UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

IN RE TYCO INTERNATIONAL, LTD.,
SECURITIES LITIGATION

OVERBY, et al.,

Plaintiffs,

v.

TYCO INTERNATIONAL LTD., et al.,

Defendants.

02-MDL-1335-B
ERISA ACTION
Civil Action No.
02-1357-B

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF OUTSIDE DIRECTOR DEFENDANTS BODMAN AND LANE'S MOTION TO DISMISS CONSOLIDATED AMENDED COMPLAINT

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Defendants Richard S. Bodman and Wendy E. Lane, former outside directors of Tyco International Ltd. ("Tyco"), respectfully submit this reply memorandum in further support of their motion to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6), F.R.C.P.[1] As in their moving brief, Bodman and Lane focus here only upon those points that are particularly relevant to their motion.[2]

Preliminary Statement

It is not disputed by plaintiffs in their opposition papers that Bodman and Lane are alleged to have served only as former outside directors of Tyco, the parent of the Plans' sponsor, Tyco US, during a portion of the alleged class period. Compl. ¶ 26; Def. Mem. at 2-4. Bodman and Lane are not alleged to have ever served as officers of Tyco, much less as directors or officers of the Plans' sponsor, Tyco US, or as members of the Tyco US Retirement Committee, which plaintiffs themselves allege to be the Plans' administrator and "named fiduciary." Compl. ¶¶ 15-17, 26. Also undisputed by plaintiffs are the facts that Bodman and Lane: (i) never were named as fiduciaries under the Plan documents; (ii) never were named as fiduciaries pursuant to a procedure outlined in the Plan documents; and (iii) never rendered investment advice to the Plans for a fee or had any responsibility or involvement whatsoever for the management or administration

[1] Unless the context indicates otherwise, capitalized terms as used herein shall have the same meanings as defined in the Memorandum Of Law In Support Of Defendants Bodman and Lane's Motion To Dismiss Consolidated Amended Complaint, filed April 18, 2003 ("Def. Mem.").

[2] To minimize duplication, Bodman and Lane hereby join in the (i) Reply Memorandum Of Tyco International Ltd., Tyco International (US) Inc. And Certain Of The Individual Defendants In Support Of Their Motion To Dismiss ("Tyco Reply"); and (ii) The Tyco International Ltd. Director Defendants' Reply Memorandum Of Law In Support Of Their Motion To Dismiss The Consolidated ERISA Class Action Complaint, insofar as the arguments advanced in those memoranda also support dismissal of the Complaint as against Bodman and Lane.

of the Plans, much less any control over the investment options provided by the Plans.

In light of these undisputed, critical facts, Bodman and Lane made two dispositive points as to why the Complaint should be summarily dismissed as against them (and the other Tyco outside directors): [3]

- **First**, the Plans themselves do not specify -- and plaintiffs certainly plead no facts as to any conduct giving rise to -- any administrative, managerial or other fiduciary role concerning the Plans for Bodman, Lane or any of the Tyco Outside Directors; nor does controlling law provide any basis for plaintiffs' conclusory allegations that the Tyco Outside Directors were fiduciaries of the Tyco US Plans. Plaintiffs' ipse dixit labeling of Bodman and Lane as Plan fiduciaries does not make it so, and cannot survive challenge on this motion to dismiss. Def. Mem. at 4-8.

- **Second**, plaintiffs do not plead any facts demonstrating any conduct on their part that could constitute a breach of fiduciary duty under ERISA. Plaintiffs' sole charge against the Tyco Outside Directors (including Bodman and Lane) -- that they signed allegedly "false and misleading" Tyco disclosure and registration statements filed with the SEC -- as a matter of law, does not constitute a fiduciary act within the meaning of ERISA. Def. Mem. at 9-14.

Lacking any meaningful response to these two points, plaintiffs revert back to the non-factual, conclusory allegations of their Complaint -- which merely "lumps" together numerous differently-situated individual and corporate defendants having plainly different roles -- in an attempt to salvage their doomed ERISA claims against Bodman and Lane. In their opposition brief, plaintiffs argue that they have adequately alleged that all defendants violated their so-called ERISA fiduciary duties by supposedly: (1) making negligent misrepresentations and negligently failing to disclose

[3] Tyco's former outside directors who are named defendants in this action are Richard S. Bodman, Wendy E. Lane, Michael A. Ashcroft, Joshua M. Berman, John F. Fort, III, Stephen W. Foss, James S. Pasman, Jr., and W. Peter Slusser (collectively, the "Tyco Outside Directors").

material information to the Participants concerning Tyco corporate financial matters and whether the Tyco Stock Fund was an appropriate investment (Claim I), and (2) allowing Participants to invest in the Tyco Stock Fund when Tyco stock allegedly was not a prudent investment (Claim II). Plaintiffs rest their entire case in Claims I and II against Bodman and Lane and the other Tyco Outside Directors solely on the contention that those directors were de facto fiduciaries of the Tyco US Plans because of their status as mere signatories to Tyco's Form S-8 Registration Statements and other periodic public filings, as mandated by the SEC under the federal securities laws. See Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ("Pl. Mem."), at 24, 61; Compl. ¶ 61.

However, plaintiffs have done nothing in their opposition papers to refute Bodman and Lane's showing that, as a matter of law, the mere signing of SEC filings -- required of an issuer's corporate directors under the securities laws -- without more, is not a fiduciary act within the meaning of ERISA. Indeed, it is now well established that Plaintiffs' sole allegation, that Bodman and Lane were signatories to Tyco's Form S-8 Registration Statements and other SEC filings, is insufficient to state a claim for relief:

> [t]hose who prepare and sign SEC filings do not become ERISA fiduciaries through those acts, and consequently, do not violate ERISA if the filings contain misrepresentations.

In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745, 766, 2003 WL 21385870, at *15 (S.D.N.Y. 2003) (emphasis added); see also In re Williams Cos. ERISA Litig., 2003 WL 21666555 (N.D. Okla. July 14, 2003), discussed below. And plaintiffs all but concede in their opposition papers that there are not, and could not be, any allegations that Bodman or Lane (or any other Tyco Outside Director) signed the SEC filings other

than expressly in their corporate business capacity as Tyco directors; and there certainly is (and could be) no pleading that they signed in the capacity of Plan fiduciaries under ERISA. As such, Claim I against defendants Bodman and Lane must be dismissed. See Point I, infra; see also Tyco Reply, at 11.

Claim II of the Complaint, in blunderbuss fashion, charges all individual and corporate defendants (including Bodman and Lane) with allowing the Tyco US Plans to invest their assets in the Tyco Stock Fund when the Fund was not a prudent investment. Not surprisingly, plaintiffs' sole basis for this claim is the same as that advanced in Claim I: "Tyco International, its Directors and Belnick are . . . liable [for Tyco US Plan Participants' imprudent investments] 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." Pl. Mem. at 61. In their moving brief (at 13), however, Bodman and Lane established that the Complaint failed to make any allegation (much less plead any facts showing) that the Tyco Outside Directors (including Bodman and Lane) ever were given or exercised any discretionary authority or control respecting the investment options provided under the Plans.[4] Rather, as the Complaint alleges (at ¶ 42), and as plaintiffs concede in their opposition brief (at 7), it was the Tyco US Retirement Committee -- and only that Retirement Committee -- that

[4] As explained in Bodman and Lane's moving brief (at 4, n.1), on a motion to dismiss for failure to state a claim for relief, the court must accept only the complaint's well-pled factual allegations as true. See Gomez v. Toledo, 446 U.S. 635, 636-37 (1980). Contrary to plaintiffs' position on this motion, this Court is "not obliged to accept as true legal conclusions or unsupported conclusions of fact." Hickey v. O'Bannon, 287 F.3d 656, 659 (7th Cir. 2002) (citation omitted); Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993). See also 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1363 (2d ed. 1990 & 2002 Supp.). As set forth below, plaintiffs here at most allege mere conclusions, not facts, and their claims against Bodman and Lane thus should be dismissed.

had the duty to establish, change and terminate investment options under the Plans. Thus, Claim II likewise fails to state a claim for relief against defendants Bodman and Lane, and therefore, should be dismissed as against them. See Point II, infra; see also Tyco Reply, at 11.

Argument

I. CLAIM I SHOULD BE DISMISSED AS AGAINST BODMAN AND LANE BECAUSE, AS A MATTER OF LAW, THE SIGNING OF PERIODIC PUBLIC SEC FILINGS, WITHOUT MORE, DOES NOT GIVE RISE TO OR IMPLICATE ANY ERISA FIDUCIARY OBLIGATIONS -- AND THERE IS NOTHING MORE ALLEGED HERE

Bodman and Lane's moving brief established that there are three ways by which a person may be determined to be a plan fiduciary under ERISA: (1) by being named as a fiduciary under the plan documents; (2) by being named as a fiduciary pursuant to a procedure outlined in the plan documents; or (3) by being deemed a de facto fiduciary as a result of performing functions that fall within ERISA's definition of "fiduciary." Def. Mem. at 4 (citing Torchetti v. IBM Corp., 986 F. Supp. 49, 55 (D. Mass. 1997)). As to the first criterion, in their opposition brief, plaintiffs do not dispute, and thus concede, that the Retirement Committee is the only "named fiduciary" under the Plans -- not Bodman and Lane or the other Tyco Outside Directors. Compl. ¶ 41; Pl. Mem. at 2, 44, 52, 60. As to the second criterion, plaintiffs likewise do not dispute that Bodman and Lane were never named as a fiduciary pursuant to a procedure specified in the Plans. Thus, plaintiffs concede (Pl. Mem. at 24), as they must, that Bodman and Lane can be liable only if they are deemed de facto fiduciaries under ERISA by virtue of (i) exercising any discretionary authority or control respecting management of the Plans or the Plans' assets, (ii) rendering investment advice for a fee or (iii) having any

discretionary authority or responsibility in the administration of the Plans. See ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Plaintiffs have not met and cannot meet this burden with respect to defendants Bodman and Lane (and the other Tyco Outside Directors).

As explained in Bodman and Lane's moving brief, plaintiffs' de facto fiduciary argument rests solely upon the ground that the Tyco directors "signed the Form S-8 Registration Statements and other SEC filings that were incorporated by reference in the Form S-8 and Prospectus." Pl. Mem., at 24; Compl. ¶ 61. That is, plaintiffs charge Bodman and Lane (and other Tyco Outside Directors) in Claim I with both incurring and breaching ERISA fiduciary duties by allegedly making negligent misrepresentations and nondisclosures to Plan Participants concerning the financial condition of Tyco and the appropriateness of the Tyco Stock Fund as an investment, based solely on the discrete, directoral acts of signing such public periodic SEC filings of Tyco, as mandated by the federal securities laws. Compl. ¶¶ 3, 61.

Plaintiffs, however, fail to cite any authority supporting their bald contention that merely signing Form S-8 Registration Statements and other SEC filings as required by the securities laws, without more, imposes ERISA fiduciary status upon corporate directors. And we are aware of none. To the contrary, every court that has addressed the issue -- including three that issued such decisions subsequent to the filing of Bodman and Lane's opening brief -- has held that merely signing SEC filings and issuing other public statements regarding corporate financial results, without more, does not implicate any fiduciary standards under ERISA. See, e.g., In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745, 2003 WL 21385870 (S.D.N.Y. 2003); In re Williams

Cos. ERISA Litig., 2003 WL 21666555 (N.D. Okla. July 14, 2003); Stein v. Smith, 2003 WL 21513207 (D. Mass. July 3, 2003); Crowley, ex rel. Corning, Inc. Inv. Plan v. Corning, Inc., 234 F. Supp. 2d 222 (W.D.N.Y. 2002); Hull v. Policy Mgmt. Sys. Corp., 2001 WL 1836286 (D.S.C. Feb. 9, 2001).[5]

Judge Cote's very recent decision in WorldCom establishes that Bodman and Lane are entitled to dismissal of the claims against them. There, as in the instant case, the gravamen of the ERISA action centered on allegations of dissemination of false and misleading information concerning the financial condition of WorldCom. WorldCom, 263 F. Supp. 2d at 751. As here, the WorldCom plaintiffs -- participants in the WorldCom 401(k) plan who invested in WorldCom stock through the plan -- sought to hold WorldCom's directors, some of whom, like Bodman and Lane, were outside directors, liable as ERISA fiduciaries, solely on the basis of their having signed or authored certain SEC filings:

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

Id. at 761.

Judge Cote flatly rejected plaintiffs' theory and held that mere status as a signatory or author of SEC filings was not sufficient to state a claim that the directors

[5] The decisions in WorldCom, Williams and Stein, which post-date the filing of Bodman and Lane's motion to dismiss and plaintiffs' opposition brief, in addition to Crowley and Hull, are submitted herewith in Compendium Of Certain Authorities Cited In The Reply Memorandum Of Law In Further Support Of Outside Director Defendants Bodman And Lane's Motion To Dismiss Consolidated Amended Complaint.

were ERISA fiduciaries: "[t]hose who prepare and sign SEC filings do not become ERISA fiduciaries through those acts, and consequently, do not violate ERISA if the filings contain misrepresentations." Id. at 766 (emphasis added). The court explained:

> ERISA liability arises only from actions taken or duties breached in the performance of ERISA obligations. . . . The SEC filings are documents that directors must execute to comply with a corporation's obligations under federal securities laws. Although the SPD incorporates SEC filings by reference and is part of the Section 10(a) prospectus, those connections are insufficient to transform those documents into a basis for ERISA claims against their signatories.

Id. at 760 (emphasis added). And, if such is the rule where, as in WorldCom, the defendants are directors of the company that is the Plan's sponsor, a fortiori, there can be no fiduciary duty or liability for Bodman and Lane here (and the other Tyco Outside Directors), who were not directors of the Plans' sponsor (Tyco US), but rather, only of its parent (Tyco), whose relationship to the Plans is even more attenuated.[6]

Similarly, in In re Williams Cos. ERISA Litig., 2003 WL 21666555 (N.D. Okla. July 14, 2003), plaintiffs brought an ERISA claim alleging that the company and its directors made misrepresentations and nondisclosures in public announcements concerning the financial condition of the company. Id. at *5. There, neither the company nor its directors were the named fiduciaries of the plan; rather, under the provisions of the Williams plan (similar to the Tyco US plan), "[t]he responsibility to administer the Plan belongs to the Investment Committee and the Benefits Committee." Id. at * 8.

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[6] It also is noteworthy that WorldCom, as plan sponsor, had discretion to appoint individuals to serve as plan administrator and investment fiduciary. See WorldCom, 263 F. Supp. 2d at 754-55. Here, the situation is further attenuated because the Tyco Directors had no such discretion -- or indeed, any discretion whatsoever to take action with respect to the Plans.

Accordingly, the court found that neither Williams, despite its role as plan sponsor, nor the Williams directors, as directors of the plan sponsor, could be considered fiduciaries for purposes of ERISA liability, for only the designated committees could act as fiduciaries under the plan. With regard to the director defendants, the Williams court held that "the only power the Board had under the Plan was to appoint, retain, or remove members of the Benefits Committee," and the directors' fiduciary obligations therefore could "extend only to those acts." Id. at * 9. The Williams court thus dismissed the claim against the directors because, as here, under the plan documents, the board of directors was not accorded responsibility for communicating plan information to plan participants. See id. The Williams court also dismissed the claim against the company, holding that plaintiffs failed to state a claim since "such [public filing] statements, regardless of truth or falsity, were not made . . . in any fiduciary capacity regarding the [company's plan]." Id. Thus, Williams, like WorldCom, flatly rejects plaintiffs' theory of liability here, and makes clear that, in the absence of any duty imposed by the plan documents to communicate plan information -- and none is alleged here -- directors of even the company that is the plan sponsor (much less parent-company directors) cannot be held to incur, or to be liable under, ERISA's fiduciary standards for signing public filings containing allegedly misleading disclosures or failing to disclose material financial information concerning the corporation.

In still another recently decided case, Stein v. Smith, 2003 WL 21513207 (D. Mass. July 3, 2003), plaintiffs asserted a claim under ERISA for breach of fiduciary duty against the company's former chief executive officer for failure to disclose to ERISA plan participants complete information about the company's financial condition.

Id. at * 11. The allegedly incomplete and misleading statements were made in press releases and periodic public filings required by the SEC. Id. With regard to these public statements, the court held that no fiduciary liability under ERISA could attach because "these were statements made to the market in general, not to Plan participants specifically." Id. Explaining that "context made all the difference" in ERISA fiduciary cases, the Stein court held that plaintiffs could not show any set of facts that would tend to prove that statements in SEC filings were made in the specific context of a discussion of plan benefits, and no plausible argument could be made that the issuance of such statements constituted an act of plan administration. Id. Again, if the CEO of a company that is the plan sponsor is not an ERISA fiduciary and has no ERISA liability for public statements and filings concerning the company's financial condition, then the outside directors (such as Bodman and Lane) of the parent company (Tyco) of the plan's sponsor (Tyco US) certainly cannot have ERISA fiduciary status or liability.

In their moving brief (at 10-12), Bodman and Lane relied upon another recent decision that is in direct contravention of plaintiffs' theory, Crowley, ex rel. Corning, Inc. Inv. Plan v. Corning, Inc., 234 F. Supp. 2d 222 (W.D.N.Y. 2002). There, the directors of Corning were sued for breach of ERISA fiduciary duty based upon the directors making allegedly material misrepresentations and non-disclosures concerning Corning's future performance in SEC filings and permitting the imprudent investment in Corning stock. Id. at 227, 229. As noted in Bodman and Lane's moving brief, the Crowley court dismissed both claims on the basis that the only fiduciary responsibility that the Corning directors had under that plan was to appoint, retain, or remove members of the Plan's investment committee, which was the named fiduciary under the Corning

investment plan. See id. at 229-30; Def. Mem. at 11. Because, as here, the board had no responsibility to communicate information to the plan participants, the court held the directors could not be held liable under ERISA for the alleged misrepresentations and non-disclosures made in the SEC filings concerning Corning's performance. See id. Further, as here, the board itself had no control over the plan's investment options, and therefore, the allegation that the board continued to offer participants the ability to invest in Corning stock did not state a claim for relief. See id. at 230.[7]

Thus, plaintiffs are simply wrong when they state that 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, [defendants Bodman and Lane] could not be liable as fiduciaries for those communications." Pl. Mem. at 29 (emphasis in original). Indeed, as noted above and in our moving brief, Crowley specifically did hold that, where directors had no responsibility under the terms of the plan to communicate information to plan participants, such directors could not be liable as ERISA fiduciaries based solely on public filing communications. Crowley, 234 F. Supp. 2d at 229.

Further, in Hull v. Policy Management Systems Corp., 2001 WL 1836286 (D.S.C. Feb. 9, 2001), plaintiffs sued their corporate employer, its chief executive officer, and three members of an ERISA plan's administrative committee for breach of fiduciary

[7] Bodman and Lane pointed out in their moving brief (at 10-11) that they did not owe even the limited fiduciary duty owed by the Corning directors, since they were not members of the Tyco US board, whose members had the limited fiduciary responsibility (similar to those of the Corning Board members) to appoint and monitor the Retirement Committee for the Plans here in issue. Thus, the case for dismissal is even stronger here than in Crowley because here, the Tyco outside directors had no fiduciary responsibilities whatsoever regarding the Plans.

duties under ERISA. Id. at *2; see also Def. Mem. at 13 n.6. The claims were based on the "alleged dissemination of misinformation and failure to disclose information," and "effectively mirror[ed] the allegations in the related securities litigation." Id. at *3. The Hull court dismissed all ERISA claims as to all defendants and held:

> while plaintiff includes numerous allegations of wrongdoing by the corporate defendants, there is no connection between the two. If the allegations of wrongdoing, including allegations of providing misinformation and failing to provide accurate information, ultimately prove true, the Plan's remedy will be the same as for the plaintiff class in the related securities action. This result is not at all unreasonable as the duties of disclosure owed to the Plan by the corporate defendants are not based on the duties owed by an ERISA fiduciary duty to a Plan and its participants, but the general duties of disclosure owed by a corporation and its officers to the corporation's shareholders.

Id. at *8.

In their opposition brief, plaintiffs attempt to distinguish Hull by arguing, ipse dixit, that the complaint there was based upon alleged misrepresentations which were made to the general public, whereas in the present case, the alleged misrepresentations supposedly were directed only toward ERISA plan participants. Pl. Mem. at 19-20. As pointed out in Tyco's reply (at 7), however, this distinction is meaningless, and in any event, is belied by the public record, of which this Court plainly can take judicial notice on this motion: the allegedly false and misleading statements contained in the SEC filings here in issue also were undeniably disseminated to the public at large. In any event, regardless of this red herring, plaintiffs have cited no authorities in support of their argument that, without more, statements made in SEC filings signed by outside directors can give rise to fiduciary status and liability under ERISA, nor have plaintiffs demonstrated how the making of such statements could constitute an exercise of

discretion or control with regard to ERISA plan administration or management.

Thus, the decisions in WorldCom, Williams, Stein, Crowley and Hull underscore, as pointed out in Bodman and Lane's moving brief (at 9-10), that the act of outside directors in signing SEC filings is undertaken in a corporate capacity -- and not an ERISA fiduciary capacity -- because such act does not involve any discretionary authority or control over the administration or management of an ERISA plan. Therefore, no fiduciary status or liability under ERISA is implicated merely by signing such SEC filings.

Finally, plaintiffs' reliance upon Vivien v. WorldCom, Inc., 2002 WL 31640557 (N.D. Cal. July 26, 2002) (Pl. Mem. at 16-17, 20, 24), which pre-dated the consolidation and transfer of the WorldCom ERISA suits disposed of in the Southern District of New York's WorldCom decision, supra, is misplaced. The Vivien complaint was not directed at outside directors who merely signed public filings, such as Bodman and Lane, here. Rather, Vivien specifically alleged that WorldCom's CEO and CFO were plan fiduciaries with discretionary authority or control over the management of the ERISA plans at issue. See Vivien, 2002 WL 31640557, at *3. The court held that, in that particular context, the allegations of fiduciary status were sufficient to withstand a motion to dismiss. Id. at *7-8. Contrary to plaintiffs' strained interpretation (Pl. Mem. at 16-17), the Vivien court did not conclude, as is alleged here, that mere status as a signatory to periodic public SEC filings was sufficient to confer ERISA fiduciary status: and here, the limited fact pattern in Vivien is not presented at all as to outside directors, such as Bodman and Lane. Vivien simply stands for the unremarkable (and as to Bodman and Lane, irrelevant) proposition that those who are deemed to be ERISA

fiduciaries by virtue of having been delegated authority or control over plan management or administration cannot, consistent with their ERISA fiduciary obligations, disseminate false information to plan participants. See id. at *7-8.

It was only after the Vivien decision, when the WorldCom ERISA cases were consolidated in the Southern District of New York, that a specific claim was added against the WorldCom directors. And, as discussed, supra, at 7-8, that claim was dismissed in the WorldCom decision, in which the court expressly held that outside directors who merely prepare and sign periodic public SEC filings do not become ERISA fiduciaries through those acts alone, and consequently, do not violate ERISA if the filings contain misrepresentations. See WorldCom, 263 F. Supp. 2d at 760, 766.[8]

[8] The other cases cited by plaintiffs in response to the Tyco outside directors' motions to dismiss (Pl. Mem. at 24-30) are distinguishable from the facts at bar, and thus are inapposite: in those cases, none of the defendants were, as here, mere outside directors of the parent corporation of the subsidiary that sponsored the plan; and unlike here, the defendants in those cases were alleged to have been named as fiduciaries under the plan, or otherwise were given discretion and control over the plans. See, e.g., Confer v. Custom Eng'g Co., 952 F.2d 34, 37 (3d Cir. 1991) (holding that "when an ERISA plan names a corporation as a fiduciary, the officers who exercise discretion on behalf of that corporation are not fiduciaries within the meaning of [ERISA], unless it can be shown that these officers have individual discretionary roles as to plan administration") (emphasis in original); Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1459-61 (9th Cir. 1995) (finding that corporate officers acting on behalf an ERISA plan fiduciary may have fiduciary status under ERISA even if the plan documents do not name the officers as fiduciaries, so long as there are facts demonstrating that such officers had discretionary duties with respect to administration of the plan); Martin v. Schwab, 1992 WL 296531, at *1, 8 (W.D. Mo. Aug. 11, 1992) (holding that director defendants were fiduciaries under ERISA on the grounds that the plan documents instructed the board to appoint and remove members of the plan's administrative committee, and by failing to appoint any members to the committee before electing to terminate the plan, the directors "put themselves in the shoes of the Administrative committee"); Musmeci v. Schwegmann Giant Super Mkts., 159 F. Supp. 2d 329, 353 (E.D. La. 2001) (finding that the chief executive officer of the partnership which was alleged to have sponsored the ERISA plan at issue had fiduciary status because of "the discretion and direct control that he exercised and/or had over the Plan's administration and assets, bringing him squarely within [the ERISA] definition of a plan fiduciary") (emphasis added); Yeseta v. Baima, 837 F.2d 380, 384-85 (9th Cir. 1988) (corporate officer of plan sponsor deemed an ERISA fiduciary on the grounds that his discretionary authority in the administration of the plan allowed him to exercise control over the assets of the plan). None of those cases found

Accordingly, based on the consistent line of authorities discussed herein -- which holds that merely signing SEC public filings and issuing other public statements concerning corporate financial results does not, without more, implicate any fiduciary duty under ERISA -- Claim I should be dismissed in its entirety as against Tyco outside directors Bodman and Lane.

II. CLAIM II SHOULD BE DISMISSED AS AGAINST BODMAN AND LANE BECAUSE THERE IS AND COULD BE NO ALLEGATION, EVEN IN CONCLUSORY TERMS, THAT EITHER OF THEM HAD ANY FIDUCIARY RESPONSIBILITY FOR THE INVESTMENT BY THE PLANS IN THE TYCO STOCK FUND

Claim II of the Complaint, in blunderbuss fashion, charges all defendants (including Bodman and Lane) with allowing the Tyco US Plans to invest their assets in the Tyco Stock Fund when the Fund was not a prudent investment. In their moving brief (at 13), Bodman and Lane established that the Complaint failed to make any allegation (much less plead any facts showing) that the Tyco Outside Directors (including Bodman and Lane) ever (i) were given or exercised any discretionary authority or control respecting management of the Plans, or (ii) had any authority or control over the investment options made available under the Plans -- and plaintiffs do not and cannot contend otherwise, or even address this point, in their brief.

Instead, plaintiffs, without alleging any facts whatsoever, offer the non sequitur that the Tyco Outside Directors (including Bodman and Lane) are liable under Claim II "because they were responsible for the SEC filings which contained the negligent misrepresentations which were to be used by Participants in evaluating the

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fiduciary status, much less liability, based on a director signing a Form S-8 or other public disclosure documents.

prudence of Plan investments." Pl. Mem. at 61. However, as the Complaint alleges (Compl. ¶ 42), and as plaintiffs concede in their opposition brief (at 7), it was the Tyco US Retirement Committee -- and only that Retirement Committee, not the Tyco Board of Directors -- that had the duty to establish, change and terminate investment options under the Plans. As Bodman and Lane were not members of the Retirement Committee, as a matter or law, they cannot be liable as having fiduciary responsibility for the Plans' investments. Furthermore, for the reasons advanced in Bodman and Lane's moving brief, and Point I, supra, plaintiffs' theory of liability based on merely signing public SEC filings, without more, fails as a matter of law.

In the absence of any allegation of fact that the Tyco Outside Directors controlled or were otherwise involved in selecting and maintaining investment options under the Tyco US Plans -- and no such facts (or even conclusions) are or could be alleged here -- Claim II must be dismissed in its entirety as against Bodman and Lane. See Crowley, 234 F. Supp. 2d at 229 ("As to Corning, plaintiffs' first claim that defendants imprudently continued to offer participants the ability to invest in Corning stock must fail, since it is clear from the amended complaint that Corning could not control investment options"); Williams, 2003 WL 21666555, at *8 (same).

Conclusion

Plaintiffs have not established any fiduciary obligation imposed by ERISA upon defendants Bodman and Lane that arises from or is implicated by their having signed certain SEC filings pursuant to their duties under the securities laws -- the sole factual allegation in the Complaint upon which the claims against Bodman and Lane are based. And plaintiffs clearly have not made any allegation (much less pled a single fact showing) that the Tyco Outside Directors (including Bodman and Lane) ever were given or exercised any discretionary authority or control respecting the investment options provided under the Plans. Accordingly, for all the reasons set forth above and in defendant Bodman and Lane's moving brief, as well as the moving and reply briefs of Tyco and the reply brief of the other Outside Director Defendants, the Complaint should be dismissed in its entirety as against Bodman and Lane.

Dated: August 1, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ashley R. Altschuler, an attorney, hereby certify that on August 1, 2003, a copy of the following:

- Reply Memorandum Of Law In Further Support Of Outside Director Defendants Bodman And Lane's Motion To Dismiss Consolidated Amended Complaint; and

- Compendium Of Certain Authorities Cited In The Reply Memorandum Of Law In Further Support Of Outside Director Defendants Bodman And Lane's Motion To Dismiss Consolidated Amended Complaint

was mailed first-class, postage prepaid, to counsel of record as reflected on the attached service list.

Ashley R. Altschuler

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August 1, 2003

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