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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

MARVIN OVERBY, ET. AL.

Plaintiffs,

vs

TYCO INTERNATIONAL LTD., ET. AL.

Defendants.

Case No. 02-CV-1357-B

This Document Relates To:
ERISA Actions

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Lead Plaintiffs Marvin Overby, Edmund J. Dunne and Kay M. Jepson ("Plaintiffs") submit this Memorandum In Opposition To Defendants' Motions To Dismiss. Though a total of six separate Motions To Dismiss (and supporting memoranda) were filed by different groups of Defendants,[1] Plaintiffs respond to all of these motions, collectively, in this one brief.[2]

INTRODUCTION

Plaintiffs bring this action for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") to compensate (i) the seven plans which contain the retirement savings of the employees of Tyco International Ltd. ("Tyco International") and its subsidiaries and affiliates (collectively, the "Plans") and (ii) the participants of those Plans (the "Participants"). The Plans and the Participants suffered massive losses caused by widespread misconduct by the Plans' fiduciaries.

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

[1] (1) Tyco International Ltd., Tyco International (US) Inc., Robert A. Bent, Kelly Heffernan, Irving Gutin, Jerry R. Boggess and Richard J. Meelia filed a motion to dismiss on April 4, 2003; (2) Richard S. Bodman and Wendy Lane (former outside directors) filed a motion to dismiss on April 18, 2003; (3) the Tyco International Director Defendants filed a motion to dismiss on April 17, 2003; (4) Mark A. Belnick filed a motion to dismiss on April 25, 2003; (5) Mark H. Swartz filed a motion to dismiss on April 25, 2003; and (6) L. Dennis Kozlowski filed a motion to dismiss on April 25, 2003.

[2] Plaintiffs named both the Tyco International (US) Inc. Retirement Committee ("Committee") and the individual members of that committee as defendants in this case. Counsel for the Tyco Defendants indicates that it has appeared for the Committee but submits that the Committee is not a separate entity that can be sued. The Memorandum of Tyco International Ltd., Tyco International (US) Inc. and Certain of the Individual Defendants in Support of their Motion to Dismiss ("Def. Br.") does not state that it was filed on behalf of the Committee but includes arguments relevant to both the Committee and its members. Those arguments are addressed herein.

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management of retirement plan assets.[3] To fulfill this goal, ERISA requires that retirement plans be managed by fiduciaries whose duties to retirement plans and their participants are among the highest known to law. The Amended Complaint ("Complaint")[4] alleges that Defendants were fiduciaries who breached their fiduciary duties to the Plans in two principal ways: (1) Defendants negligently misrepresented and negligently failed to disclose material facts to the Plans and the Participants in connection with the management of the Plans' assets, and (2) Defendants negligently offered the Tyco Stock Fund (the "Fund") as an investment option under the Plans and permitted the Plans to purchase and hold shares in the Fund when it was imprudent to do so. As a result of these wrongful acts, Defendants are personally liable to make good to the Plans the losses resulting from their breaches of fiduciary duty and are responsible for the huge losses suffered by the Plans and the Participants.

In response to these clear allegations, Defendants erroneously argue that because the Participants selected the investments made by the Plans, the Defendants are not liable. However, the Plans' fiduciaries are liable for all of the Plans' imprudent investments, **including those selected by Participants**, because the Plans did not comply with strict Department of Labor Regulations permitting the transfer of liability for imprudent investments from fiduciaries to participants. Moreover, although Defendants claim that no Defendant other than the Tyco Retirement Committee, the "named fiduciary," can be liable under ERISA, "unnamed"

[3] "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).

[4] References to the Complaint appear as "Complaint, ¶ " unless otherwise indicated.

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fiduciaries are fiduciaries if they engage in fiduciary conduct, which is the case with all of the Defendants in this case. Despite the clear allegations of the Complaint, Defendants also improperly argue that the Complaint does not sufficiently allege either negligent misrepresentations or that the Tyco Stock Fund was not a prudent investment. Finally, Defendants erroneously contend that insider trading rules somehow protect them from their breaches of fiduciary duty.

Underlying these arguments is the Defendants' incorrect contention that this case is nothing more than a securities fraud case pled under ERISA. However, this case involves factual and legal issues which are substantially different from those in the Tyco securities fraud case. First, only Count I alleges liabilities based on misrepresentations and omissions which could be alleged in a securities fraud case. Count II alleges that Defendants improperly offered the Tyco Stock Fund as an investment option under the Plans and imprudently invested Plan assets in that Fund. Count II has nothing to do with a claim of fraud in connection with the purchase of securities. Second, even as to Count I, while 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 ERISA and the securities laws. Third, ERISA and the securities laws differ significantly in that Plaintiffs are not required to plead or prove scienter under ERISA. Fourth, the Complaint names several defendants not included in the securities fraud cases, many of whom played a direct role in the underlying wrongdoing at Tyco. Fifth, this case involves not only losses from **purchases** of securities, but also losses from the decline in the value of Fund

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shares that were purchased before the class period and **held** by the Plan.[5] Therefore, the claims in this case are much broader than in the securities fraud case. Finally, this Court has already implicitly recognized the differences between the ERISA and "securities fraud" actions in issuing Practice and Procedure Orders Number 3 (establishing a separate "ERISA" case grouping) and 5 (finding that ERISA cases were not filed to circumvent the PSLRA discovery stay). *See also* J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1253 n.8 (1st Cir. 1996) (ERISA involves underlying policies and protections different from securities laws). Moreover, though Defendants suggest a risk of double recovery in this case and the securities fraud case, this case cannot be premised on the assumption that may or may not come to pass that the fiduciaries will elect to participate as a member of the class in the securities fraud suit. In any event, the substantial differences in law and fact between the cases preclude the risk of double recovery.[6]

Defendants' core ERISA arguments are premised on a fundamental misunderstanding of two key provisions of ERISA. First, Defendants mistakenly contend that the Tyco Stock Fund

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[5] In addition, it is not clear that the interests of the Participants would be protected in the securities fraud cases. Under the terms of the Plans, neither the Participants nor the Plans invested directly in Tyco stock. Rather the Participants held an interest in the Plans which held an interest in a Master Trust which held an interest in the Tyco Stock Fund which held Tyco stock. Because the securities fraud cases only concern publicly traded Tyco stock, not the Tyco Stock Fund in which the Plans invested, or the interests in the Plan in which Participants invested, this case may not be part of the securities fraud cases. *See, e.g.,* In re Waste Management Inc. Securities Litigation, H-99-2183 (S.D.Tex. April 29, 2002) (denying plan participant's motion to intervene as of right in securities case because participant had no "direct, substantial, legally protectable" interest in the proceeding); 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).

[6] In the event double recovery becomes an issue, it can be addressed in a later stage of the case, perhaps as part of the damages calculation. *See, e.g.,* Dinco v. Dylex Ltd., 111 F.3d 964 at 973 (1st Cir. 1997) (risk of double recovery can be addressed by jury instructions and verdict forms). The mere possibility of double recovery is not a valid ground to dismiss the ERISA complaint.

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was an Employee Stock Ownership Plan ("ESOP") and, therefore, that the fiduciaries were required to invest all assets in Tyco stock and cannot be liable for that investment. In fact, the Fund was an investment option much like a mutual fund. Moreover, establishment of the Fund was solely at the discretion of the fiduciaries. It was not mandatory as is the case with an ESOP. Consequently, Defendants' arguments premised on the notion that the Tyco Stock Fund was an ESOP are wrong. Moreover, even if the Fund was an ESOP, which it was not, Defendants still would be liable for the imprudent investments in the Fund.

Defendants' second major error is claiming that they are immune from liability under ERISA § 404(c) and that the Participants themselves are somehow responsible for the losses suffered by the Plans. The Plans, not the individual Participants, made the imprudent investments in the Fund. Under ERISA § 404(a), a plan's fiduciaries are liable for all imprudent investments made by a plan. The only exception to this rule is where a plan complies with the very specific requirements of ERISA § 404(c) and the Regulations promulgated thereunder. In this case, the Plans did not meet the strict requirements of § 404(c). Since the Plans did not qualify under § 404(c), Defendants are liable for imprudent investments by the Plans, regardless of whether the Plan investments were selected by Participants.

In making these arguments, Defendants also completely ignore the pleading standard that this Court should apply. Defendants do not dispute that this case is governed by the liberal, notice pleading standard of Rule 8 of the Federal Rules of Civil Procedure and that the Complaint need only allege a short plain statement of the claim showing that the Plaintiffs are entitled to relief. Defendants also do not dispute that Plaintiffs need not allege facts sufficient to set forth a *prima facie* case - although Plaintiffs have done so. Even though the Complaint

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obviously satisfies this liberal notice pleading standard, Defendants still argue that it should be dismissed. However, the fact that Defendants need over 100 pages to "argue their case" suggests that Defendants are attempting to either brief a motion for summary judgment based on no factual record or are improperly attempting to persuade the Court to apply the much more stringent pleading standard that applies in securities fraud cases. Put another way, the voluminous briefing by Defendants is in effect an admission that Defendants have notice of and understand Plaintiffs' claims. This is all that Rule 8 requires.

DESCRIPTION OF THE PLANS

The Plans are typical 401(k) retirement plans, the purpose of which is to provide income for Tyco employees when they retire.[7] As required under ERISA, these Plans are managed by fiduciaries who are alleged to be the Defendants in this case. Complaint at ¶¶ 41-62. These fiduciaries are responsible for managing the Plans prudently and in the best interests of the Participants. ¶¶ 63-64.

The essential provisions of the Plans are set forth in the documents legally creating and describing the Plans ("Plan Documents") and are not in dispute. According to these Plan Documents, Tyco International (US), Inc. ("Tyco US") is the Sponsor. Plan, §§ 1.13, 1.29.[8] Tyco US acts through its Board of Directors ("Board") or other persons who are authorized by the Board. Plan, § 10.2. Tyco US retains all rights, powers, and duties with respect to the Plans

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[7] 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, Plaintiffs use it to mean a self-directed individual account plan in the ERISA context.

[8] All citations to Plan Documents are in the form "Plan, § __ " and correspond to the Plan Document creating the Tyco International (US) Inc. Retirement Savings and Investment Plan II, which is Exhibit 1 to the Declaration of Francis P. Barron ("Barron Decl.") filed by Defendants. Though Plan Documents for the other Plans may have sections numbered differently, the referenced terms are identical.

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and its assets but delegates all such rights and powers to the Committee, "except as such Plan Sponsor may exercise the same for itself." Plan, § 10.2.

The Tyco US Board appoints the Committee. Plan, §§ 8.1, 8.2.

The Committee has discretion to establish appropriate investment options for the Plans in its discretion. Plan, § 1.23. These options may but are not required to include the Tyco Stock Fund. Plan, § 8.4(g). Because the Tyco Stock Fund is not specifically mandated by the Plans, establishing and maintaining the Fund as an investment option for the Plans is a discretionary act by the Committee.

Pursuant to the Plan Documents, the Tyco Stock Fund is an investment vehicle established by the Committee in its discretion. Plan, § 1.23. It is not a "plan" or an ESOP. It is not defined as a "Plan" under the Plans. Plan, § 1.28. Moreover, it is not defined as an ESOP. The only ESOP referred to under Plan II is the "Colgate-Palmolive Company Employee Stock Ownership Plan." Plan, § 1.19.

The Plans expressly provide that the Board, the Committee and any other person who is deemed a fiduciary by virtue of his conduct under ERISA has duties of loyalty and prudence under the Plans. Plan, § 13.

Significantly, the Plans nowhere state that they intend to be subject to or even reference the "safe harbor" under § 404(c) upon which Defendants purport to rely so heavily.

Defendants also issued to Participants a Summary Plan Description ("SPD") for the Plans, which is the core disclosure document prepared by the fiduciaries to describe the essential

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features of the Plans.[9] The SPD states that although the Plans are administered by the Committee, "most of your day-to-day questions can be answered through the Tyco Benefits Center," and that Participants can contact the Tyco Benefits Center for answers to questions about the SPD or their rights under ERISA. SPD, 15. Significantly, the Tyco Benefits Center, which is responsible for the day-to-day operation of the Plans, has a different phone number than the Committee, the Plan Administrator. SPD at 3, 15. The SPD states that "the people who operate the plan . . . are called fiduciaries." SPD at 15.

Defendants also issued to Participants a document entitled Retirement and Savings Plan Investment Options ("Options").[10] This document describes the characteristics of the various investment options under the Plans. It was presumably sent to all Participants in each of the Plans and does not differentiate between those Plans (i.e. Retirement Savings and Investment Plan I, Retirement Savings & Investment Plan II, etc.). In other words, at least as far as communicating information concerning the Plans' investment options, there was no difference among the various Plans. The only material information that this document provides about the risk and return characteristics of the Tyco Stock Fund is that "[y]our investment's value will vary depending on Tyco's performance, the overall stock market, and the performance and amount of short-term investments held by the fund, less any expenses," and that "[i]nvesting in a non-diversified single stock fund involves more investment risk than investing in a diversified fund." Options at 7.

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[9] The SPD's for Plans 2, 3 and 5 are at Barron Decl., Exhibits 4, 5 and 6. Since these SPDs are materially identical, all references are to the SPD for Plan 2 (Barron Decl., Exhibit 4).

[10] This document is at Barron Decl., Exhibit 7.

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Defendants also issued to Participants a Plan Information Statement which, along with the SPD, is a "prospectus covering securities that have been registered under the Securities Act of 1933" ("Prospectus").[11] Prospectus at 2. This document expressly states that it applies equally to Plans I through V. Id. Thus, the same Prospectus is used for each of these Plans. The Prospectus expressly provides that for further information, Participants should review the Form S-8 Registration Statement filed by Tyco International. Prospectus at 8. The Prospectus also states that all of Tyco International's SEC filings are incorporated by reference into the Prospectus. Prospectus at 8. Finally, the Prospectus represents that Participants should contact Tyco US for further information about Tyco International and contact the Tyco Benefits Center "for further information concerning the Plans and their administration." Prospectus at 8. Because the Tyco Benefits Center functioned as the day to day Plan Administrator, the Prospectus does not direct Participants to the Committee for any information of any kind.

ARGUMENT

Plaintiffs have more than met the liberal notice pleading requirements under Rule 8. Specifically, the Complaint gives each Defendant notice of the claim that he is a fiduciary and the ways in which he violated his fiduciary duties.

Defendants make a number of erroneous arguments in response to these clear allegations. Ignoring well-established law that the definition of fiduciary is functional and does not depend on titles set forth in a plan, Defendants mistakenly contend that only the Committee can be liable because only the Committee is a named fiduciary under the Plans. They also attempt to pass off their responsibility to ensure that Plan investments were prudent to the Participants who chose

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[11] This document is at Barron Decl., Exhibit 8.

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the funds in which the Plans invested, even though the law is crystal clear that the fiduciaries in this case are liable for all imprudent Plan investments. Defendants are simply wrong in their contention that the Complaint does not detail the alleged negligent misrepresentations. There are pages of allegations on this claim, as there are pages concerning the imprudence of the Plans' investments in the Tyco Stock Fund. Defendants are also wrong in their argument that Plaintiffs lack standing and that ERISA provides no remedy for the many wrongs alleged in this case. For all of these reasons, the Motions to Dismiss should be denied.

A. PLAINTIFFS ARE REQUIRED TO ALLEGE ONLY A SHORT PLAIN STATEMENT OF THEIR CLAIMS.

The Complaint gives Defendants adequate notice of the nature of Plaintiffs' claims. Nothing more is required under Federal Rule of Civil Procedure 8's liberal notice pleading standard. Defendants do not claim that a higher pleading standard applies, nor do they claim that they do not have notice of the claims against them. Indeed, the very detailed arguments presented by Defendants demonstrate that Defendants have adequate notice of Plaintiffs' claims.

The United States Supreme Court recently reaffirmed this notice pleading standard in Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). The Supreme Court held that a complaint need not allege specific facts to set forth a *prima facie* case but instead must allege only a short plain statement of the claim showing that the pleader is entitled to relief. Id., at 508;[12] *see also* In re Initial Public Offering Securities Litigation, 241 F. Supp. 2d 281, 322-324 (S.D.N.Y. 2003)

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[12] 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, at 512-513 (citations omitted).

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(applying Swierkiewicz to a non-PSLRA securities claim and describing the history of the Rule 8 notice pleading standard). Indeed, as recognized by the Supreme Court, these requirements are exemplified by the official "forms" appended to the Federal Rules of Civil Procedure, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Swierkeiwicz v. Sorema N.A., 534 U.S. at 513, n. 4 (*quoting* Rule 84). For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Id.

The liberal notice pleading standard set forth in Swierkewicz has been applied by courts in this Circuit. Gorski v. New Hampshire Dept. of Corr, 290 F.3d 466 at 473 (1st Cir. 2002); Greenier v. Pace, Local No. 1188, 201 F. Supp. 2d 172, 177 (D. Me. 2002) ("Swierkiewicz clearly indicates that it is not fatal to plaintiff's case that some of his allegations at this stage may be legal conclusions rather than facts."); Ruder v. Maine General Medical Center, 204 F. Supp. 2d 16 (D. Me. 2002); Dellairo v. Garland, 222 F. Supp. 2d 86 (D. Me. 2002); Freeport Transit v. McNulty, 239 F. Supp. 2d 102 (D. Me. Feb. 3, 2003); Davidson v. Chou, 211 F. Supp. 2d 264 (D. Mass. 2002).

In this case, Plaintiffs have gone far beyond the requirement that they give notice of their claims under Rule 8. The Complaint contains both the required (conclusory) allegations that each Defendant is a fiduciary, **plus** substantial factual allegations concerning the fiduciary status of each defendant: for the Committee, Complaint, ¶¶ 41-48; for the Tyco US Directors, Complaint, ¶¶50-51; for Tyco US, Complaint, ¶¶ 52-54; for Tyco International, Complaint, ¶¶

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55-60; for the Tyco International Directors, Complaint, ¶ 61; for Defendants Kozlowski, Swartz and Belnick, Complaint, ¶ 61; and for Defendants Bent and Heffernan, Complaint, ¶¶ 18, 19. Moreover, Plaintiffs plead not only the required (conclusory) allegations that each Defendant was negligent, but **also** substantial factual allegations concerning the negligent misrepresentations and negligent omissions alleged in Claim I concerning Tyco's finances, Complaint, ¶¶ 69-105, and the risk and return characteristics of the Tyco Stock Fund, Complaint, ¶¶ 107-108. Claim II similarly alleges not only the required (conclusory) allegations that the Tyco Stock Fund was an imprudent investment but **also** substantial facts showing why that was so. Complaint, ¶¶ 119-120. Defendants do not contend that they do not have notice of the claims against them. Rather, in response to the detailed factual allegations, which Defendants cannot refute and which are presumed to be true, Defendants mischaracterize both the clear terms of ERISA and the plain allegations of the Complaint.

B. DEFENDANTS WERE FIDUCIARIES OF THE PLANS.

Defendants do not contest the claim that the Committee was a fiduciary. They similarly do not contest the claim that the Committee members were fiduciaries. Defendants' arguments that the Defendants other than the Committee and the Committee members were not fiduciaries as a matter of law is misguided.

The Complaint alleges that Defendants other than the Committee and its members were fiduciaries because they performed fiduciary functions and had discretion concerning the management and administration of the Plans' assets and the Plans' communications to Participants. Complaint,

¶¶ 49-62. ERISA provides, in pertinent part, that a person is a fiduciary "to the extent (i) he

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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 (21)(A)(i) and (iii). The term "fiduciary" is liberally construed in keeping with the remedial purpose of ERISA. American Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U. S., 841 F. 2d 658, 662 (5th Cir. 1988). 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. Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) ("ERISA, however, defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan"); Bannistor v. Ullman, 287 F. 3d 394, 401 (5th Cir. 2002); *see generally*, DOL Br. at 3-5.[13] As the Plans state, a fiduciary is any "person, by reason of his involvement in and under this plan" who shall be deemed a fiduciary under ERISA § 3(21) (ERISA's functional definition of fiduciary). Plan, § 13. According to these principles, all of the Defendants were fiduciaries because they engaged in fiduciary conduct with respect to the Plans and the Participants.

1. Tyco International Was a Fiduciary

Tyco International has more than ample notice of the claim that it was a fiduciary. Plaintiffs allege that Tyco International acted as a fiduciary because it (i) made representations in

[13] "DOL Brief" refers to the Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss filed in Tittle v. Enron Corp., Civil Action No. H-01-3913 and Consolidated Cases pending in the United States District Court for the Southern District of Texas. A copy of this Brief is attached to the Declaration of Robert Izard, filed herewith ("Izard Declaration"), as Exhibit A. 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, e.g.*, Schwartz v. Gordon,761 F.2d 864 at 686 (2d. Cir. 1985) (according "considerable deference" to DOL's interpretation of ERISA).

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the Plan Documents and its Form S-8 Registration Statement and Form 11-K, (ii) made direct representations to Participants in a fiduciary capacity and (iii) assumed responsibility for the fiduciary activities of Tyco US. Complaint, ¶¶ 55-60.

a. Tyco International made representations in plan communications in a fiduciary capacity.

Tyco International was a fiduciary because it made representations to Participants to be used by Participants in making decisions concerning Plan investments in the Tyco Stock Fund. Tyco International's fiduciary representations are alleged to be contained in the SPD, the Prospectus and in the Form S-8 Registration Statement. Included in these fiduciary representations were Tyco International's SEC filings which were incorporated by reference into those documents.

The Complaint alleges that Tyco International issued a Form S-8 Registration Statement to Participants which, along with the SPD, incorporated by reference all of Tyco's SEC filings which were to be used by Participants in managing their Plan investments, as well as a Form 11-K Annual Report for the Plans. Complaint, ¶¶ 55-56. Tyco International also issued the Prospectus, which relates principally to investment of Plan assets in the Tyco Stock Fund and was also a fiduciary representation by Tyco International. The Prospectus defines "Tyco" as Tyco International. Prospectus at 2. The Prospectus expressly states that it "contains important information" and that Participants "should take time to read it thoroughly" and keep a copy to answer questions in the future. Prospectus at 2. It then explains that Participants should review the Tyco International annual report before investing in the Tyco Stock Fund and discusses the relationship between an ownership interest in the Tyco Stock Fund and Tyco common stock.

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Prospectus at 4-7. The Prospectus also expressly provides that for further information about investing in Tyco, Participants should review the Form S-8 Registration Statement filed by Tyco International. Prospectus at 8. The Prospectus further represents that all of Tyco International's SEC filings are incorporated by reference into the Prospectus. Prospectus at 8.

Based on these allegations in the Complaint and the express language in the Prospectus, Tyco International has ample notice of the claim that it made representations in a fiduciary capacity. For example, an SPD is specifically defined as a representation in a fiduciary capacity. 29 U.S.C. §§1022(a)(1) and 1024(b)(1); *see* McCauley v. IBM, 165 F.3d 1038, 1046 (6th Cir. 1999) (statements in summary plan description 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). The same is true with respect to the Form S-8 Registration Statement and the Prospectus. The purpose of these documents was to provide Participants with information concerning Plan investment in the Tyco Stock Fund. Accordingly, they are fiduciary representations. "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. Varity Corp. v. Howe, 516 U.S. 589, 502 (1996).

In Varity, the company's Chief Executive Officer made statements to employees about their employer's "bright financial future." Id at 504. In rejecting defendants' argument that these representations were not in a fiduciary capacity, the Supreme Court held that the ultimate purpose of these representations was to convey information about the likely future of plan

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benefits. Id. The same is true with respect to the representations at issue in this case. Future Plan benefits were determined based on the amounts contributed to the Plans and the investment of those contributions. Complaint at ¶ 36. The alleged fiduciary representations were intended to convey information to Participants about Tyco and the Tyco Stock Fund to be used by Participants in making decisions concerning the investment of Plan assets which would determine their future Plan 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." See, SEC 1398 (8-01), Item 1, p. 6 (Exhibit B to Izard Declaration) This language is materially identical to the definition of a fiduciary representation quoted from Varity above. Since the Prospectus and the Form S-8 Registration Statement deal principally with the investment of Plan assets in the Tyco Stock Fund and the resulting future of Plan benefits, and since they expressly incorporate by reference all of Tyco International's SEC filings, the Prospectus, the Form S-8 and the incorporated SEC filings are fiduciary representations.

Vivien v. WorldCom, 2002 WL 31640557, 29 Employee Benefits Cas. 1368 (N.D.Cal. Jul 26, 2002), is directly on point. In that case, the court denied a motion to dismiss filed by two directors of WorldCom who were not named fiduciaries but were alleged to be fiduciaries because of their actions with respect to the plan. Id. at *4. The WorldCom directors claimed that they were not acting in a fiduciary capacity with respect to WorldCom's SEC filings which were incorporated by reference into the plan's summary plan descriptions because the representations in the SEC filings were made in a corporate capacity. In rejecting this argument and citing Varity, the court the denied defendants' argument in a motion to dismiss that the directors were

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not acting in a fiduciary capacity with respect to the representations in the SEC filings. Id. at *7. The same analysis applies to Tyco International in this case in that it also incorporated its SEC filings into the Form S-8 Registration Statement and the Prospectus. Tyco International's SEC filings were therefore representations in a fiduciary capacity. See also, In re Ikon Office Solutions Securities Litigation, 86 F.Supp. 2d 481,490-91 (E.D.Pa.2000)(premature at motion to dismiss stage to dismiss claim that employer could not or did not act as fiduciary in providing misinformation about investing in employer stock).

In response to these arguments, Tyco International wrongly argues that the Form S-8 Registration Statement is a function of plan design and was not, as a matter of law, a discretionary act. Def. Bf. at 31. Resolution of this issue requires findings of fact not appropriate for a decision under Rule 12. Indeed, issuance of the Form S-8 could not be a matter of plan design because the Plans were not "designed" to require the offer of the Fund as an investment option – the Fund was offered strictly at the discretion of the Committee. See, page 7, *supra*. Similarly, Tyco International was not required to offer Tyco stock to the Fund – it did so solely in its discretion. There is nothing in the design of the Plans or anything else that required Tyco to offer stock to the Fund, file a Form S-8 Registration Statement, prepare the Prospectus or incorporate its SEC filings into those documents. If Tyco International wanted to avoid these fiduciary responsibilities, it should have done what many companies do - refuse to offer company stock to the Plans. However, once Tyco International made the decision to sell Tyco securities to the Plans, it assumed all of the fiduciary duties that came with that decision. More to the point, selling Tyco stock to the Fund was a voluntary act, as was the related act of incorporating the SEC filings into Plan documents. *See* John Deere Health Benefit Plan v.

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Chubb, 45 F.Supp. 2d 1131, 1139 (D. Kan. 1999) (although fiduciaries not required to include information concerning subrogation right in SPD, "once included in the SPD, they must not fail to inform participants of rights under plan.")

Defendants also incorrectly contend that the filing of documents with the SEC somehow protects them in this case. While Plaintiffs agree that preparing and filing SEC documents is not necessarily a fiduciary act, the fact that documents are filed with the SEC does not mean that they do not become fiduciary representations if they are disseminated to Participants in a fiduciary capacity. Under Vivien , Defendants cannot immunize themselves from liability for fiduciary representations merely by claiming that those representations were also filed with the SEC. Defendants' argument is particularly strange in light of their argument that they are entitled to the § 404(c) safe harbor. As set forth below, § 404(c) requires, among other things, that plans disclose to participants all material information about plan investment options. Like most companies, Defendants apparently attempted to meet this obligation by incorporating Tyco International's SEC filings into its fiduciary representations. To the extent that the SEC filings were not incorporated into the fiduciary representations, then the Plans did not disclose material information to Participants in a fiduciary capacity and did not meet the disclosure obligations of § 404(c). *See, e.g.,* In re Unisys Sav. Plan Litigation, 74 F.3d 420, 447 (3rd Cir. 1996) (fiduciary cannot meet its disclosure obligation if based on a situational, isolated response to a crisis in one investment; to comply with § 404(c), the plan must make disclosure, in a fiduciary capacity, as a matter of course pursuant to a plan term).

In essence, Defendants are making contradictory and irreconcilable arguments. On the one hand, they argue that they met the requirements of § 404(c) by disclosing all material

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information in a fiduciary capacity, but on the other hand, they argue that the representations in the SEC filings were not made in a fiduciary capacity. Defendants cannot have it both ways. Either the representations in the SEC filings were fiduciary representations in an attempt to comply with § 404(c), or they were not, and Defendants did not even attempt to qualify for the § 404(c) safe harbor.

Defendants overstate the holding in Crowley v. Corning, 234 F.Supp.2d 222 (W.D.N.Y. 2002), which is distinguishable in a number of ways. First, the court in Crowley merely noted that the plaintiff alleged that SEC filings were incorporated into the SPD. It did not analyze the impact of that allegation on Corning's fiduciary status. More important, it did not even address the issue of whether Corning could be a fiduciary by conduct, much less whether SEC filings incorporated into an SPD or Prospectus constitute a representation in a fiduciary capacity. The Crowley court's failure to recognize that an "unnamed" fiduciary could nonetheless be a fiduciary because of its conduct is confirmed by the fact that Crowley erroneously distinguished Varity solely on the basis that Varity Corp. could be liable because it was the Plan Administrator whereas Corning could not be liable because it was not a named fiduciary. Id. Since under ERISA, there is no distinction between a named fiduciary and a *de facto* fiduciary with respect to claims for breach of fiduciary duty, Crowley's distinction of Varity was erroneous. In addition, Crowley did not address the many other arguments raised herein, such as the fact that the instructions to Form S-8 demonstrate that a Form S-8 Registration Statement is by definition a fiduciary representation.

Hull v. Policy Mgmt. Sys. Corp., 2001 WL 1836286 (D. S.C. 2001), cited by Defendants at page 34 n. 18, is also readily distinguishable. In Hull, the complaint based its claim for breach

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of fiduciary duty on representations to the public at large, and, according to the Court, "mirrored" the claims in a pending the securities fraud case. Id. at 3. It did not contain any allegations that the representations were made in a fiduciary capacity such as those directed at Participants in the Prospectus and the Form S-8 Registration Statement. Accordingly, Hull is not relevant to this case. Indeed, the Department of Labor takes the position that Hull is wrongly decided. DOL Br. at 28.

The court in Vivien similarly rejected Defendants' arguments concerning Hull. Vivien, 2002 WL at *7. In holding that directors could be liable for misrepresentations in SEC filings that were incorporated into an SPD, Vivien distinguished Hull in part on the ground that Hull merely compared the fiduciary duties alleged in the complaint with the specific duties enumerated in the plan's governing instrument and failed to account for the fact that an unnamed fiduciary could be a fiduciary by conduct. Id. Viven, on the other hand, properly looked beyond the plain language of the plan and considered the conduct of the directors in making representations directly to Participants in the SEC filings that were incorporated into the SPD and disseminated to Participants in connection with their Plan investments. Id.

b. Tyco International was a fiduciary because of direct representations to Participants

Plaintiffs also allege that Tyco International was a fiduciary because of direct representations by Kozlowski, CEO of Tyco International, to Participants while acting in the scope of his employment.[14] Complaint, ¶ 58. Though Tyco International does not specifically

[14] In arguing that Kozlowski was acting in a corporate capacity in making these statements, Defendants admit that Kozlowski was acting on behalf of Tyco International. Def. Br. at 50. Furthermore, as Kozlowski was the CEO of both Tyco International and Tyco US, his actions implicated both of these corporate defendants. Complaint, ¶ 23.

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respond to these allegations, they are addressed at pages 34 to 36, *infra*, in response to Kozlowski's arguments.

Plaintiffs also allege that Tyco International was a fiduciary as a result of representations that Tyco International made to Participants of the Mallinckrodt plan, which was merged into the Plans, and whose participants became Participants in the Plans. Complaint, ¶ 58. In other words, Tyco International is alleged to have made representations to Participants in a Tyco International subsidiary retirement plan which has since been merged into the Plans concerning Plan investment in the Tyco Stock Fund. Accordingly, the representations are by definition fiduciary representations.

Tyco International makes a number of erroneous arguments concerning these fiduciary representations. Tyco International first claims that the Mallinckrodt Stock Fund was an ESOP. Def. Br. at 34. However, for the reasons set forth at pages 60-64, *infra*, this fund was an investment fund, not an ESOP. Tyco International then erroneously contends that if Tyco International was a fiduciary because of its dissemination of the Mallinckrodt Update, then every company offering a stock fund to an ERISA plan would be a fiduciary. Def. Br. at 34-35. In addition to the fact that this acknowledgment that the Mallinckrodt Stock Fund is like a mutual fund directly contradicts the argument that the Mallinckrodt and Tyco Stock Funds are ESOPs, this fact-based argument should not be considered on a motion to dismiss. It also reflects a complete misunderstanding of how ERISA plans are administered. Under ERISA, fiduciaries, not mutual fund companies, disseminate information relating to plan investment options to Participants. *See* In re Unisys Sav. Plan Litigation, 74 F.3d 420, 447 (3rd Cir. 1996) (for § 404(c) protection, plan must disseminate information concerning the financial condition and

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performance of investment options and developments which materially affect the financial status of such investments). *See also,* Varity Corp. v. Howe, 516 U.S. at 502 ("ERISA itself specifically requires administrators to give beneficiaries certain information about the plan"). For this reason, fiduciaries (not mutual fund companies) are liable for breach of fiduciary duty if their fiduciary representations are not accurate.[15] By undertaking this fiduciary obligation, Tyco International assumed the role of fiduciary.

Finally, Tyco International makes the particularly fact-based argument that the Committee, not Tyco, was responsible for dissemination of the Mallinckrodt Update. However, the Complaint alleges that Tyco International was responsible. Complaint, ¶ 58. Defendants admit that this allegation is expressly confirmed by the Update itself. Def. Br. at 35-36. This issue should not be resolved on a motion to dismiss.

c. Tyco International is liable for the acts of Tyco US.

Defendants improperly move to dismiss the claim that Tyco International is liable for the acts of Tyco US only on the grounds that Plaintiffs allege a "conclusory allegation." Def. Br. at 36. However, even a "conclusory" allegation is sufficient to put Defendants on notice of Plaintiffs' claim. Furthermore, the Complaint alleges numerous facts demonstrating the manner in which Tyco International controlled Tyco US. Complaint, ¶¶ 59-60. Moreover, the Plan Documents confirm that Tyco US was acting on behalf of Tyco International. For example, the Prospectus expressly states that Participants should contact Tyco US for information about Tyco

[15] Indeed, the Fidelity Freedom Fund example cited by Tyco International provides an excellent example of this point. Def. Br. at 35. Defendants' quotation is from the document "Your Tyco Retirement and Savings Plan Investment Options," Barron Decl., Ex. 7 at 8-9. This document was drafted and disseminated by Defendants to Participants in a fiduciary capacity. Def. Br. at 35. It was not drafted by Fidelity. To the extent that this document negligently misrepresents or fails to disclose information about the Fidelity Freedom Funds, then Defendants are liable for those negligent misrepresentations and nondisclosures under section 404(c).

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International for the specific purpose of obtaining information about investment in the Tyco Stock Fund. See pages 8-9, *supra*. Therefore, Tyco US was Tyco International's agent for purposes of conveying Plan information to Participants. Furthermore, the Complaint sets forth the overlap of senior management between Tyco International and Tyco US - the same individuals held the same top positions in both companies. Complaint, ¶ 59. At least at the motion to dismiss stage, before any discovery, this should be sufficient to state a claim under Rule 8.

Respondeat superior liability may be imposed for ERISA violations, and Defendants' statement that the doctrine of ERISA *respondeat superior* has never been applied by any appellate or district court simply is not true. Def. Br. at 42. For example, in Stanton v. Shearson Lehman/American Exp., Inc., 631 F. Supp. 100 (N.D. Ga. 1986), Shearson Lehman was responsible for its stock broker employee - holding, the "broad protective purpose of ERISA" calls for *respondeat superior* liability between employees who are fiduciaries and their employers. Id. at 104-05. This decision was cited by the 5th Circuit Court of Appeals in holding that "[t]he doctrine of *respondeat superior* can be a source of liability in ERISA cases." American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc. of the U.S., 841 F.2d 658 at 665 (5th Cir. 1988); *see also* Bannistor v. Ullman, 287 F. 3d 394, 408 (5th Cir. 2002).

The cases quoted by Defendants do not reject the doctrine of *respondeat superior* or even use the words "*respondeat superior*." Defendants cite a string of cases for the unremarkable proposition ERISA does not impose fiduciary liability on non-fiduciaries. However, the doctrine of *respondeat superior* is perfectly compatible with ERISA's recognition of *de facto* fiduciaries

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who exert control over other fiduciaries. In Defendants' principal case, Reich v. Rowe, 20 F.3d 25 (1st Cir. 1994), participants sued an accountant and his firm - alleging that the accountant was acting "within the scope of his employment" as agent for the accounting firm. Id. at 28. While the court discussed the limited scope of ERISA fiduciary liability, it did not find that either the accountant or the accounting firm was a fiduciary. Therefore the issue of *respondeat superior* never came up. The other case extensively relied upon by Defendants, Gelardi v. Pertec Computer Corp., 761 F.2d 1323 (9th Cir. 1985), is readily distinguishable. In its holding, the court found that an employer is not necessarily responsible for the acts of a committee on which some of its employees may serve. Id., 1325. While those committee members may not have been acting within the scope of their employment in that case, the present Complaint contains sufficient allegations to support such a claim. *See* Complaint, ¶¶ 17-19, 52.

2. The Tyco International Directors Were Fiduciaries.

The Tyco International Directors were *de facto* fiduciaries because they made representations to Participants concerning Plan investments in the Tyco Stock Fund. Just like Tyco International, they signed the Form S-8 Registration Statements and other SEC filings that were incorporated by reference into the Form S-8 and the Prospectus. Consequently, they are alleged to be fiduciaries just as the WorldCom directors were alleged to be fiduciaries in Vivien. *See* pages 14- 20, *supra*.

Notwithstanding the clear holding of Vivien that directors can be liable even though not named fiduciaries, Defendants incorrectly argue that the Directors are not liable as fiduciaries

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because they were acting on behalf of a corporate fiduciary. Def Br. at 37.[16] Defendants attempt to make this argument through a tortured reading of Confer v. Custom Eng'g Co., 952 F.2d 34 (3rd Cir.1991). Confer held that corporate officers are not responsible for the fiduciary actions of a corporation merely because of their corporate status within the organization. However, that court also expressly held that its holding was inapplicable when - like the case at hand - the individual was alleged to have engaged in fiduciary actions or was given fiduciary discretion under the plan documents. Id. at n. 3 ("We agree with Judge Seitz that officers of a corporation 'may assume a fiduciary status, even absent a designation as the named fiduciary or trustee of the plan, by performing functions that fulfill the statutory definition of a fiduciary.'"). Moreover, other courts have expressly rejected Confer, correctly recognizing that such a rule would create an exception for corporate officers that does not exist for any other functional fiduciaries. *See, e. g.*, Kayes v. Pacific Lumber, 51 F. 3d 1449, 1460 (9th Cir.) (rejecting argument based on Confer because it would allow corporations to shield its decision makers from personal liability merely by stating in plan documents that their actions are taken on behalf of the company), *cert. denied*, 516 U. S. 914 (1995); Martin v. Schwab, 15 Employee Ben. Cas. 2135 (BNA), 1992 WL 296531, at *5 (W. D. Mo. 1992) ("Defendants' contention they have no individual exposure as fiduciaries [because they were on the Board of Directors] is clearly at odds with the language of the statute. . . . Congress 'conferred fiduciary status on persons and entities by activity and not by label.'") (citation omitted). As another court noted, "under the broad scope of the ERISA fiduciary definition, corporate employees and officers who fit under section 1002(21)(A), while

[16] This argument is somewhat ironic in light of Tyco International's argument that agency principles do not apply under ERISA and that each "fiduciary" is liable for his own actions.

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nevertheless acting on behalf of a corporate entity, face potential fiduciary liability in their individual capacities with no necessity of piercing the corporate veil. . . . A contrary approach would ignore "[t]he broadly based liability policy underpinning ERISA and its functional definition of 'fiduciary'" and allow a corporation "to shield its decision-makers from personal liability" in contravention of what Congress intended in ERISA. Musmeci v. Schwegmann Giant Super Markets, 159 F. Supp. 2d 329, 353 (E. D. La. 2001) (*citing* Kayes v. Pacific Lumber Co., 51 F.3d, 1461)

Defendants' argument is thus inconsistent with the holdings of many courts which have routinely held officers and directors to be fiduciaries when they have discretionary authority or control over plans. *See, e. g.*, Yeseta v. Baima, 837 F. 2d 380, 384-85 (9 th Cir. 1988) (corporate officer of plan sponsor which also administered the plan held to be a fiduciary based on his discretionary authority and responsibility in the administration of the plan); Leigh v. Engle, 727 F. 2d 113, 134-135 (7th Cir. 1984); Brock v. Self, 632 F. Supp. 1509, 1520, 1521, 1523 (W. D. La. 1986); McNeese v. Health Plan Marketing, Inc., 647 F. Supp. 981, 983-85 (N. D. Ala. 1986); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 641 (W. D. Wisc. 1979); *see also* Liss v. Smith, 991 F. Supp. 278, 310 (S. D. N. Y. 1998) ("It is by now well-established that the power to appoint plan trustees confers fiduciary status."); Martin v. Schwab, 15 Employee Benefits Cas. (BNA) 2135, No. CIV. A. 91-5059-CVSW-1, 1992 WL 296531, at *4 (W. D. Mo. Aug. 11, 1992) ("[C]ase law clearly provides that officers and directors of an employer who sponsors a pension plan may be fiduciaries to the extent they maintain authority for the selection, oversight, or retention of plan administrators."); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456 at 1459-60 (5th Cir. 1986); 29 C.F.R. § 2509.75-8 at

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D-4 (a fiduciary who appoints trustees has the responsibility and liability for those functions over which he exercises authority or control, *i.e.*, selection and retention of fiduciaries).

Confer's approach also cannot be reconciled with the statutory language of ERISA, which explicitly defines a fiduciary as a "person . . . to the extent that he exercises any discretionary authority or discretionary control" over plan management or plan assets. 29 U. S. C. § 1002 (21). This definition contains no exemption for a "person" who is acting on behalf of a corporation; to the extent that such persons have discretionary authority or control over the plan, they are plan fiduciaries regardless of any other role that they play.

Plaintiffs do not allege that the Tyco International Directors were fiduciaries solely on account of their positions. Rather, they actually signed the fiduciary communications–one who signs a report makes the representations contained therein. Howard v. Everex Systems, Inc, 228 F.3d 1057,1061-62 (9th Cir. 2000). Thus, even under Confer, the Tyco International Directors are alleged to be fiduciaries concerning these representations.

The Directors also argue that they had no duty to disclose. Tyco International LTD. Director Defendants' Memorandum of Law in Support of Their Motion to Dismiss ("Director Br.") at 8.[17] In this case, however, Plaintiffs allege affirmative factual representations in a fiduciary capacity by the Directors. Regardless of whether they had a duty to disclose, once they elected to disclose, they are liable for those disclosures. Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3rd Cir. 1993) ("when a plan administrator speaks, it must speak truthfully"), *cert.*

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[17] The Tyco International Director Defendants in a separate brief reiterate the arguments made in Defendants' Brief that they did not act as fiduciaries in signing the Form S-8 Registration Statement and that they were acting in a corporate capacity and not acting in a fiduciary capacity. Plaintiffs' response thereto is set forth at pages - , *supra.*

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denied, 510 U.S. 1020 (1993); John Deere Health Benefit Plan v. Chubb, 45 F. Supp. 2d 1131, 1139 (D. Kan. 1999) (although fiduciaries not required to include information concerning subrogation right in SPD, once included in the SPD, they must not fail to inform participants of rights under plan."). *See* pages 52-56, *infra*.

The Directors also argue that the instructions to Form S-8 "make clear that the Director Defendants' signing of that document and related disclosures were acts undertaken solely in a corporate capacity under the securities laws".... Director Br. at 8-9. However, Plaintiffs allege that a purpose of the Form S-8 Registration Statement was to convey information about Tyco stock offered to the Plans to enable Participants to make informed decisions about investment of Plan assets which would affect future Plan benefits. Complaint ¶¶ 46-47. Form S-8 can only be used to register securities to be offered to employees through employee benefit plans; it cannot be used to register securities offered to the general public. 17 C.F.R. §239.16b. Defendants do not question this purpose. Rather, they argue only that the Tyco International Directors were signing in their capacity as directors, not as trustees of the Plans. Regardless of whether the Directors were signing as directors or in some other capacity, the point is that they signed a Registration Statement that made factual representations to be used by Participants concerning Plan benefits. Therefore, these representations conveyed information concerning plan benefits - a uniquely fiduciary action. *See* Varity Corp v. Howe, 516 U.S. at 502. Moreover, as set forth at page 16, *supra*, the instructions to Form S-8 demonstrate that a Form S-8 Registration statement is at the heart of a fiduciary representation.

The Directors also make the irrelevant point that they did not sign on behalf of the Plans. Director Br. at 9. Plaintiffs contend that the Directors individually signed the Form S-8

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Registration Statements which incorporated the SEC filings that they also signed, and that they are liable for their personal acts. This is true regardless of whether they acted on behalf of the Plans.[18]

In a separate brief, Directors Bodman and Lane incorrectly cite Crowley for the proposition that since the Corning directors had no responsibility **under the terms of the plan** to communicate information to participants, they could not be liable as fiduciaries for those communications. Memorandum of Law in Support of Defendants' Bodman and Lane's Motion to Dismiss Consolidated Amended Complaint, 11-12, *citing* Crowley at 228-229. As set forth above, this argument is directly contrary to the principle that the definition of fiduciary is functional and is not determined solely by the terms of the plan. Indeed, Bodman and Lane admit this where they describe three types of fiduciary: a fiduciary named in the plan documents; a fiduciary named pursuant to a procedure outlined in the plan documents; or "by being deemed a *de facto* fiduciary as a result of performing functions that fall within ERISA's definition of 'fiduciary.'" Memorandum of Law in Support of Defendants Bodman and Lane's Motion to Dismiss Consolidated Amended Complaint, 4.

The Directors also articulate a variation of Tyco International's "Fidelity Freedom Funds" argument. Director Br. at 12. *See* page15,n.15, *supra*. In connection therewith, they make the erroneous argument that a prospectus from a third party mutual fund provider is incorporated into the Plan Prospectus. However, there is no basis for this assertion anywhere in the pleadings or the Prospectus. This argument thus depends on alleged facts without the proper record for a Rule 12 motion. Defendants' argument also ignores the fact that the mutual fund company supplies

[18] The Directors also rely on Crowley and Hull. These cases were distinguished at pages 19-20, *supra*.

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the same prospectus that it prepares for all customers, including a 401(k) plan, to the fiduciaries, who then distribute the prospectus to Participants. In that case, the mutual fund company would not be a fiduciary because it makes no direct representations to Participants. However, to the extent that the mutual fund company is also a plan trustee or other fiduciary, circumstances could be different.[19]

3. Tyco US Was A Fiduciary

Tyco US was a *de facto* fiduciary because it exercised discretionary control over the management and administration of the Plans and their assets. The Complaint contains sufficient allegations to give Tyco US notice of Plaintiffs' claims. Complaint, ¶¶ 52-53. The fiduciary status of Tyco US is also clear from the Plan Documents themselves. Tyco US employees served on the Committee without compensation. § 8.2. They were selected by and served solely at the pleasure of the Board of Tyco US. § 8.2. Tyco US indemnified them for all acts as Committee members. §8.11. Based on these facts, Tyco US has notice that Plaintiffs claim that the Committee members served on the Committee as part of their jobs with Tyco US and, therefore, were agents of Tyco US with respect to Plan management and administration. Moreover, Tyco US is liable for the acts of Kozlowski, its CEO, who Defendants admit was acting within the scope of his employment in communicating with Participants. Def. Br. at 50.

Moreover, Tyco US operated the Plans directly. The SPD expressly states that **although** the Plans are administered by the Committee, "most of your day-to-day questions can be answered through the Tyco Benefits Center," and that Participants can contact the Tyco Benefits

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[19] In separate Motions to Dismiss, Defendants Kozlowski, Belnick and Swartz make the same arguments that they did not sign the SEC filings in a fiduciary capacity. The arguments above apply equally to them.

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Center for answers to questions about the SPD or their rights under ERISA. SPD, 15. Significantly, the Tyco Benefits Center, which is responsible for the day-to-day operation of the Plans, has a different phone number than the Committee, the Plan Administrator. SPD at 3, 15. These facts demonstrate that Tyco US had responsibilities which were different from the Committee and was directly responsible for the operation and administration of the Plans. Similarly, the Prospectus told Participants to contact the Tyco Benefits Center for "further information about the Plans and their administration." Prospectus at 8. Finally, the Prospectus told Participants to contact Tyco US directly for further information concerning Tyco International in relation to Plan investments. Prospectus at 8. More significant is the fact that the SPD states that "the people who operate the plan"..."are called fiduciaries." SPD at 15. Thus, Tyco US not only operated the Plans, it told Participants it was a fiduciary because it did so.[20]

It is important to note that Tyco US and the Committee were never clear in their representations as to who did what. Indeed, the Committee was referred to by a number of different names. Complaint, ¶17. From these different representations as to the name and identity of the "Plan Administrator," Participants would reasonably have had little idea as to the identity of the named fiduciary. One thing that they did know, however, was that they could call Tyco US for information about their investment options.

The Tyco US argument that it is not a fiduciary because the Plan Documents do not confer discretionary authority on it (Def. Br. at 39) misses the point. Tyco US is a fiduciary

[20] If there is a conflict between the terms of the Plan Documents and the information contained in an SPD, the SPD controls. Moriarity v. United Tech. Corp. Represented Employees Retirement Plan, 158 F.3d 157, 162 fn. 2 (2d Cir. 1998) ("Any other rule would be, as Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary.") Therefore, Tyco US's admissions that it was a fiduciary control.

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because of its actual conduct, not because of the duties conferred on it in the language of the Plan. A fiduciary cannot absolve itself of responsibility simply by stating in the plan that it has no responsibility. 29 U.S.C. § 1110(a) (Except as specifically provided in ERISA, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.") Moreover, the Plans themselves state that fiduciary status is functional and not limited to the specific words written in the Plan Documents. The Plans expressly provide that the Board, the Committee and any other person who, "by reason of his involvement in and under this Plan, shall be deemed to be a fiduciary within the meaning of Title I, Section 3(21) of ERISA [the functional definition of fiduciary], shall discharge their Plan related duties and responsibilities solely in the interest of the Participants and their Beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Plan, § 13. Finally, even the specific language of the Plans demonstrates that Tyco US was a fiduciary. The Plans state: "The Plan Sponsor hereunder shall have and exercise all the rights, powers and duties thereof with respect to the Plan and the assets of the Plan" and that the Plan sponsor delegates rights and powers to the Committee "except as such Plan Sponsor may exercise for itself." Plan § 10.2. Consequently, even the Plans deemed Tyco US a fiduciary to the extent that it exercised its powers in the administration and management of the Plans and their assets as alleged in the Complaint.

The Tyco US contention that the Committee cannot be the agent of Tyco US (Def. Br. at 40, 42-45) is simply wrong. As set forth at pages 22-24, *supra*, *respondeat superior* is a

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recognized claim under ERSISA. At the very least, Tyco US cannot reasonably contend that it is not on notice of the claim that it is liable for the acts of the Committee under the doctrine of *respondeat superior*, which is all that is required at this stage of the litigation.

4. The Tyco US Directors Were Fiduciaries

The Tyco US Directors were fiduciaries because, as Defendants concede, they had the power and responsibility to appoint Committee members qualified to perform the task. Def. Br. at 41. With this appointment power came the duty to monitor the Committee's performance and convey material information necessary for their appointees to properly perform their responsibilities. Complaint ¶ 51. The "ongoing responsibilities of a fiduciary who has appointed trustees" require that "[a]t reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such a manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan." 29 C. F. R. § 2509.75-8 at FR-17; *see also* Miniat v. Globe Life Ins. Group, Inc., 805 F. 2d 732, 736 (7 th Cir. 1987) (fiduciaries have duty to monitor administrators they selected). "[I]mplicit in [a fiduciary's] power to select the plans' named fiduciaries is the duty to monitor the fiduciaries' actions, including their investment of plan assets." Mehling v. New York Life Ins. Co., 163 F. Supp. 2d 502, 509-10 (E. D. Pa. 2001). See also Liss v. Smith, 991 F. Supp. at 311 (fiduciaries who appoint trustees have "the obligation to ensure that the appointees are performing their fiduciary obligations."). Thus, an appointing fiduciary has a duty of oversight to promote compliance with ERISA's fiduciary obligations and to prevent misconduct or injury. *See*, *e. g.*, Leigh v. Engle, 727 F. 2d 113 at 134-35 (7th Cir. 1984); Coyne & Delany Co. v. Selman, 98 F.3d 1457 at 1465 (4th Cir. 1996); Martin v. Feilen,

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965 F. 2d 660 (8th Cir. 1992); *see generally* DOL Br. 9-12. Moreover, the Board had a duty to provide material information to the Committee that was necessary for the Committee to perform its duties. Complaint, ¶¶ 51, 124(c); DOL Br., 10-11; *c.f.* Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec. Inc., 93 F.3d 1171, 1181-1182 (3rd Cir. 1996) (fiduciary had obligation to disclose material adverse information to other fiduciary).

Defendants do not dispute that the Tyco US Directors had these responsibilities. Def. Br. 41 - 42. Rather, they present a narrow factual issue, namely, whether the Complaint sufficiently alleges that the Committee members were inadequate appointees and, therefore, whether the Tyco US Directors breached their fiduciary duties in appointing them. This argument has nothing to do with whether the Tyco US Directors were fiduciaries in the first instance. Rather, it has to do with whether they breached their fiduciary duties. Thus, the Tyco US Directors appear to concede that they were fiduciaries concerning their appointment of Committee members.

The Complaint also gives the Tyco US Directors ample notice of how they breached their fiduciary duties in failing to appoint appropriate Committee members. For example, the Complaint alleges that to the extent that the Committee members were not aware of the public information that was widely disseminated in the investment community to be used in evaluating any investment in Tyco stock, the Committee was not qualified to manage the Plans' investment in the Tyco Stock Fund and, therefore, the Board appointed inadequate Committee members. Complaint at ¶ 124(b). Additionally, the Complaint alleges that to the extent that the Committee did not know the non-public information alleged in the Complaint (which Defendants contend at Def. Br. at 69), then the Tyco US Directors either did not appoint sufficiently knowledgeable

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Committee members or did not convey material information to the Committee. Complaint, ¶ 124(c). See, Rule 8(e)(alternative theories acceptable). These allegations provide ample notice to the Tyco US Directors of the claim that the Committee lacked the knowledge and ability to manage the Plans' investments in the Tyco Stock Fund properly and that they appointed inappropriate Committee members.[21]

5. Kozlowski Was A Fiduciary Because Of His Direct Representations To Participants

In addition to being a fiduciary because he signed the Form S-8 Registration Statement and related SEC filings, Kozlowski is alleged to be a fiduciary because he made direct representations to Participants relating to the value of the Tyco Stock Fund, which had the effect of inducing Participants to direct the Plans to maintain or increase their investments in the Fund. Complaint, ¶ 109. This allegation gives Kozlowski sufficient notice of the claim against him.

Ignoring this clear allegation, Kozlowski makes the particularly fact-based argument that his communications were not directed at Participants or related to investment of Plan assets. Memorandum of Law of Defendant L. Dennis Kozlowski In Support of His Motion to Dismiss ("Kozlowski Br.") at 11-12. These self-serving factual arguments should not be considered on a motion to dismiss. Moreover, Kozlowski's alleged communications were **not** general communications to the financial markets as a whole, but internal communications directed solely at the employees who were Participants in the Plans. The fact that Kozlowski uses the term

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[21] Significantly, Defendants do not deny that the Tyco US Directors had knowledge of this adverse information. Indeed, the Complaint alleges that the Tyco US Directors were in the best position to know this information. For example, at ¶ 20, the Complaint alleges that Tyco US Director Irving Gutin was also the Senior Vice President in charge of mergers and acquisitions of Tyco International Ltd. He was in a unique position to know about Tyco's undisclosed acquisitions and the impropriety surrounding the acquisition accounting and should have ensured that the Committee knew that as well.

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"employee" rather than "Participant" does not change this fact. Indeed, to accept this distinction would exalt form over substance, and would allow any fiduciary to escape liability simply by changing the name of the addressee of the communication, which would be directly contrary to the functional definition of fiduciary under ERISA. Such an application would not only be contrary to the analysis in Varity, but would also conflict with ERISA and the DOL regulations specifically concerned with preventing exactly this type of undue influence. *See* 29 U.S.C. § 1104(a) (duty of loyalty); 29 C.F.R. 2550.404c-1(b)(2)(i)(B)(i) (§ 404(c) does not apply when "[t]he participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction")

Kozlowski wrongly contends that Crowley and Hull support his position. Kozlowski Br. at 2-3, 10-12, 15. The alleged representations at issue in Hull, however, were made only to the public at large in documents filed with the SEC and similar types of communications. In Crowley, as discussed above, the court ignored the fact that the SEC filings were incorporated into the SPD.

Kozlowski's attempt to distinguish Varity on the grounds that Kozlowski was not the Plan Administrator or employer similarly fails. Kozlowski Br. at 11-12. Kozlowski overlooks the fact that the speaker in Varity was, like Kozlowski, the Chief Executive Officer of the participants' employer. As such, Varity is indistinguishable from this case. Furthermore, Varity held that statements about a company's financial condition are fiduciary representations when connected to the future of plan benefits. As set forth at page 15-16, *supra*, that is precisely what allegedly occurred in this case.

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6. Belnick Was A Fiduciary

In addition to adopting the arguments of the other Defendants, Belnick makes the separate argument that he was only responsible for the Form 14A proxy statement and not a fiduciary. However, he was also corporate counsel for Tyco International. Complaint, ¶ 25. Accordingly, it is reasonable to infer that he was responsible for the Form S-8 Registration Statement which is a fiduciary representation. Though he is not alleged to have signed that document, he clearly would have been responsible for drafting and filing the document. Therefore, he is responsible for its contents just as one who actually signed the document.

7. Bent And Heffernan Were Fiduciaries

The Complaint alleges Bent and Heffernan were members of the Committee. As Defendants agree that the Committee was a fiduciary, so also were its members. Def. Br. at 25. The Complaint provides Heffernan's and Bent's exact positions on the Committee - Bent was the Committee "Clerk" and Heffernan was its "authorized signatory." Complaint at ¶¶ 18, 19. To the extent that Defendants argue that these individuals were not "members" of the Committee but were merely performing their jobs as Tyco employees, this argument fails. They obviously had authority to act on behalf of the Committee as evidenced by the fact that Bent signed the Plans' Form 11-K annual reports and Heffernan signed the Plans' Form S-8 registration statements.[22]

C. DEFENDANTS ARE NOT PROTECTED BY THE SAFE HARBOR

Defendants contend that they are not liable for any of their breaches of fiduciary duty because the Plans qualify for the "safe harbor" under § 404(c), 29 U.S.C. § 1104(c). The Plans

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[22] Furthermore, defendants' argument - that Bent and Heffernan were merely Tyco US employees - is in fact an admission that Tyco US had *de facto* control over the Committee. See, pages 30-32, *supra*. Defendants cannot have it both ways.

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do not qualify for four reasons: (1) they did not designate the Plans as § 404(c) plans as required by ERISA, (2) they did not meet their affirmative duty to disclose to Participants all material information, (3) they did not adequately disclose the risk and return characteristics of the Tyco Stock Fund, and (4) they subjected Participants to undue influence. Moreover, the § 404(c) defense is a fact-based affirmative defense that should not be considered on a motion to dismiss. Finally, the § 404(c) safe harbor is limited and does not apply to many of the claims alleged in this case.

First, Defendants erroneously contend that Participants are liable for imprudent investments made by the Plan. They are wrong. Under ERISA § 404(a), 29 U.S.C. § 1104(a), plan fiduciaries are liable for all imprudent investments made by a plan.[23] The only exception is where the Plan complies with ERISA § 404(c). Complaint, ¶¶ 31-33; In re Unisys Sav. Plan Litigation, 74 F.3d at 446 ("section 1104(c) is akin to an exemption from or a defense to ERISA's general rule, relieving fiduciaries in the appropriate circumstances of the liability to which they would otherwise be exposed under 29 U.S.C. § 1109"); DOL Br., 35-37. In this case, since the Plans did not comply with § 404(c), the fiduciaries are liable for all imprudent investments by the Plans.[24]

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[23]A plan fiduciary must act with the "care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in 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).

[24] By way of background, companies typically provide two types of pension plans – (a) a "defined benefit" plan, where the amount of an employee's retirement benefit is a direct obligation of the company which is a set amount (typically based on salary while employed and number of years of employment), and/or (b) a "defined contribution" plan, such as a 401(k) plan, where the retirement benefit is based solely on the amount invested and the earnings therefrom in an employee's plan account. Fiduciaries of defined benefit plans, who invest or actively supervise the investment of plan assets, are liable under ERISA § 404(a) for imprudent investments made by the plan, and they are liable for and must make good to the plan any losses suffered by the plan and any loss of benefits suffered by participants as a result of imprudent investments. Likewise, fiduciaries of defined contribution plans are liable under ERISA § 404(a) for imprudent investments made by a plan, even where the investment choice is

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§ 404(c) expressly states that the requirements for taking advantage of the "safe harbor" are set by regulations adopted by the Department of Labor. 29 U.S.C. § 1104(c)(1). These regulations set forth a number of detailed criteria which must be met before a plan qualifies for the § 404(c) safe harbor. In particular, fiduciaries can shift liability for imprudent investments to participants only if, among other things, they meet four specific requirements:

a) they disclose in advance the intent to shift liability to participants, 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(i);

b) they disclose to participants all material information necessary for participants to make investment decisions that they are not precluded from disclosing under other applicable law. In this regard, fiduciaries have a choice – they can disclose all material information to participants, including information that they are not required to disclose under the securities laws, and shift liability to participants, or they can comply with the more limited disclosure requirement under the securities laws but remain liable for imprudent investments. 29 C.F.R. § 2550.404c-1(c)(2)(ii); *see* In re Unisys Sav. Plan Litigation, 74 F.3d at 445.

c) they provide an adequate description of the investment objectives and risk and return characteristics of each investment option, 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(ii); and

d) they ensure that participants are not subject to undue influence, 29 C.F.R. § 2550.404c-1(c)(2)(i).

Where a plan and the fiduciaries do not comply with these strict requirements, plan fiduciaries are liable for imprudent investments by a plan, regardless of whether the participants

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selected by the participant, unless the plan and the fiduciaries comply with the strict requirements of ERISA § 404(c). Where the plan and fiduciaries do **not** comply with section 404(c), then the fiduciaries' liability for imprudent investments is the same as the liability of a fiduciary of a traditional defined benefit pension plan.

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made the investment choices. Contrary to these clear provisions, Defendants appear to argue that they are immune from liability simply because the Participants chose the Plan investments. In so doing, Defendants attempt to confuse the issue of the power to choose an investment, which was in the hands of the Participants, with liability if that investment was imprudent, which falls squarely on Defendants. Under ERISA, the fiduciaries are liable for all imprudent plan investments, regardless of who chooses the investment, unless § 404(c) applies. To shift liability to participants under § 404(c), fiduciaries must do more than give participants the mere power to choose the investment; they must ensure that the choice is informed and comply with all of the other requirements of § 404(c). Indeed, if the Court accepts Defendants' analysis that a participant is **always** responsible for imprudent investments made by a 401(k) plan whenever the participant chooses the investment, regardless of compliance with all of the § 404(c) requirements, then § 404(c) would be meaningless, and a fiduciary would never have to disclose the information to participants that is required by the § 404(c) regulations.[25]

Moreover, by its express terms, § 404(c) only applies to losses which resulted from the participant's exercise of control. 29 U.S.C. § 1104(c). Consequently, it would only apply to decisions made by Participants to cause the Plans to purchase or sell shares of the Tyco Stock Fund. § 404(c) would not, therefore, apply to the many other claims alleged in this case, including the claims that Defendants negligently misrepresented and failed to disclose material information, that the Plans should have terminated the Fund as an investment option and breach of the duty to monitor the Committee. *See* Final Regulation Regarding Participant Directed

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[25] In order to avoid this risk of liability, many companies do not permit employees to direct their 401(k) plans to purchase shares of a company stock fund. However, Tyco voluntarily elected to permit such purchases and is responsible for compliance with all regulations governing them.

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Individual Account Plans (ERISA Section 404(c) Plans), 57 FR 46906-1 at 46922, 1992 WL 277875 ("The Department emphasizes, however, that the act of designating investment alternatives (including look-through investment vehicles and investment managers) in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable."); Letter from the Pension and Welfare Benefits Administration, U. S. Department of Labor to Douglas O. Kant, 1997 WL 1824017, at *2 (Nov. 26, 1997) ("The responsible plan fiduciaries are also subject to ERISA's general fiduciary standards in initially choosing or continuing to designate investment alternatives offered by a 404(c) plan."); DOL Brief, 37.

1. Defendants Did Not Designate The Plans As § 404(c) Plans

The Plans nowhere state that they are or intend to be subject to § 404(c). Accordingly, they do not qualify as 404(c) plans.

DOL Regulations specifically state that, in order to qualify as a § 404(c) plan, the participant must be "provided or [have] the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B). "[A] participant or beneficiary will not be considered to have sufficient investment information unless" a plan fiduciary provides the participant with:

> (i) An explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Income Security Act, and title 29 of the Code of Federal Regulations Section 2550.404c-1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary.

29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(i). The failure to state in the Plans that they are 404(c) plans

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is fatal to Defendants' defense.[26]

2. Defendants Negligently Misrepresented And Concealed Material Non-public Facts

Defendants contend that they are entitled to the fact-based § 404(c) affirmative defense because the Complaint does not allege that Defendants failed to disclose all material information to Participants as required under § 404(c). In particular, Defendants contend (i) that the Complaint fails to identify any of the non-public facts that were negligently misrepresented or concealed, (ii) that only the Committee is a fiduciary, and the Complaint does not allege that the Committee knew the non-public information, and (iii) that insider trading rules somehow bar this claim. Def. Br. 19-20. The Complaint alleges all of this information and Defendants are wrong on all counts.

As a prerequisite to the application of § 404(c), Defendants must prove the Participants exercised "independent control." ERISA § 404(c)(1); 29 U.S.C. 1104(c)(1) ("In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account . . ."). The definition of "independent control is defined by regulations set by the Secretary of Labor. Id. The regulations defining "independent control" include the following:

> . . . a participant's or beneficiary's exercise of control is not independent in fact if:
> (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary unless the disclosure of such

[26] Though the SPD says that the Plan qualifies as a § 404 (c) Plan, SPD at 8, that is not sufficient since the SPD also expressly states that the official Plan document controls where there are any inconsistencies between the Plan and the SPD. SPD at 1.

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> information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act . . .

29 C.F.R. §2550.404c-1(c)(2)(ii). The Complaint alleges Participants did not exercise independent control because Defendants did not disclose all material information required by the regulations. *See* In re Unisys Sav. Plan Litigation, 74 F.3d at 445, n. 22, 447 ("accurate and complete information regarding the investments [defendant] made for [the investment option] is essential to the section 1104(c) control"; plans must disclose the "financial condition and performance of the investments" and "developments which materially affected the financial status of the investments.").

Defendants' first argument - that the Complaint has not alleged the missing adverse information - is specious. The Complaint contains nineteen pages of allegations concerning Tyco's material negligent misrepresentations and non-disclosures. Complaint, ¶¶ 72-110. Though Rule 8 does not require pleading with this specificity, Defendants cannot seriously contend that the Complaint does not state with great specificity the material information that was negligently represented to and concealed from Participants.[27]

The same is true with respect to the second argument – that the Committee did not know

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[27] Defendants do not contend that the concealed information was not material. To the contrary, Tyco in effect has admitted the materiality of omitted material in pleadings filed in connection with civil actions against Tyco's former executive officers. For example, at ¶ 26 of the complaint filed in Tyco International v. Frank E. Walsh, Jr., 02-cv-4633 (S.D.N.Y.), Tyco International states:

> On January 28, 2002, Tyco filed its proxy statement for its upcoming annual meeting with the Securities and Exchange Commission and the contents of that proxy, including the disclosure of payments to Walsh, became public. Following this disclosure, which was immediately picked up and publicized in the national financial press, the price of Tyco's stock fell from $42 to $33.65, reducing the Company's market capitalization by $16.7 billion in one day.

A copy of Tyco's complaint in Tyco v. Walsh is attached to the Izard Declaration as Exhibit C.

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the non-public facts. The Complaint specifically alleges that the Committee is comprised of senior Tyco personnel, such as Tyco's Treasurer, who, because of their seniority and experience, should have known the facts that were misrepresented or not disclosed. Complaint, ¶ 17. The Committee is also alleged to have signed the Form S-8 Registration Statement filed by Tyco International which Participants were told to review in the Prospectus, and to have prepared and disseminated to Participants the Prospectus. Both the S-8 and the Prospectus incorporated Tyco's SEC filings by reference. Complaint, ¶¶ 45-47; Prospectus at 1, 8. Since the Committee prepared, signed and disseminated to Participants documents which contained the alleged negligent misrepresentations and nondisclosures in the course of its duties, it should have known the truth or falsity of the information contained therein. Indeed, the instructions to Form S-8 expressly state that the purpose of the 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 ¶ 46; Izard Declaration, Exhibit B, Item 1, p.6. This is at the heart of the fiduciary duty under ERISA. 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.") More to the point, the Committee, the "named fiduciary," is on notice that Plaintiffs allege that the Committee should have known the accuracy of the facts incorporated into the documents it prepared and gave to Participants.

Defendants argument that the Committee is not responsible because it did not "know" misses the point. Def. Br., 20. The issue is what the Committee **should** have known, and the

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Committee should have known that its core fiduciary representations were not true. Indeed, Defendants' argument that the Committee did not or should not have known the negligently misrepresented and concealed material facts is directly contrary to the requirements of § 404(c). § 404(c) requires that the Plans, which can only act through their fiduciaries, disclose all material information to Participants to come within the safe harbor. *See* In re Unisys Sav. Plan Litigation, 74 F.3d at 447. This disclosure obligation, which is designed to ensure that Participants make informed choices, is not limited only to those facts that the fiduciary knows. If that were the case, a plan sponsor could appoint fiduciaries with no knowledge, experience or education, keep them "in the dark," insure that they disclose no material information to participants, and then claim that the fiduciaries are entitled to the § 404(c) protection because the fiduciaries didn't know the facts. As set forth at pages 32-34, *supra*, this is not the law.[28]

Ironically, Defendants' attempt to insulate the Committee on the ground that it didn't know any material facts compels the conclusion that the Plans do not comply with § 404(c). Defendants contend that the Committee was the only fiduciary. Assuming that were true, in order to comply with § 404(c), the Committee was required to cause the Plans to disclose to Participants all material information. Id. If the Committee didn't know that information, it couldn't have caused the Plans to disclose it, and the Plans couldn't have complied with § 404(c). Therefore, under Defendants' own argument, there can be no § 404(c) protection.

Defendants' final argument, that insider trading rules somehow affect a § 404(c) defense, is similarly flawed. Def. Br. 20-21. Defendants erroneously argue that insider trading rules

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[28] If the Committee as a factual matter did not know the truth or falsity of the information, then the Board breached its duty in appointing the Committee. *See* pages 32-34, *supra*.

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somehow relate to this case. They are mistaken. "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); Dirks v. SEC, 463 U.S. 646 (1983). 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. Nothing in the securities laws prevented the Committee from refusing to purchase more shares of the Tyco Stock Fund stock or to discontinue the Tyco 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, nothing in the securities laws would have prohibited defendants from disclosing the non-public information to the public at large prior to directing the Plan to sell the stock. *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 to the market before trading and fulfill their fiduciary duties to the Plan and Participants, or withhold the information,

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refrain from trading and assume liability for imprudent investments. Moreover, the Department of Labor has endorsed this policy of requiring plan fiduciaries to disclose non-public information when prudence requires plan sales if the decision is made as a result of non-public information. DOL Br., 24-26.

Defendants argue this "disclose or abstain" solution must fail because it is inconsistent with the "efficient market" theory utilized in securities fraud class action cases and because the Plans suffered no damage as the price of the Tyco Stock Fund would have dropped on disclosure. Def. Br., 66-67. However, as alleged in the Complaint, the price drop following early and honest disclosure would have been less than ultimately occurred and the losses suffered by the Plans would have been minimized. Complaint, ¶ 122. For example, had the truth been told all along, the price of the Tyco Stock Fund would have trended down more moderately and the Plans could have sold at higher prices. Moreover, the price would not have dropped an additional amount due to serious market concerns about management integrity and credibility. Thus, Plaintiffs submit that the **evidence** will establish that the Plans would have been protected to a much greater extent had the Defendants disclosed the information when first learned and liquidated the Plans' interest in the Tyco Stock Fund. More to the point, these factual disagreements should not be resolved on a motion to dismiss.

Defendants erroneously cite Hull v. Policy Mgmt. Sys. Corp., No. Civ. A. 3:00-778-17, 2001 WL 1836286 (D.S.C. Feb. 9, 2001), for the proposition that even though refraining from purchasing shares while in the possession of insider information might not violate the securities laws, fiduciaries should not be obligated to do so because it is against the "spirit" of those laws. Def. Br., 66. The reasoning of Hull has been rejected by both the Vivien court and by the

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Department of Labor. Vivien v. WorldCom, Inc., 29 Employee Benefits Cas. 1368, 2002 WL 31640557, *7 (N.D. Cal. 2002); DOL Br., 28. As ERISA must be strictly construed, ERISA's prudence requirements cannot be watered down to keep within the "spirit" of the securities laws. Defendants' other case, In re McKesson HBOC, Inc. ERISA Litigation, 2002 WL 31431588 (N.D.Cal. 2002), 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 information prior to the sale. 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 alleged damages from the failure to sell at the appropriate time.

3. Defendants Failed To Provide An Adequate Description Of The Risk And Return Characteristics Of The Tyco Stock Fund

Defendants failed to provide Participants with an adequate description of the risk and return characteristics of the Tyco Stock Fund. Under the DOL regulations, fiduciaries must provide this information for a plan to qualify as a § 404(c) plan.

> For purposes of this subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless–
>
> (1) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

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> . . .
>
> (ii) A description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the **investment objectives and risk and return characteristics of each such alternative**, including information relating to the type and diversification of assets comprising the portfolio of the designed investment alternative

29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(ii)(emphasis added)

The boilerplate description of the risks inherent in the Tyco Stock Fund was inadequate. Complaint, ¶¶ 107-108. Defendants argue that they satisfied their obligation by merely stating that the Tyco Stock Fund involved more investment risk because it was not diversified - it invested in only one stock. Def. Br. at 16-17. However, limiting the disclosed risk to this one factor ignores the much greater risks particular to this Fund. Moreover, by limiting the disclosure, Defendants failed to satisfy the purpose of the regulation - providing Participants with "sufficient information to make informed decisions with regard to investment alternatives available under the plan." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B). Rather than being informed, Participants were misled into believing that there was no additional risk associated with the Tyco Stock Fund other than the risk inherent in any single stock fund. The Complaint, however, includes pages of allegations which affected the risk and return characteristics of the Tyco Stock Fund to a far greater extent than the fact that the Fund contained only a single stock, including allegations relating to negligent misrepresentations and nondisclosures concerning related party transactions, improper acquisition accounting and other accounting violations. Complaint, ¶¶ 72-109. The Complaint specifically alleges that these negligent misrepresentations caused the representations concerning risk and return characteristics to be misleading. Complaint, ¶ 108.

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4. Defendants Subjected Plaintiffs To Undue Influence

Participants were subjected to undue influence by the Plans' fiduciaries, and, thus, they did not exercise "independent control" as defined by the regulations. Because Participants did not exercise independent control, the Plans do not qualify as § 404(c) plans. The relevant regulation states:

> (2) Independent control. Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if:
>
> (i) The participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction;

29 C.F.R. § 2550.404c-1(c)(2).

As an initial matter, the regulations expressly state that this determination depends on the facts and circumstances of each particular case, and thus is particularly inappropriate for resolution on a motion to dismiss. Id. Moreover, the Complaint alleges the Participants were subject to substantial undue influence. Complaint, ¶¶ 68, 109. For example, the Complaint alleges that Defendant Kozlowski sent a series of letters to Participants which discussed market events which affected the Tyco Stock Fund's price and represented that there were no accounting problems or internal governance issues at Tyco. Complaint, ¶ 38. The representations concerning Tyco's performance had no purpose other than to affect Participant decisions concerning continued Plan investment in the Fund. But for this undue influence, employees would have made different choices concerning the investment allocations of the Plan assets in their individual accounts.

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5. § 404(c) Is A Fact Dependant Affirmative Defense That Should Not Be Resolved On A Motion To Dismiss

Defendants bear the burden to plead and prove that they are entitled to protection under § 404(c). Because the fiduciary must prove compliance with this section, § 404(c) is an affirmative defense. *See, e.g.,* In re Unisys Sav. Plan Litig., 74 F.3d at 446 ("[S]ection 1104(c) is akin to an exemption from or a defense to ERISA's general rule, relieving fiduciaries in the appropriate circumstances of the liability to which they would otherwise be exposed under 29 U.S.C. § 1109. Accordingly, a fiduciary which seeks section 1104(c)'s protection bears the burden of showing its application"); Allison v. Bank One-Denver, 289 F.3d 1223, 1238 (10th Cir. 2002); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1215 (2d Cir. 1987); Donovan v. Cunningham, 716 F.2d 1455, at 1467, n. 27 (5th Cir. 1983). Because the application of § 404(c) is factual, it is particularly inappropriate for resolution on a motion to dismiss. *See, e.g.,* Vivien v. WorldCom, 2002 WL 31640557, *6 (N.D.Cal.) (denying motion to dismiss because "[w]hether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case," *quoting* 29 C.F.R. 2550.404c-1(c)(2); the matter is properly reserved for summary judgment, after appropriate discovery).

D. CLAIM I STATES A CLAIM

Claim I alleges detailed allegations of misrepresentations and omissions by the Defendants. Complaint, ¶¶ 69-105, 109. It is well settled that a plan fiduciary's misrepresentations constitute a breach of fiduciary duty. *See, e.g.,* Varity Corp. v. Howe, 516 U.S. 489 (1996); In re Unisys Sav. Plan Litig., 74 F.3d 420, 441 (3d Cir. 1996); Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997); Franklin v. First Union, 84 F. Supp. 2d 720, 735 (E.D. Va. 2000); McCauley v. IBM, 165 F.3d 1038, 1046 (6th Cir. 1999). Defendants do not

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dispute that fiduciaries are liable for negligent misrepresentations. Notwithstanding this fact, they make a number of erroneous arguments as to why they are not liable.

1. Claim I States A Claim With Respect To The SEC Filings

Conceding Plaintiffs' claim is well recognized under established law, Defendants make three futile arguments with respect to the alleged misrepresentations in the SEC filings. First, Defendants claim that the Committee, the named fiduciary of the Plans, played no role in preparing or filing Tyco's SEC filings. Second, they claim that the other Defendants are not liable because they were not fiduciaries with respect to the SEC filings. This argument is erroneous for the reasons set forth at pages 14-20, 24-36, *supra*. Finally, they contend that they are not liable because ERISA imposes no duty to disclose.

a. The Committee was responsible for all representations in the Prospectus and Form S-8, including the SEC filings incorporated therein

The Complaint expressly alleges that the Committee signed and disseminated the Form S-8 Registration statements and disseminated the Prospectus to Participants. Complaint, ¶¶ 45-46. It further alleges these documents incorporated by reference Tyco's SEC filings. Complaint, ¶ 47. Consequently, the Complaint alleges that the Committee disseminated to Participants the SEC filings. Id. Since the Committee is the named fiduciary and should have known the accuracy of all of the representations it made to Participants, it should have known of the accuracy of the SEC filings. The fact that the Committee did not actually prepare and file the SEC filings is irrelevant. The Committee exercised its discretion and voluntarily made those SEC filings a part of its own fiduciary representations. Id. Because incorporating Tyco's SEC filings was the only means by which the Committee purported to provide information necessary

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for Participants to make informed investment decisions about the Tyco Stock Fund, the Committee had an obligation to ensure that the information was accurate. Accordingly, the Complaint states a negligent misrepresentation claim against the Committee and its members. *See* pages 14-20, *supra*; Vivien v. Worldcom, 2002 WL at *7.

b. Defendants are liable for non-disclosures

Defendants contend that they are not liable under Claim I because ERISA imposes no duty to disclose. This defense is erroneous for two reasons. First, this is a negligent misrepresentation case, not a pure negligent non-disclosure case. For the reasons set forth above, page 51, *supra*, ERISA imposes liability for affirmative misrepresentations, regardless of the duty to disclose.

Moreover, ERISA imposes a duty to disclose on fiduciaries, particularly if they wish to take advantage of the § 404(c) safe harbor. *See, e.g.*, Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d 371 at 381 (4th Cir. 2001) ("ERISA fiduciary that knows or should know that a beneficiary labors under a material understanding of plan benefits that will inure to his detriment cannot remain silent - especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions."); In re Unisys Sav. Plan Litigation, 74 F.3d 420, 441; *see also* Franklin v. First Union Corp., 84 F.Supp.2d at 375 ("defendants had a duty to inform the plaintiffs of the changes in the investment funds in such a manner as to provide the plaintiffs the opportunity to make decisions regarding their options, as required by the regulations addressing § 404(c).") Finally, whether or not there was an obligation to disclose in the first instance, when Defendants elected to make any statements, they then had an obligation to do so honestly and accurately. *See, e.g.*, Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3rd Cir. 1993) ("when

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a plan administrator speaks, it must speak truthfully"), *cert. denied*, 510 U.S. 1020 (1993); John Deere Health Benefit Plan v. Chubb, 45 F.Supp. 2d 1131,1139 (D.Kan. 1999) (although fiduciaries not required to include information concerning subrogation rights in SPD, "once included in the SPD, they must not fail to inform participants of rights under plan.")

Defendants wrongly contend that their disclosure obligations are limited to those specifically mandated by ERISA. Def. Br. at 47-48. However, the SEC filings **were** part of statutorily mandated plan disclosures (i.e. the SPD, Form S-8s and the Plan Prospectus). Therefore, Defendants' argument that they had no duty to disclose is misplaced. Furthermore, in Varity, the Supreme Court rejected the contention that fiduciaries are only bound by the specific disclosure provisions of ERISA and the plan instruments, concluding instead that "the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime." 516 U. S. at 504. *See also* Jordan v. Federal Express Corp., 116 F. 3d 1005, 1012 (3rd Cir. 1997) (referring to this passage from Varity, noting that "[i]t would appear that the Supreme Court has also determined that fiduciary duties operate both independently from and in conjunction with ERISA's specifically delineated requirements."). Thus, under Varity, defendants cannot claim that they have no duties to disclose information beyond that which strictly complies with the statutory disclosure requirements. *See also* Central States, Southeast & Southwest Areas Pension Fund v. Central Transp. Inc., 472 U. S. 559, 570, 570 (1985) ("rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); In re Unisys Corp. Retiree Medical Ben. ERISA Litigation, 57 F.3d 1255 at 1264 (3rd Cir. 1995) ("Furthermore,

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satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those to whom the duty of loyalty and prudence are owed."); Harte v. Bethlehem Steel Corp., 214 F. 3d 446, 451, n. 6 (3rd Cir. 2000) ("But the fiduciary duty to disclose and explain is not achieved solely by technical compliance with the statutory notice requirements."), *cert. denied*, 531 U. S. 1037 (2000); McCall v. Burlington Northern/Santa Fe Co., 237 F.3d 506, 510-11 (5th Cir. 2000) ("[p]roviding information to beneficiaries about likely future plan benefits falls within ERISA's statutory definition of a fiduciary act."); Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 88 (2nd Cir. 2001) ("With respect to the claims based on allegedly misleading communications, we likewise conclude that Empire may have been acting as a fiduciary when it communicated with its employees and retirees concerning the contents of the welfare benefits plan"); *see generally*, DOL Br., 15-23.

Whether or not there were specific obligations imposed by ERISA (which there were) or whether Defendants undertook obligations as part of plan communications (which they did), Defendants would still have an obligation to disclose material information necessary to protect beneficiaries from relying on information Defendants should have known was false. *See* DOL Br. at 17; *quoting* Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483 at 489 (N.Y. 1918) (Cardozo, J.) (While a "trustee is free to stand aloof, while others act, if all is equitable and fair," he must disclose the truth or take some other prudent action to protect plan assets "if there is improvidence or oppression, either apparent or on the surface, or lurking beneath the surface, but

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visible to his practiced eye.")

The authority Defendants rely upon for their position on this point is either not applicable or easily distinguished. Watson v. Deaconess Waltham Hosp., 298 F.3d 102, 105 (1st Cir. 2002), merely stands for the proposition that courts should not create additional duties outside of those set forth in ERISA. But here, as set forth above, the duty to disclose exists **under ERISA**. Although Plaintiffs agree with Defendants that Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997), stands for the proposition that ERISA does not require disclosure of **every** facet of the sponsor's business activity, Plaintiffs here claim that Defendants had to disclose **material** information necessary for Participants to make informed decisions about their Plan investments, not every facet of Tyco's business. Finally, although Defendants contend that Hull v. Policy Mgmt. Sys. Corp., CIV.A.3:00-778-17, 2001 WL 1836286 (D.S.C. Feb. 9, 2001), stands for the proposition that the duty to disclose under ERISA does not extend to general duties of corporate disclosure by non-fiduciaries, as discussed at pages 14-20, *supra*, the Complaint alleges in this case that the Defendants are fiduciaries with respect to these representations. In any case, Hull has been expressly rejected by both the Department of Labor and by at least one court. DOL Br., 28; Vivien v. WorldCom, Inc., 29 Employee Benefits Cas. 1368, 2002 WL 31640557, *7 (N.D. Cal. 2002).

2. Defendant Kozlowski Misrepresented The Tyco Stock Fund In Letters Sent Directly To Participants

The Complaint alleges misrepresentations by Defendant Kozlowski to Participants that involved hyping Tyco stock and playing down news of Tyco's impropriety. Defendants do not contend that these communications were anything but materially false or misleading. Rather, they argue again that only the Committee is a fiduciary of the Plans and that the Committee did

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not send the letters and is not responsible for them. However, as set forth at pages 34-36, *supra*, Kozlowski was a fiduciary with respect to these letters. They also argue that no other Defendants is responsible for the letters as they were sent in a business capacity, not in a fiduciary capacity. However, as Plaintiffs point out at page 20 and n.14, *supra*, Tyco International and Tyco US are fiduciaries with respect to these misrepresentations.

3. The Boilerplate Description Of The Risk Associated With The Tyco Stock Fund Constituted A Negligent Misrepresentation And/or An Omission

Defendants disclosed only one risk associated with investing in the Tyco Stock Fund - that investing in a single stock fund is more risky than investing in a fund with multiple stocks. Participants were led to believe that the Fund was no riskier than any other single equity fund. This description of the Funds' risk characteristics was woefully inadequate. See, page 8,*supra*; Complaint, ¶ 56(b). By identifying the lack of diversification as the only risk factor, Defendants implied that there were no other risks. Under the circumstances that should have been known to Defendants, there were substantial additional risks that Defendants chose not to disclose. Indeed, as set forth in the Complaint, Defendants should have known of - and disclosed - the serious risk that Tyco was a "house of cards" plagued by accounting gimmicks, ready to collapse at any moment. The risk/return description further stated that Participants should invest in the Tyco Fund if they want to share in Tyco's long term growth. See, page 8, *supra*; Complaint, ¶ 56(a). Given the allegations of the Complaint concerning Tyco's accounting misrepresentations, stating that the Fund would prosper along with Tyco was a misrepresentation about the Fund's anticipated future.

The risk inherent in investing in employer securities included other additional risks that

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Defendants did not disclose. While a non-diversified single equity fund obviously increases the volatility of that investment, when that single equity is the participant's employer, the participant is exposed to an additional, unique risk that - in the event the employer fails - he risks losing both his job and his savings. Rather than being cautioned about this additional risk, Participants were told, "increase the value of your investments over the long term by investing in the common stock of your company." Comp., ¶ 107(a). The additional risk inherent in investment in employer stock is precisely the type of risk employees should know when employer securities are offered. *See* 29 C.F.R. 2550.404c-1(b)(2)(i)(B)(1)(ii) (requiring disclosure of general risks for investment options). Not only was this additional risk not disclosed, Defendants suggest tying one's livelihood and retirement savings together with the same non-diversified investment is an inherently wise decision. It is not.

Defendants make two unavailing arguments as to why the risk descriptions were not negligent misrepresentations or negligent omissions.[29] First, Defendants defend these statements on the ground that they are technically true. Half-truths and lies both have the same effect of misleading participants. Defendants should have known that the Tyco Stock Fund was extremely risky because of the alleged negligent misrepresentations and corporate wrongdoing.

Second, Defendants argue that it would be "patently absurd" to disclose the risk that "corporate insiders were defrauding millions of dollars, engaging in massive securities law violations and mismanaging the company on a grand scale." Def. Br. at 54. Defendants are wrong. If Defendants should have known that this impropriety was taking place (which they

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[29] Defendants concede that these statements were the responsibility of the Committee and their "not a fiduciary" argument does not apply to this portion of Claim I.

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should have), then ERISA § 404(a) demands these facts should have been disclosed to protect Participants. *See, e.g.*, Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d, 381 (disclosure required to correct participant's false impression, especially when impression was made by fiduciary). Complete and honest disclosure is required by ERISA to protect employee retirement savings; this "absurd" requirement is the public policy of the United States. *See* 29 U.S.C. 1001(b).[30]

E. CLAIM II STATES A CLAIM

Claim II gives Defendants adequate notice of Plaintiffs' claim for breach of fiduciary duty caused by Defendants' imprudent investment of the Plans' assets in the Tyco Stock Fund. There is no question that an imprudent investment claim is a valid ERISA cause of action. ERISA § 404(a); 29 U.S.C. § 1104(a) (prudent man standard), ERISA § 409(a), 29 U.S.C. § 1109(a) (fiduciary liable). Defendants breached their fiduciary obligations when they (a) imprudently offered and maintained the Tyco Stock Fund as an investment option for the Plans, (b) imprudently allowed the Plans to purchase shares of the Tyco Stock Fund, and (c) caused the Plans to hold shares of the Tyco Stock Fund when it was imprudent to do so. The Complaint alleges that investing in the Tyco Stock Fund was imprudent based upon both public and non-public information (that the Defendants should have known). While not required to do so, the Complaint sets forth specific examples of such public and non-public information.

Defendants make a number of erroneous arguments in response to this claim. First, Defendants erroneously argue that only the Committee could be responsible for these imprudent

[30] Contrary to Defendants' arguments, these negligent misrepresentations are not akin to vague statements of optimism. Rather, under § 404(c), ERISA specifically requires disclosure of risk and return characteristics. To the extent that these disclosures are not intended to meet this ERISA test, then Defendants have not complied with § 404(c).

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investments. Because of ERISA's inclusive, functional definition of "fiduciary," other Defendants in addition to the Committee were fiduciaries of the Plans. They also argue that the Fund was an ESOP and, therefore, that they are not liable for imprudent investments. However, the Tyco Stock Fund was not an ESOP, it was an investment fund. Moreover, fiduciaries can be liable for imprudent investments in company stock even in an ESOP. Defendants also erroneously contend that insider trading rules would bar sales by the Plans. However, as set forth at pages 45-47, *supra*, insider trading rules are no defense. Defendants additionally argue that they had no duty with respect to the prudence of the Plans' investments because the Participants made investment choices themselves. However, as set forth at pages 37-50, *supra*, Defendants are liable for imprudent Plan investments even where the Participants directed the investment allocations for their individual accounts. Finally, Defendants make the erroneous and particularly fact-based argument that the Tyco Stock Fund was a prudent investment. Because Claim II sets forth a valid, well established claim, and Defendants' arguments are all unavailing, Defendants' motion to dismiss Claim II should be denied.

1. The Committee Is Not The Only Defendant Responsible For The Imprudent Investment Of Plan Assets

Defendants admit that the Committee, as the named fiduciary, is subject to this claim for imprudent investment. They also do not contest the claim against the Committee members. However, contrary to Defendants' arguments, the Committee was not the only fiduciary of the Plans under ERISA's broad definition of that term. In particular, as set forth at pages 32-34, *supra*, the Complaint alleges that the Tyco US Directors were fiduciaries with regard to Claim II because of their specific duties and responsibilities under the Plans in selecting and monitoring appropriate Committee members. Tyco US and Tyco International are liable under the doctrine

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of *respondeat superior*. See pages 22-24,32, *supra*. Tyco US is also liable for imprudent investments because it operated the Plans and because it provided information to Participants concerning Plan investments in the Tyco Stock Fund. *See* pages 29-32, *supra*. Tyco International, its Directors and Belnick are similarly liable because they were responsible for the SEC filings which contained the negligent misrepresentations which were to be used by Participants in evaluating the prudence of Plan investments. *See* pages 14-20, 24-29,36, *supra*. Therefore, all Defendants have notice of the basis of the claims against them in Claim II.

2. Defendants Are Liable For Imprudent Investments Because The Tyco Stock Fund Is Not An ESOP.

Defendants make the fact-based and incorrect argument that the Tyco Stock Fund is some sort of Employee Stock Ownership Plan rather than an investment fund available for investment of assets held by the Plans, which are the only plans relevant to this case. They make this argument as a basis for their claim that the Fiduciaries had no choice other than to invest in the Tyco Stock Fund and, therefore, that they cannot be liable for those investments. Defendants are simply wrong. The Plans make very clear that the Tyco Stock Fund was an investment option for Plan investments, not some sort of separate plan, ESOP or otherwise. According to the express language of the Plans, the Tyco Stock Fund is an investment vehicle established by the Committee in its discretion. Plan §1.23. It is not defined as a "Plan" under the Plans. Plan §1.28. Moreover, it is not defined as an ESOP. The only ESOP referred to under the Plan is the "Colgate-Palmolive Company Employee Stock Ownership Plan." Plan § 1.19. Thus, accepting Plaintiffs' allegations as true and drawing all reasonable inferences in favor of Plaintiffs, Defendants cannot reasonably claim on a motion to dismiss that the Tyco Stock Fund is as a matter of fact an Employee Stock Ownership Plan.

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Moreover, Defendants argument is directly contrary to the plain language of ERISA. 29 U.S.C. §1107(d)(6) defines "Employee Stock Ownership Plan":

> (6) The term "employee stock ownership plan" means an individual account plan-
>
> > (A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities, and
> >
> > (B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

The Tyco Stock Fund is not an individual account plan. Even if an investment fund could be a "plan," the Funds' assets are not alleged in the Complaint to be segregated into individual participant accounts as required by the statute. According to the Form 11-K's filed by Tyco International with the SEC on behalf of the Plans, the assets of the seven Tyco plans are all held collectively in a Master Trust (11-K, § 4).[31] This Master Trust invests a percentage of its assets in the Tyco Stock Fund (11-K, § 6). Under this arrangement, the Fund investments held by the Trust are allocated among the different Plans, not among Participants in the Plans. Only the Plans, not the Fund, maintain individual accounts for Participants and qualify as individual account plans. 29 U.S.C. § 1002(34) (defining "individual account plan").

The relevant Department of Labor provision sets further requirements for qualification as an employee stock ownership plan:

> <u>Definition of the term "employee stock ownership plan"</u>
>
> (a) In general–

[31] A copy of the most recent Form 11-K filed on behalf of the Tyco Retirement Savings and Investment Plan II is attached to the Izard Declaration as Exhibit D.

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> (1) Type of plan. To be an "ESOP" (employee stock ownership plan), a plan described in section 407(d)(6)(A) of the Employee Retirement Income Security Act of 1974 (the Act) must meet the requirements of this section. See section 407(d)(6)(B).
>
> (2) Designation as ESOP. To be an ESOP, a plan must be formally **designated as such in the plan document.**
>
> . . .
>
> (b) Plan designed to invest primarily in qualifying employer securities. A plan constitutes an ESOP **only if the plan specifically states** that it is designed to invest primarily in qualifying employer securities. Thus, a stock bonus plan or a money purchase pension plan constituting an ESOP may invest part of its assets in other than qualifying employer securities. Such plan will be treated the same as other stock bonus plans or money purchase pension plans qualified under section 401(a) of the Code with respect to those investments.

29 C.F.R. § 2550.407d-6 (emphasis added). The documents attached to the Barron Declaration do not formally designate the Tyco Stock Fund as an ESOP. Indeed, there simply is no "plan document" for the Tyco Stock Fund for the simple reason that this "fund" is not an ERISA qualified plan but an investment option in the nature of a mutual fund.[32]

Moreover, the Plans were not required to invest in the Tyco Stock Fund, a necessary feature to qualify as an ESOP. According to the Plan Documents, the Committee had complete discretion to establish appropriate investment options for the Plans. Plan, § 1.23. These options could, but were not required to, include the Tyco Stock Fund. Plan, § 8.4(g). Because the Committee had discretion whether or not to offer the Fund - i.e. it was not mandated by the Plan Documents - the Fund could not be an ESOP as defined by the regulations which require

[32] 29 U.S.C. § 1102 sets forth minimum features that every ERISA plan must have, including a "written instrument" establishing the plan, a named fiduciary, policies and procedures for administrating the plan and a method for amending the plan. In addition, every ERISA plan must furnish every participant a summary plan description and file reports with the Secretary of Labor. 29 U.S.C. § 1021. There is no indication that the Tyco Stock Fund satisfied <u>any</u> of these requirements as it was a "fund" not a "plan."

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investment in company stock to be mandatory. Because neither the Plans nor the Fund were ESOPs, the Plans' investments in the Fund are **not** exempt from ERISA's prudent investment requirements, set forth at ERISA § 404(a), as Defendants contend. Def. Br. at 58-60.

Since the Fund is not an ESOP, Defendants are not entitled to a presumption that investing in employer securities was prudent. Some courts have recognized such a presumption for ESOP plans because ESOP fiduciaries have less discretion because ESOP plan documents mandate investment in employer stock. *See, e.g.*, Moench v. Robertson, 62 F.3d 553 at 571 (3d Cir. 1995). This presumption is simply not applicable to non-ESOP plans, even when fiduciaries of the non-ESOP plan exercise discretion to offer company stock as an investment option. *See* Nelson v. IPALCO Enterprises, 2003 WL 402253 (S.D. Ind. Feb. 13, 2003) (analyzing participant directed contributions separately from ESOP employer matching contributions). This is particularly clear in this case, because the Plan Documents do not mandate investment in the Fund, and Defendants had complete discretion whether or not to offer the Fund.

3. The Complaint States A Claim Even If The Fund Is An ESOP

The Complaint sufficiently alleges Defendants should have taken action to protect the Plans' Participants even if the Tyco Stock Fund was an ESOP (which it was not). Defendants cite Moench v. Robertson, , 62 F.3d 553 (3d Cir. 1995), and Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995), as authority for presuming an ESOP plan's investment in company stock is prudent. Defendants wrongly argue that the Complaint has not set forth sufficient information to overcome this presumption. Def. Br. at 67-68. The extraordinary adverse information set forth in the Complaint in detail is more than sufficient to plead that the presumption can be overcome. *See* Complaint, ¶¶ 71-110, 119(a)-(z). Moreover, at this stage of the case, Plaintiffs need not

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plead facts to overcome the presumption. As the Supreme Court has made clear, presumptions are matters of proof, not pleading, and need not be overcome in a complaint under Rule 8. Swierkiewicz v. Sorema N. A., 534 U.S. at 510-511.

4. The Complaint Alleges That The Tyco Stock Fund Was An Imprudent Investment

Defendants were required to prudently invest the Plans' assets. ERISA § 404(a). Count II alleges that Defendants breached these fiduciary duties when they imprudently selected the Tyco Stock Fund as one of the Plans' investment options. Complaint, ¶¶ 118, 121; *see* Nelson v. IPALCO Enterprises, 2003 WL 402253 (S.D. Ind. Feb. 13, 2003) (recognizing claim for imprudently offering employer stock offered as an investment option). Defendants' motion to dismiss does not address this claim. Accordingly, Plaintiffs assume that Defendants concede that it is a valid claim.

Count II also alleges that Defendants breached their fiduciary duties when they permitted the Plans to purchase and hold shares of the Tyco Stock Fund when it was imprudent to do so. Defendants argue that not purchasing these shares or selling shares already held would violate the terms of the Plans which required Defendants to follow instructions given by Participants. Def. Br., 60-61. However, as set forth at pages 37-50, *supra*, the fiduciaries are liable for imprudent investments, even if the Participants choose the investments.

Contrary to Defendants' arguments, the Complaint alleges numerous facts demonstrating that the Fund was an imprudent investment. With respect to public information, the Complaint alleges that: (1) Tyco International Ltd. was engaged in a massive, high risk acquisition program involving many disparate industries, (2) Tyco International Ltd.'s accounting was impenetrable and, therefore, the merits of investing Plan assets in the Fund could not reasonably be evaluated,

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and (3) analyst reports concerning Tyco International Ltd. could not be trusted. Comp. ¶¶ 3, 119. Moreover, the Complaint alleges numerous non-public facts which give further notice as to why the Fund was not prudent for retirement accounts. Defendants certainly have notice of the nature of Plaintiffs' claim, and, while conclusory statements are sufficient, Plaintiffs have presented over 15 pages of facts in support of these allegations.

Defendants do not deny that this public information could have made the Tyco Stock Fund an imprudent investment. Rather, they make the particularly fact based argument that portions of the articles cited by Plaintiffs as examples of adverse public information could also be construed to indicate that investing in Tyco was prudent. Defendants' argument ignores the liberal standard on a motion to dismiss - all allegations of fact must be construed in favor of the pleader. Under this standard, there cannot be any doubt that Plaintiffs have set forth a valid claim.

Moreover, whether some analysts had a "buy" recommendation on Tyco stock is not relevant to this claim. The "prudent man" standard analyzes the investment from the unique perspective of a conservative retirement savings plan. Certainly, high-growth/high-risk equities might be appropriate investments for some investors in certain circumstances. However, such an investment is not appropriate for a retirement savings plan. Defendants put great emphasis on the fact that Tyco stock was recommended by securities analysts. Such recommendations are meaningless to this analysis for two reasons. First, these analysts were recommending Tyco for what it was - a high-growth/high-risk stock; analysts were comparing Tyco to other high-risk/high-growth stocks - they were not recommending Tyco for investment by retirement plans or comparing it to conservative investments appropriate for retirement plans. Second, the

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Complaint itself alleges these analyst recommendations could not be trusted. Comp., ¶¶ 3, 119, 119(j). Construing the Complaint in favor of Plaintiffs, the analyst recommendations are meaningless.

The one case Defendants cite is easily distinguishable. In Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995), the court noted that the company stock at issue was recommended by securities analysts. However, in doing so, that court was applying the presumption of prudence applicable only to ESOP plans as suggested in Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995). This presumption is expressly limited to ESOP situations where investment in company stock is required. Because defendants had complete discretion whether to offer the Tyco Stock Fund as an investment option, this case is not relevant.

Finally, in another articulation of the argument that Participants are liable for imprudent investments by the Plans notwithstanding the failure to comply with § 404(c), Defendants erroneously point out that the public information was equally available to Participants. By holding fiduciaries liable for all imprudent investments absent compliance with § 404(c), ERISA presumes that participants are less sophisticated investors than plan fiduciaries, and thus requires the fiduciaries to either provide participants with the material information necessary to make informed investment decisions or remain liable for imprudent investments under § 404(c). *See* pp. 41-47, *supra*. As a matter of law, Participants' knowledge is measured by what was disseminated by the Plans' fiduciaries in plan documents or material incorporated or referenced by those documents. Id. There is no question that the Tyco fiduciaries did not provide the adverse information to Participants. Defendants thus cannot rely on the information which they, in fact, failed to provide to Participants.

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F. PLAINTIFFS HAVE STANDING TO REPRESENT THE ENTIRE CLASS

Tyco concedes that the seven ERISA Plans are virtually identical: all have the same Plan Administrator, all are managed by the same fiduciaries, all offer shares of the Tyco Stock Fund as a Participant investment option, all but two use the same Prospectus, all have identical SPDs, all describe the Plans' investment options with the same document ("Retirement and Savings Plan Investment Options") and the assets of all seven Plans are held in one Master Trust. Complaint, fns. 1-2; *see* pages6-9, *supra*. Nonetheless, Tyco argues that the administrative convenience of multiple plans deprives injured Plan Participants of the right to seek relief. That is not the law.

Tyco's restrictive argument has been rejected by every federal appellate court to consider the issue, and also by several well-reasoned recent district court decisions. The leading case, Fallick v. Nationwide Mutual Ins. Co., 162 F.3d 410 (6th Cir. 1998) -- which Tyco fails to mention -- involved a claim under ERISA § 409, 29 U.S.C. § 1109, against the fiduciaries of several ERISA plans. The named plaintiff, Arthur Fallick, was a member of only one of these plans, but he alleged that the fiduciaries used an improper methodology to determine benefits in all of the plans they administered. *Id.* at 411-12. The district court dismissed Fallick's claims against plans other than his own, **and the Sixth Circuit reversed**, holding that:

> [A]n individual in one ERISA benefit plan can represent a class of participants in numerous plans other than his own, if the gravamen of the plaintiff's challenge is to the general practices which affect all of the plans.
>
> . . . .
>
> Where, as here, the crux of an ERISA plaintiff's complaint concerns the methodology used to determine benefits, courts have recognized that the standing-related provisions of ERISA were not intended to limit a claimant's right to proceed under rule 23 on behalf of all individuals affected by the challenged conduct, regardless of the representative's lack of participation on all the ERISA-governed plans involved.

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> . . . .
> [O]nce a potential ERISA class representative establishes his individual standing to sue his own ERISA-governed plan, there is no additional constitutional standing requirement related to his suitability to represent the putative class of members of other plans to which he does not belong.

Id. at 422, 423, 424 (citations omitted). A plaintiff has standing if he or she has suffered injury-in-fact, if a causal connection exists between that injury and the defendant's conduct, and if the requested relief will likely redress that injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-01 (1992) (cited in Fallick, 162 F.3d at 421). Here, there can be no dispute that the named plaintiffs allege these requirements sufficient to allege standing.[33]

Similarly, in Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101 (5th Cir. 1993), plaintiff sought class certification on behalf of four ERISA plans, alleging that the defendants used an improper method for calculating social security benefits. Ms. Forbush was a participant in only one of the four plans, but neither the district court nor the Fifth Circuit questioned Forbush's standing to seek relief for all four plans.[34] The district court denied class certification, but the Fifth Circuit reversed because Forbush's claim presented issues common to members of all four ERISA plans, and her claim was typical of those challenging the defendants' general practice. 994 F.2d at 1106.[35]

Fallick and Forbush have been followed in several recent decisions. *See* Rawls v. Unum

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[33] Whether the class representatives are typical and adequate class representatives under Fed. R. Civ. P. 23 is a different and separate question, and one that should not be confused with "standing" on this motion to dismiss. *See* Fallick, 162 F.3d at 421-23 (noting that the district court improperly confused the question of standing with the question of class certification, reversing the district court's partial dismissal based on standing, and instructing the district court to apply a careful rule 23 analysis upon remand).

[34] Fallick, 162 F.3d at 423 (discussing Forbush).

[35] *See also* Caranci v. Blue Cross & Blue Shield of R.I., 1999 U.S. Dist. Lexis 14801 (D.R.I 1999) (class representatives' claims were typical of class members in other ERISA plans).

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Life Ins. Co., 219 F. Supp. 3d 1063, 1067 (C.D. Cal. 2002) (plaintiff had standing to assert class claim for participants in several different ERISA plans); Alves v. Harvard Pilgrim Health Care, Inc., 204 F. Supp. 2d 198, 205 (D. Mass. 2002) ("When a single defendant offers a range of ERISA plans, an individual in one plan can represent a class of plaintiffs – including some belonging to other plans – as long as 'the gravamen of the plaintiff's challenge is to the general practices [of the defendant] which affect all of the plans'"); Sutton v. Med Serv. Ass'n of Pa., 1993 WL 273429, *5 (E.D. Pa. 1993).[36]

Here, plaintiffs propose class representatives who are participants in Plans I, II, III, IV and V.[37] These plaintiffs have standing to assert class claims on behalf of all participants in Tyco's retirement plans.

The only case defendants cite – a district court opinion that is almost 20 years old – contains little analysis and is based on dissimilar facts. *See* Bradshaw v. Jenkins, No. C83-771R, 1984 U.S. Dist. LEXIS 20013, *12 (Jan. 30, 1984) (plaintiff alleged that her ERISA plan suffered losses from imprudent holdings of company stock; she had standing to assert that claim, but she lacked standing to assert claims for losses by other ERISA plans offered by the same employer because those other plans were not alleged to hold any company stock). This case should not be followed by the Court. Rather, since the Plans are virtually identical, and each

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[36] This line of authorities is consistent with, and sometimes identified as stemming from, the "juridical link" doctrine exemplified by La Mar v. H&B Novelty & Loan Corp., 489 F.2d 461, 466 (9th Cir. 1973). *See* Payton v. County of Kane, 308 F.3d 673, 679-80 (7th Cir. 2002) (considering Fallick as a case "using juridical link analysis").

[37] To moot this issue partially, Plaintiffs have moved to join additional named plaintiffs who are participants in additional plans: Peter Poffenberger and Eugene Crouch, participants in Plan I, and Karen Wade, a participant in Plan IV.

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suffered financial losses associated with holdings of the Tyco Stock Fund, the named Plaintiffs have standing to bring claims on behalf of Participants in all of the Tyco plans.

G. PLAINTIFFS PROPERLY SEEK MONETARY RELIEF

Defendants wrongly assert that Plaintiffs' claims cannot be brought under either ERISA § 502(a)(2) or (3), 29 U.S.C. § 502(a)(2) or (3), arguing that the Plaintiffs seek individual, not plan-wide relief under § 502(a)(2), and that they are not entitled to monetary relief under § 502(a)(3). Essentially, Defendants argue that the Court should ignore the very existence of the Plans and treat the losses suffered by the Plans as if they were suffered directly by the Participants themselves. Accordingly, they argue that Plaintiffs do not seek plan-wide relief. From there, Defendants argue that because the claims for money damages are individual and not for Plan losses, Plaintiffs have no right to monetary relief in this case. In other words, Defendants argue that though Plaintiffs may have been wronged, ERISA provides no remedy.

Defendants are wrong on both counts. Plaintiffs seek plan-wide relief under § 502(a)(2). Moreover, they are entitled to monetary relief under § 502(a)(3). Indeed, adoption of Defendants' position would work a sweeping rewrite of ERISA that would leave 401(k) participants without monetary remedy for **any** breach of fiduciary duty.

1. Monetary Relief Is Appropriate Under Plaintiffs' § 502(a)(2) Claims.

Defendants argue that Plaintiffs seek individual damages under § 502(a)(2), instead of plan-wide relief for losses suffered by the Tyco ERISA Plans. Def. Br. at 69-72. This argument is premised on a mischaracterization of the plain language of the Complaint. Both sides agree that under § 409 of ERISA, fiduciaries who breach their duties are "personally liable to make

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good . . . any losses to the plan resulting from each such breach . . . ." 29 U.S.C. § 1109(a).[38] They also agree that "recovery for a violation of § 409 inures to the benefit of the plan as a whole." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985)). *See* Def. Br. at 69-70. The only disagreement appears to be whether the Complaint seeks plan-wide relief under § 409, or whether it seeks non-plan relief under some other legal authority.

The Complaint is explicit on this point: Plaintiffs seek plan-wide relief, Complaint, ¶¶ 1 ("Plaintiffs . . . bring this action for Plan-wide relief on behalf of the Plans"), 2 ("Defendants are personally liable to make good to the Plans the losses resulting from each such breach of fiduciary duty"), 112 ("As a consequence of Defendants' misrepresentations and nondisclosures, the Plans suffered losses"), 113 ("Defendants are personally liable to make good to the Plans any losses resulting from each breach"), 126 ("As a consequence of Defendants' breaches, the Plans suffered losses"), 127 ("Defendants are liable to personally make good to the Plans any losses resulting from each breach"); Prayer C ("An Order compelling the Defendants to make good to the Plans all losses to the Plans . . . . and to restore to the Plans all profits the Defendants made through use of the Plans' assets, and to restore to the Plans all profits which the Participants would have made if the Defendants had fulfilled their fiduciary obligations"), and Prayer F ("Actual damages in the amount of any losses the Plans suffered, to be allocated among the participants individual accounts in proportion to the accounts' losses").[39]

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[38] Section 502 of ERISA provides the procedural vehicle to enforce this right: "A civil action may be brought…by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [i.e., ERISA § 409]…." 29 U.S.C. § 1132(a)(2).

[39] This is not inconsistent with Plaintiffs' allegation that each participant's financial interest in the Plans' recovery may be relatively small, giving individual participants little or no incentive to seek Plan-wide recovery as they are entitled to do under ERISA § 502(a)(2). *See* Complaint at ¶ 34. Under these circumstances, individual Plan

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Defendants argue that the Complaint should be construed to allege something else, but that is not Defendants' prerogative. Plaintiffs are masters of their Complaint, and they plainly seek Plan-wide relief. Easton v. Crossland Mortgage Corp., 114 F.3d 979, 982 (9th Cir. 1997) (the plaintiff is the master of his or her complaint, not the defendant); Carolina Aircraft Corp. v. American Mut. Liability Ins. Corp., 517 F.2d 1076, 1077 (5th Cir. 1975) ("The plaintiffs are the masters of their own pleadings; it is their pleading and not the answers of Carolina which determines the nature of their complaint").

In this case, as in **every** other plan-wide breach of fiduciary duty case under ERISA, Participants of the Plans would benefit from a judgment requiring Defendants to make good the loss their breaches of duty caused the Plans. This does not, as Defendants appear to suggest, transform Plaintiffs' **plan-wide action** into one for individual relief. Rather, it reflects the sometimes-overlooked reality that ERISA plans exist for the benefit of human beings. Eventually, all deposits to a plan, from contributions, or, as would be the case here, from a judgment, flow through to individual participants and beneficiaries, per the terms of the plan. *See, e.g.*, Kuper v. Iovenko, 66 F.3d 1447, 1452-53 (6th Cir. 1995) (ERISA § 409, 29 U.S.C. § 1109, "contemplates that breaches of fiduciary duty injure the plan, and, therefore, any recovery under such a theory must go to the plan"); Smith v. Sydnor, 184 F.3d 356, 363 (4th Cir. 1999) (damages paid to the plan "undoubtedly" benefit individual participants in the plan, yet "[t]his

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participants also lack incentives to seek personal recoveries under ERISA § 502(a)(3). The Complaint is absolutely clear that Plaintiffs seek plan-wide relief under § 502(a)(2), and Defendants must admit to being on notice of these allegations.

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remedy is precisely what § 409 provides").[40] Call v. Sumitomo Bank of Cal., cited by the defendants, is not to the contrary. 881 F.2d 626, 629 (9th Cir. 1989) (plaintiffs explicitly sought plan-wide relief under ERISA § 502(a); the court noted, in passing, that if plaintiffs were successful they could not necessarily dictate that "damages recovered on behalf of a plan . . . be allocated entirely to the account of a particular plan participant"). Here, Plaintiffs anticipate that the recovery they obtain for the Plan will be distributed by the Plans, with the Court's approval, according to equitable principles. This is exactly what ERISA § 502(a)(2) is designed to do.

2. Monetary Relief Is Appropriate Under Plaintiffs' § 502(a)(3) Claims.

Defendants' final argument is that Congress and the Supreme Court have created a Catch-22 precluding the Class from any relief at all. That is not how ERISA works. Indeed, another court recently rejected this argument as "too clever by half." Laurenzano v. Blue Cross and Blue Shield of Mass., Inc., 134 F. Supp. 2d 189, 194, 196 (D. Mass. 2001) ("this court . . . does not hesitate to award money as a form of equitable relief pursuant to ERISA. . . . [T]o hold that ERISA mandates certain benefits, but then deny receipt of those benefits, strips the right of its remedy, in direct contravention of the words of the statute and the intent on Congress, which require courts to 'redress' violations and 'enforce' provisions of ERISA").

Defendants erroneously rely on two Supreme Court cases to make their point. In Mertens v. Hewitt Assocs., 508 U.S., 256, a case in which claims were asserted against **non-fiduciaries**,

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[40] To the same effect is Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599 (8th Cir. 1995). There, the court found that a loss to the plan had occurred because, as a result of the trustee's breach of fiduciary duty, the plan possessed shares of stock that declined in value, and, in fact, had become worthless. Id. at 605. While participants also suffered a loss in *Roth*, this did not change the fact that there was a loss to the plan. The court came to the unremarkable conclusion that a breach of fiduciary duty can cause a loss both to participants and the plan. Id. The court noted that "[t]o the extent that there are ambiguities in determining loss, [the court] resolves them against the trustee in breach." Id. at 602.

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the Court held that § 502(a)(3)'s reference to "other appropriate equitable relief" means those categories of relief that were "*typically* available in equity" in the days of the divided bench. In Great-West Life & Annuity Ins. Co. v. Knudsen, 534 U.S. 204, 122 S. Ct. 708, 712-16 (2002), the Court considered yet another different scenario: **a fiduciary** (a health plan) **sued a beneficiary** (a subscriber) under § 502(a)(3), seeking money damages. The fiduciary asserted that the subscriber was required by contract to share his proceeds from a personal injury settlement.[41] The **subscriber** owed no fiduciary duties **to the health plan** so the **health plan's claim** was treated as an ordinary contract claim for damages, which was not "typically available in equity" and therefore was not cognizable under § 502(a)(3). Great-West, 122 S. Ct. at 712-13. Great-West did **not** hold that a claim **against a fiduciary** was outside the traditional scope of equity; only that the fiduciary's ordinary contract claim **against a non-fiduciary beneficiary** was outside the traditional scope of equity.[42]

Both Mertens and Great West relied upon standard historical texts to determine what was "*typically* available in equity." Mertens, 508 U.S. at 256; Great West, 122 S. Ct. at 716. Using this historical perspective, it is clear that the monetary, make-whole relief Plaintiffs seek from the Defendants, who are Plan fiduciaries, not only was "typically" available in equity, it was

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[41] Although the plan sued the beneficiary, the disputed funds had actually been paid to an attorney and a trust; neither the trust nor the attorney had been named as Defendants. Great-West, 122 S. Ct. at 74.

[42] The Secretary of Labor has expressly noted this important facet of Great West: "Monetary relief **against breaching fiduciaries** is equitable relief within the meaning of § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), under Great-West v. Knudsen, 122 S. Ct. 708, 712-716." DOL Br. at 51 (emphasis added). The Department also appeared as *amicus* before the Seventh Circuit, to make sure that Court was fully advised of the Government's authoritative interpretation of ERISA. *See* Brief of the Secretary of Labor as Amicus Curiae In Support of the Appellant, filed in Ostler v. OCE-USA, Inc., No. 01-3801, before the United States Court of Appeals for the Seventh Circuit (attached to the Izard Decl., as Exhibit E).

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exclusively available in equity. Historically, a fiduciary could be compelled to restore a beneficiary to "the position he would have been if the trustee had not committed the breach of trust." RESTATEMENT (SECOND) OF TRUSTS § 205, at 458 cmt. a. The Restatement of Trusts also explains that "the remedies of the beneficiary against the trustee are *exclusively equitable*." Id. § 197, at 433 (emphasis added); *see also* id. § 199, at 437 (setting forth "equitable remedies of beneficiary"). Indeed, the Restatement of Trusts is replete with references to the "equitable duties" of the trustee and the "equitable interests" of the beneficiaries.[43]

A leading treatise explains:

> Equity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with **whatever remedy is necessary** to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties.

G. Bogert, THE LAW OF TRUSTS AND TRUSTEES, § 861, at 3-4 (Rev. 2d ed. 1995) (emphasis added), *see also* 3 A. Scott & W. Fraher, THE LAW OF TRUSTS § 199, at 203-04 & 206 (4th ed. 1988) (listing money payment designed to redress fiduciary breach as one of the "equitable remedies" available to a beneficiary). The trust relationship arises in equity and creates equitable rights and duties, which, when breached, are redressed exclusively through equitable remedies. The fact that such a remedy consists of a money award does not change its character as an equitable remedy.[44]

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[43] RESTATEMENT OF TRUSTS § 2, at 9 ("In a trust there is a separation of interests in the subject matter of the trust, the beneficiary having an equitable interest and the trustee having an interest which is normally a legal interest."); id. at 10 (trustee owes "equitable duties" to beneficiary); id. § 74, at 192 (beneficiary has equitable interest in the trust).

[44] For instance, Illustration 1 § 205, at 459 cmt. c of the Restatement explains: "A is the trustee of $10,000 in cash. As a result of his negligence, the money is stolen. A is liable for $10,000." Illustration 3 notes: "A is the trustee of a claim against B for $1,000. B is solvent and A can collect the claim in full. A negligently fails to take steps to collect the claim until B becomes insolvent with the result that he is able to collect only $400 of the money owed by

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Justice Scalia's dissenting opinion in Bowen v. Massachusetts, 487 U.S. 879 (1988), on which the Court relies in Great-West, bolsters this view. There, Justice Scalia pointed out that "the term 'damages' refers to money awarded as reparation for injury resulting from breach of **legal** duty." Id. at 913 (emphasis added). A fiduciary's duty to the beneficiary is not "legal," however, for at law fiduciary duties did not exist. Rather, a fiduciary's duty is equitable, and therefore remedies for its breach fall outside of this definition of "damages." Indeed, the Restatement of Trusts gives several examples of equitable remedies that involve monetary awards fiduciaries must pay to remedy losses caused by their breaches. Id. § 205, cmt. c. and illus. at 459.[45]

Mertens and Great West do not, as defendants argue, foreclose Plaintiffs' right to seek monetary compensation **from a fiduciary** under ERISA § 502(a)(3). Indeed, the Court in Great West took pains to note that one could seek the payment of money as a form of equitable restitution (for example, a constructive trust or equitable lien) under § 502(a)(3). 122 S. Ct. at 714-15. Here, Plaintiffs are entitled to all the equitable remedies at the Court's disposal, including rescission of improper transactions, restitution of money and property, the

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B. A is liable for $600."

[45] Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000), demonstrates the equitable nature of a monetary award against an ERISA fiduciary for breaching its fiduciary responsibilities. In that case, Bowerman lost health insurance coverage for her pregnancy. She sued under § 502(a)(3) seeking the amount of the pregnancy-related expenses that would have been covered but for the breach. The Court upheld Bowerman's claim for monetary relief under § 502(a)(3) because it rested on a violation of fiduciary duty. The Court recognized that § 502(a)(3) excludes legal relief such as damages (*citing* Mertens, 508 U.S. 255 (1993)), but explained, "[h]owever, when sought as a remedy for breach of fiduciary duty [, this kind of relief, which the Court viewed as restitution] is properly regarded as an equitable remedy *because the fiduciary concept is equitable*." Id. at 592 (citation and internal quotation marks omitted). In support for its ruling, the court cited Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2d Cir. 1999), which awarded monetary relief under § 502(a)(3) for a fiduciary's negligent handling of a life insurance application which resulted in a participant's loss of coverage. The court in Strom explained that beneficiary claims against breaching fiduciaries to redress their breaches "have lain at the heart of equitable jurisdiction from time immemorial." Id. at 144.

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disgorgement of ill-gotten gains, and forcing the fiduciaries to make whole the losses they imposed on their beneficiaries. Neither Mertens, Great West, nor any other authority bars Plaintiffs from seeking broad equitable relief from a fiduciary, including, if the Court deems it appropriate, the payment of money.[46]

3. Plaintiffs Also Seek Other Equitable Relief Under ERISA § 502(a)(3).

Although Defendants also argue the Complaint should be dismissed because Plaintiffs seek only monetary relief, Plaintiffs also seek other equitable relief however as the Complaint makes clear. Complaint at Prayer D (constructive trust), E (injunction). Thus, even if monetary relief were not available (which is wrong), dismissal still would be improper.

H. CONCLUSION

For the reasons set forth above, the Motions to Dismiss should be denied.

[46] Defendants also cite distinguishable cases in which the only relief requested was money damages. For example, in Lee v. Burkhart, 991 F.2d 1004, 1005-06 (2d Cir. 1993), two plan participants sued for coverage of medical expenses excluded from their benefits plan. They sued for money damages -- $12,600 and $47,500 respectively -- not any form of equitable relief.

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DATED: June 11, 2003

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