL 1836286 *7. In this case, on the other hand, Plaintiffs allege that Defendants should have known the relevant information and participated in disseminating misleading information. The reasoning in Hull was distinguished in Vivien on this basis. 2002 WL 31640557 at **7, 8 ("Plaintiffs allege that in fulfilling a statutory duty under ERISA to provide periodic plan information, defendants issued summary plan descriptions that expressly incorporated by reference false SEC filings (which defendants allegedly knew were false) in an effort to induce the plan and its participants to purchase WorldCom stock"; "The difference, for now, between Hull and this action is that plaintiffs here allege that 'as one of its duties in administering the Plans, WorldCom, as the Plan Administrator, had the duty and responsibility to distribute to the Plans' participants information explaining the Plans'"). Viven also held that Hull stood only for the proposition that securities fraud did not automatically translate into an ERISA violation. When - as in the present case - a plaintiff alleges the wrongful action was an independent violation of a recognized ERISA duty, the

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

reasoning of Hull does not apply. Id.

E. COUNT 2 SUFFICIENTLY ALLEGES THAT DEFENDANTS NEGLIGENTLY MISREPRESENTED AND FAILED TO DISCLOSE MATERIAL INFORMATION

Count 2 alleges that Defendants negligently misrepresented and negligently failed to disclose material information concerning investment in the Company Stock Fund. Defendants contend that Plaintiffs do not allege "specific facts" to support this claim for breach of fiduciary duty. Def. Br. at 26-30. Defendants' argument, however, is predicated upon a misapplication of the pleading standard and should, therefore, be rejected. The allegations of Count II contain a "short and plain statement" of the claim entitling Plaintiffs to relief.[17]

Defendants also argue, incredibly, that no one is a fiduciary with respect to the representations in that part of the SPD and Form S-8 Registration Statement which were comprised of SEC filings. Defendants further contend that those portions of the SPD and the Form S-8 Registration Statement comprised of SEC filings were not fiduciary representations. Defendants are wrong on both points.

1. Defendants Are Fiduciaries With Respect To The Portions Of The SPD and Form S-8 Which Incorporate SEC Filings

As set forth above, the SPD and Form S-8 are fiduciary representations. Since the SEC filings are a part of the SPD and Form S-8, they too are fiduciary representations.[18] See WorldCom, 263 F. Supp. 2d at 766-767. More to the point, since the SPD is the core fiduciary disclosure to Participants, the Defendant fiduciaries are responsible for the accuracy of all

[17] By taking the position that Plaintiffs have not alleged enough "specific facts," Defendants in effect ask this Court to apply the heightened pleading standard of Rule 9(b). However, as set forth above, there is no basis to apply the Rule 9(b) to an ERISA breach of fiduciary duty claim. See pp. 9-12, *supra*.

[18] See pp. 18-20, *supra*.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

statements contained therein, including those in SEC filings that are part of the SPD. Id.

Defendants contend in particular that the Administrative and Investment Committees are not fiduciaries with respect to representations in the SPD. However, paragraphs 83 through 86 of the Complaint detail the responsibilities of both the Administrative and the Investment Committee Defendants. As alleged in the Complaint, the Plan documents specifically state that the Administrative Committee shall "be the administrator of the Plan within the meaning of Section 3(16)(A) of ERISA." Complaint, ¶ 83.[19] Since dissemination of the SPD is at the heart of plan administration, the Administrative Committee is a fiduciary with respect to representations contained therein.

The Complaint also enumerates the actions which caused the Investment Committee to be a fiduciary, including selecting and monitoring investment options for the Plans. Complaint, ¶ 86.[20] Indeed, the Plan Documents specifically enumerate the Defendants as fiduciaries, stating "[e]very Fiduciary of the Plan, including the members of the Board, the Administrative Committee, the Investment Committee . . ." See Savings Plan, § 14.14 (emphasis added).[21] Since the allegedly inaccurate representations in the portions of the SPD comprised of SEC

[19]According to § 14.4 of the Savings Plan, the "Administrative Committee shall be the administrator of the Plan within the meaning of Section 3(16)(A) of ERISA and shall have all the powers necessary to administer the Plan except to the extent any such powers are vested in any other Fiduciary by the Plan or by the Administrative Committee. The Administrative Committee may from time to time establish rules for the administration of the Plan. It shall have exclusive authority and sole and absolute discretion to interpret the Plan, to determine eligibility for benefits and the amount of benefit payments and to make any factual determinations . . . . of the Plan . . ." See Thrift Plan at § 14.4, for substantially similar language.

[20]According to § 14.11 of the Savings Plan, the "Investment Committee shall be responsible for designating Investment Managers and recommending to the Board such changes in the Trustee as it shall deem necessary, and it shall take all other prudent action necessary or desirable for the purpose of carrying out the foregoing duties . . ." See Thrift Plan at § 14.11, for substantially similar language.

[21] See Thrift Plan § 14.14 for substantially similar language.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

filings relate strictly to Plan investments, the Investment Committee is likewise a fiduciary. Similarly, the Board of Directors, which both signed both the SEC filings and the Form S-8 Registration Statement and set the Plans' investment policies, is a fiduciary with respect to these communications because these communications relate solely to the investment of Plan assets. Accordingly, the Administrative Committee, Investment Committee and the Board of Directors are all fiduciaries of the Plans concerning the representations in the SEC filings. Indeed, if the fiduciaries responsible for investment of Plan assets are not fiduciaries with respect to communications concerning investments, then who is? More to the point, all of these Defendants have adequate notice of Plaintiffs claim that the Defendants are fiduciaries.[22]

Furthermore, AOLTW's SEC filings, specifically the DEF-14 filings, verify that Director Defendants Barksdale, Caufield, Mark, and Miles comprised the "Compensation Committee" of the Board of Directors. Since the merger, this committee was tasked with reviewing and approving AOLTW's employee benefits plans. Prior to the merger, Defendant Akerson served on the "Compensation and Management Development Committee" which administrated the Company Plans and ensuring that "fiduciary responsibilities of the Board of Directors" were carried out. Because of their assignments and positions regarding the Plans, the Defendants were fiduciaries with respect to representations to Plan Participants.[23]

Defendants argument as to Count II concerning the different status of the different fiduciaries is simply another variation on the "no one is responsible for anything," "shell-game"

---

[22] As to the fiduciary status of AOLTW, TWE, Bogart, Bressler, and the Board of Directors Defendants, see pp. 16-22, *supra*.

[23] As set forth above, AOLTW is also a fiduciary for these representations.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

theme. See p.15, *supra*. As set forth above, this argument should be rejected at the motion to dismiss stage. The Defendants cite In re Providian Financial Corp. ERISA Litig. for the proposition that Plaintiffs' Complaint should be dismissed due to the Complaint's inability to put the Defendants on notice of the allegations against them. However, in Providian, the Court merely ordered plaintiffs to file an amended complaint clarifying the fiduciary allegations and breaches thereof by each defendant. In re Providian Financial Corp. ERISA Litig., No. C 01-05027 CRB, 2002 WL 31785044 (N.D. Cal. Nov. 14, 2002). The allegations in this Complaint are more specific than the allegations in Providian and are, therefore, more than adequate to survive Defendants' Rule 12 challenge.[24]

2. The SEC Filings Are Fiduciary Representations

As set forth above, the SEC filings incorporated into and comprising the SPD and Form S-8 Registration Statement are fiduciary representations. See pp. 18-20, *supra*. However, Defendants contend that because the representations were contained in SEC filings, they were corporate communications made in a non-fiduciary capacity. According to Defendants, this gives them complete immunity, even if those SEC filings were distributed to Participants as part of an SPD and Plan administration. Defendants' "two hat"argument, raised in other ERISA breach of fiduciary duty cases, has been squarely rejected. See WorldCom, 263 F. Supp. 2d at 765-767; Enron, 2003 WL 22245394 at **21-24.

Defendants, who were fiduciaries of the Plans, turned the corporate disclosures into

---

[24] If the Court determines that the Complaint is deficient, leave to amend is required if there is any possibility that defects identified by the Defendants can be corrected. See, e.g., S.S. Silberblatt, Inc. v. East Harlem Pilot Block - Building 1 Housing Dev. Fund Co., Inc., 608 F.2d 28, 42 (2d Cir. 1979) ("if the plaintiff has at least colorable grounds for relief, justice... [requires an amendment be allowed] unless the plaintiff is guilty of undue delay or bad faith or unless permission to amend would unduly prejudice the opposing party").

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

fiduciary disclosures through their incorporation of the SEC filings into the SPD.[25] By specifically incorporating the SEC filings into their fiduciary disclosures to the Plan participants, the information contained in the filings was communicated in the Defendants' fiduciary capacity. WorldCom, 263 F. Supp. 2d at 767 (holding that fiduciaries "cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings"). Accordingly, Defendants were required under ERISA to be complete and accurate in these disclosures. Id.[26] The court in Rankin agreed with WorldCom, holding that SEC filings distributed as part of an SPD were fiduciary representations, and expressly rejected the reasoning of Hull (relied upon by defendants). 2003 WL 21995176, *20 ("The reasoning in WorldCom, expressed particularly by the underlined language, is sound. Like the allegations in WorldCom, Rankin says that Kmart, through defendants Conaway and/or the Outside Directors, made SEC filings which contained material misrepresentations about Kmart's financial condition (which are also the allegations in the Kmart securities case). Defendants had a duty under securities laws not to make any material misrepresentations; they also had a duty to disseminate truthful information to plan participants, including the information contained in SEC filings. Contrary to Conaway and the Outside Directors' argument, their duties under ERISA and securities law co-exist"); see also Vivien, 2002 WL 31640557 at *7 ("[I]t would be premature to rule out the [claim] as a matter of law on the basis that defendants were *not* acting in a fiduciary

---

[25] Specifically, according to the Savings Plan Summary Plan Description and the Thrift Plan Summary Plan Description, both dated April 2002, the Company's 10-K for 2001, the 8-K dated January 11, 2001, and the 11-K's for the respective Plans for 2000 were all specifically incorporated by reference into the SPDs. See Savings Plan AOLER 00000641 and Thrift Plan at AOLER 00000683.

[26] Moreover, the court in WorldCom noted "[w]hen a corporate insider puts on his ERISA hat, he is not assumed to have forgotten adverse information he may have acquired while acting in his corporate capacity." 263 F. Supp. 2d at 766.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

capacity when issuing summary plan descriptions merely because the descriptions incorporated by reference SEC filings presumably undertaken in a corporate capacity").

In this case, no Defendants' status as a fiduciary is predicated solely upon their execution of an SEC filing. The Plaintiffs allege that the Defendants, who were already fiduciaries based on their control and/or authority over the Plan, breached their fiduciary duties by disseminating false and misleading information to the Plan participants through the Company's SEC filings which were incorporated by reference into the Plan documents. Accordingly, the cases cited by Defendants for the proposition that fiduciary status is not bestowed solely by signing SEC filings are irrelevant.[27]

3. Plaintiffs have Adequately Alleged Director Defendants Breached Their Fiduciary Duties In Their Failure To Appoint And Monitor Other Fiduciaries

Defendants' challenge to Plaintiffs' claims regarding the Director Defendants duty to appoint, monitor and provide information to the Committees is simply without merit. Plaintiffs have adequately plead facts sufficient to put the Defendants on notice as to these breaches of fiduciary duty.

a. Director Defendants Failed in Their Duty to Appoint and Monitor the Commitees

Plaintiffs assert that Defendants violated ERISA by failing to appoint proper fiduciaries and monitor the actions of those fiduciaries. According to the Complaint, the Director Defendants did not appoint Committee Members with the knowledge, skill and experience necessary to do their jobs, and did not convey material information to the Committee members.

---

[27] See p. 45, *supra*.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Complaint, ¶¶ 173-174. Had the Director Defendants performed a proper review of their appointees' activities, they would have discovered that those Plan fiduciaries were failing in the performance of their ERISA duties. Complaint, ¶174. This is a cognizable claim under ERSIA. See 29 C.F.R. 2509.75-8 at FR-17 ("ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries" requires that "at reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary"); Enron, 2003 WL 22245394 at **14-15 ("A person or entity that has the power to appoint, retain and/or remove a plan fiduciary from his position has discretionary authority or control over the management or administration of a plan and is a fiduciary to the extent that he or it exercises that power"); WorldCom, 263 F. Supp. 2d at 765 (holding the director defendant's failure "'to monitor' the Plan's other fiduciaries" is a cognizable claim under ERISA); Leigh v. Engle, 727 F.2d 113, 134-35 (7th Cir. 1984) (stating that appointment power includes the duty to monitor appointees' actions). In Leigh, the Seventh Circuit concluded that two corporate officials who exercised their duty to appoint fiduciaries had a duty to monitor their appointees' actions, stating:

> As the fiduciaries responsible for selecting and retaining their close business associates as plan administrators, Engle and Libco had a duty to monitor appropriately the administrators' actions. Engle and Libco could not abdicate their duties under ERISA merely through the device of giving their lieutenants primary responsibility for the day to day management of the trust. Engle and Libco were obliged to operate with appropriate prudence and reasonableness in overseeing their appointees' management of the trust.

727 F.2d at 134-135. See also ERISA Interpretative Bulletin, 29 C.F.R. § 2509.75-8 (D-4). (members of a board of directors "responsible for the selection and retention of plan fiduciaries" have "'discretionary authority or discretionary control respecting the management of such plan' and are, therefore, fiduciaries with respect to the plan").

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

b. Director Defendants Failed to Provide Material Information to Their Appointees

Defendants' second attack focuses on Plaintiffs' alleged failure to establish that the Board Defendants failed to communicate material information to the Committees and their members. Def. Br. at 33. It is an established principle that one fiduciary can be held liable for failing to disclose information to another fiduciary that would permit the second fiduciary to protect the plan and its beneficiaries even when the information to be conveyed is beyond the scope of fiduciary authority of the inappropriately silent fiduciary. Glaziers v. Newbridge Sec., Inc., 93 F.3d 1171, 1180-82 (3d Cir. 1996); Enron, 2003 WL 222453954 at **15-19 (duty to disclose); Rankin, 2003 WL 21995176 at *20 (same); Stein, 270 F. Supp. 2d at 174 (same).

When read in its entirety, the Complaint clearly identifies the information needed to be communicated to the Committees in order for Defendants to properly carry-out their fiduciary duties. Specifically, the Complaint alleges that had the Director Defendants conveyed the information contained in paragraphs 111-144 of the Complaint, the Administrative and Investment Committee could have made fully informed decisions regarding the prudence of continued investment in the Company Stock Fund. Accordingly, the Director Defendants have more than ample notice of the information they failed to disclose to the Committees.

For the reasons stated above, Defendants' reliance on McKesson is misplaced. Moreover, McKesson has been subsequently rejected. See Enron, 2003 WL 222453954; see also Rankin, 2003 WL 21995176 (criticizing the McKesson court's reasoning). For the reasons stated above, Defendants' failure to provide their appointees with material information is a colorable claim under ERISA and Plaintiffs are entitled to seek relief through the prosecution of their claims.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

4. Plaintiffs have Adequately Alleged Breach of the Duty of Loyalty

Defendants attack Claim 4, breach of the duty of loyalty, by asserting that the sale of Company stock by the Defendants was not a breach of fiduciary duty. Specifically, Defendants assert that no breach arises from their stock sales because the stock was held in each Defendants' personal capacity and not in his capacity as a fiduciary of the Plan. Defendants argument misses the mark. Plaintiffs do not claim, as Defendants suggest, that "ERISA prohibits any fiduciary from selling any security that is also held by any Plan to which that fiduciary is bound." Def. Br. at 26. Rather, Plaintiffs assert that, pursuant to ERISA § 404, plan fiduciaries have a duty to discharge their duties of loyalty regarding the plan solely in the interest of the Plan participants and the beneficiaries and exclusively for the benefit of the participants and beneficiaries. Complaint, ¶ 175. Here, Defendants' sold massive amounts of Company stock while touting the stock to Plan participants. Complaint, ¶ 176.

Although ERISA allows officers and employees of companies to be plan fiduciaries, essentially wearing two "hats," if their dual roles collide, their loyalties must always lie with the plan participants. They must act with a "eye single" towards the best interests of the plan participants and its beneficiaries. 29 U.S.C. § 1104. As the court in Donovan v. Bierwirth, explained:

> Having provided for an unorthodox departure from the common law rule against dual loyalties, Congress provided two statutory safeguards to protect plan participants and beneficiaries. First, the statute provides that "a fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries..." Section 404(a)(1) of ERISA, 29 U.S.C. 1104(a)(1). Therefore, although a trustee may have dual loyalties, when acting on behalf of the fund, his primary loyalty to the fund is the only loyalty which may affect his judgment. (emphasis added).

538 F. Supp. 463, 468 (E.D.N.Y. 1981).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

Plaintiffs allege that Defendants breached their duty of loyalty by not having their statements conform with their actions. As alleged in the Complaint, Defendants consistently endorsed the value of investing in Company stock as a vehicle for retirement savings while they sold their personal holdings of Company stock, reaping proceeds of $558 million. Complaint, ¶177. Moreover, they failed to halt the acquisition of the Company Stock Fund by the Plan and failed to sell imprudent Plan investments while they made their personal sales. Complaint, ¶179. Defendants did not even contemporaneously disclose to Participants their sales and the reasons for those sales so that Participants could have protected themselves. See WorldCom, 263 F. Supp. 2d at 766 (corporate insider is not presumed to have forgotten adverse information when he puts on his ERISA hat). Apparently, what was good for the goose was not necessarily good for the gander, at least when $558 million in insider sales were at issue.

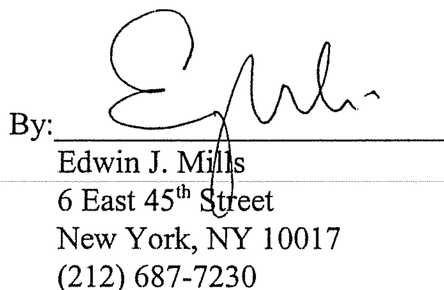
Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

IV. CONCLUSION

For the reasons set forth above, the Motion to Dismiss of all Defendants other than Fidelity should be denied. If the Court believes that any part of Defendants' Motion to Dismiss has merit, Plaintiffs respectfully request that any such order of dismissal be without prejudice and with leave to amend under Rule 15(a).

DATED: November 4, 2003

STULL, STULL & BRODY



By:____________________
Edwin J. Mills
6 East 45th Street
New York, NY 10017
(212) 687-7230

SCHATZ & NOBEL, P.C.
Robert A. Izard
Todd A. Higgins
Wayne T. Boulton
330 Main Street
Hartford, CT 06106
(860) 493-6292

SCHIFFRIN & BARROWAY, LLP
Richard S. Schiffrin
Joseph J. Meltzer
Gerald D. Wells
Three Bala Cynwyd Plaza East, Suite 400
Bala Cynwyd, PA 19004
(610) 667-7706

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=878f8d55-7ced-4719-94fa-f776e4ace1ad

CERTIFICATE OF SERVICE

I, Edwin J. Mills, hereby certify that on this 4 day of November, 2003, true and correct copies of the foregoing document were served on the below-listed counsel by Federal Express overnight delivery, addressed as follows:

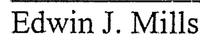
Peter T. Barbur, Esq.
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Robert Rachal, Esq.
SHOOK HARDY & BACON LLP
909 Poydras Street
LL&E Tower, Suite 1100
New Orleans, LA 70112

Matthew M. D'Amore, Esq.
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104

Robert A. Izard, Esq.
SCHATZ & NOBEL, P.C.
330 Main Street, 2nd Floor
Hartford, CT 06106-1851

Joseph H. Meltzer, Esq.
SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East, Suite 400
Bala Cynwyd, Pennsylvania 19004



Edwin J. Mills