UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AOL TIME WARNER, INC. SECURITIES AND "ERISA" LITIGATION	MDL Docket No. 1500 02 Civ. 8853 (SWK) OPINION

SHIRLEY WOHL KRAM, U.S.D.J.

Corporate defendants AOL Time Warner, Inc. ("AOLTW" or "the Company")[1] and Time Warner Entertainment Company, L.P. ("TWE"); committee defendants AOL Time Warner Savings Plan Administrative Committee, AOL Time Warner Thrift Plan Administrative Committee, TWC Savings Plan Administrative Committee and AOLTW Investment Committee; Trustee Defendant Fidelity Management Trust Company ('Fidelity"); and individual defendants[2] move to dismiss the Consolidated ERISA Complaint ("Complaint" or "Compl."). For the

[1] Although Defendant AOLTW has changed its name to Time Warner, Inc., for clarity, the Court will continue to refer to the merged entity as AOLTW.

[2] The individual defendants are Daniel F. Akerson, James L. Barksdale, Christopher P. Bogart, Stephen F. Bollenbach, Richard J. Bressler, Glenn A. Britt, Ann L. Burr, Stephen M. Case, Frank J. Caufield, Pascal Desroches, Chrles W. Ellis, Shelly D. Fischel, Miles R. Gilburne, Peter R. Haje, Thomas J. Harris, Carla A. Hills, Landel C. Hobbs, Derek Q. Johnson, J. Michael Kelly, John A. LaBarca, Gerald M. Levin, Reuben Mark, Carolyn K. McCandless, Michael A. Miles, Raymond G. Murphy, Kenneth J. Novack, Wayne H. Pace, Richard D. Parsons, Robert W. Pittman, Franklin D. Raines, Joseph A. Ripp, Mackereth Ruckman, Thomas M. Rutledge, Andra D. Sanders, Robert E. Turner, Francis T. Vincent, Jr., Mark A. Wainger, Beth A. Wann, Paul D. Williams and Frederick C. Yeager.

reasons set forth below, the motions are granted in part and denied in part.[3]

Factual Background

Plaintiffs bring this action for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") to recover losses allegedly suffered by the AOL Time Warner Savings Plan ("Savings Plan"), the AOL Time Warner Thrift Plan ("Thrift Plan") and the TWC Savings Plan ("TWC Plan")(collectively, the "Plans") which contain the retirement savings of the employees of AOLTW and TWE. Plaintiffs allege that the Plans lost significant value as a result of the defendants' breaches of fiduciary duty.

The employee benefit plans at issue in this case are typical 401(k) retirement plans, the purpose of which is to provide income for employees when they retire. Plaintiffs' Memorandum In Opposition To The Motion To Dismiss Of All Defendants Other Than Fidelity Trust Management Company, dated November 4, 2003 ("Pl. Opp.") at 5. While employers are under no obligation to set up employee benefit plans, once plans are established, ERISA sets forth standards of conduct and obligations for fiduciaries of employee benefit plans.

[3] Although Defendant Fidelity's motion to dismiss was filed separately, it is addressed by this opinion. See infra at 17-18.

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

Here, AOLTW is the Sponsor of the Savings Plan and the Thrift Plan and TWE is the sponsor of the TWC Plan. See Wolf Decl. Exs. A, B and C. The Savings Plan, the Thrift Plan and the TWC Plan are designed as individual account plans within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34).

The Savings Plan

The Savings Plan is governed by the Plan document and the Trust Agreement with Defendant Fidelity. Memorandum of Law in Support of Defendants' Motion to Dismiss the Consolidated ERISA Complaint, dated September 12, 2003 ("Def. Memo") at 6. The Savings Plan permits participating employees to contribute a percentage of their income, on a tax-deferred basis, into

numerous investment funds. See Wolf Decl. Ex. A; Savings Plan § 3.1. By the terms of the Plan, one of the investment options must be a fund designated AOL Time Warner, Inc. Stock Fund (the "Stock Fund") and invested in AOLTW stock. See Wolf Decl. Ex. A, Savings Plan § 6.2. The Plan further provides that the Company will make matching contributions to each Participant's account in an amount based on a percentage of the Participant's annual compensation. See id.; Savings Plan § 14.1. Under the Plan, the Company's matching contributions must be invested in the Stock Fund. See id.; Savings Plan § 6.4. The contributions become part of the Trust Fund, administered by the Trustee for the Plans, and are "held and disbursed by the Trustee in accordance with the provisions of the Plan and Trust Agreement." Savings Plan at § 6.1. At all times relevant to this case, Fidelity has served as the trustee for the Plans. Compl. ¶ 57.

The Trust Fund is "segregated into separate Investment Funds, each to be held for the exclusive benefit of Participants and former Participants." Savings Plan at § 6.2. With respect to the Investment Funds, the Savings Plan provides that "the investment power and authority shall be held by the Trustee to the extent provided in the Trust Agreement." Id. § 14.11. The Trust Agreement provides that the Investment Committee chooses the Investment Funds and directs the Trustee as to "the

Investment Funds in which the Participants may invest . . ." Trust Agreement § 4(a)(b).

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

The Thrift Plan

Defendants stipulate that the Thrift Plan is "identical to the Savings Plan in all relevant aspects." Def. Memo at 9.

The TWC Plan

The TWC Plan is governed by the Plan document and the Trust Agreement with Fidelity. Like the Savings and Thrift Plans, the

TWC Plan permits participating employees to contribute a percentage of their income, on a tax-deferred basis, into several investment funds. See Wolf Decl. Ex. C; TWC Plan § 3.1. The Plan offers Participants the same range of investment options as available under the Savings and Thrift Plans, including the option of investing in the AOLTW Stock Fund. See Wolf Decl. Ex. F; TWC Plan SPD at 10; Wolf Decl. Ex. G; Investment Options Guide at 3. While the TWC Plan also provides for Company matching contributions, unlike the Savings and Thrift Plans, Participants in the TWC Plan may direct company matching contributions to the investment funds of their choice. See Wolf Decl. Ex. C, TWC Plan § 4.1, 4.4.

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

The Allegations

The Complaint sets forth four separate claims for breach of fiduciary duty.

Claim 1

Claim 1 alleges that all of the defendants breached their fiduciary duties by permitting the Plans to invest in the Stock Fund when the Stock Fund was an imprudent investment. Id. ¶ 3(a). Specifically, Claim 1 alleges that it was imprudent for the Plans to invest in the Stock Fund during a period in which AOLTW lost its traditional online advertising revenue base. Id.

Claim 2

Claim 2 alleges that all of the defendants breached their fiduciary duties by negligently making misrepresentations and failing to disclose material information necessary for Participants to make informed decisions concerning Plan assets and benefits. Id. ¶ 3(b).

Claim 3

Claim 3 alleges that certain Board members breached their fiduciary duties by failing to appoint fiduciaries with the knowledge and expertise necessary to manage Plan assets, by failing to monitor those fiduciaries properly, and by failing to provide sufficient information to Plan participants and for Plan fiduciaries to perform their duties. Id. ¶.3(c).

Claim 4

Claim 4 alleges that certain officers and directors of AOLTW breached their duties of loyalty to the Plans and Participants by selling their own AOLTW stock while at the same time allowing the Plans to maintain their investments in the Fund. Id. ¶ 3(d).

I. Motion to Dismiss Standard

When deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the factual allegations in the complaint are assumed to be true and must be construed in the light most favorable to plaintiffs. Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1992). At the motion to dismiss stage, "the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Wright v. Ernst & Young LLP, 152 F.3d 169, 173 (2d Cir. 1998) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). Thus, a court must deny a defendant's motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." In re Emex Corp. Sec. Litig., No. 01 Civ. 4886 (SWK), 2002 WL 31093612, at *4 (S.D.N.Y. Sept. 18, 2002)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

II. ERISA Pleading Requirements

Unlike claims of fraud brought pursuant to Fed. R. Civ. P. 9(b), which require a heightened standard of pleading, claims

brought under ERISA are subject only to the simplified pleading standard of Fed. R. Civ. P. 8. See Swierkiewicz v. Sorena N.A., 534 U.S. 506 (2002). Accordingly, to survive this motion to dismiss, the Complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); see also Swierkiewicz, 534 U.S. at 512-13.

To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege that (1) the defendant was a fiduciary of an ERISA plan who, (2) acting within his capacity as a fiduciary, (3) engaged in conduct constituting a breach of his fiduciary duty. See ERISA § 409, 29 U.S.C. § 1109.

Defendants' arguments in support of dismissal are addressed below.

III. The Complaint Properly Pleads That AOLTW Was A Fiduciary

According to the defendants, the Complaint's allegations are insufficient to confer fiduciary status on AOLTW. Def. Memo at 14. Specifically, defendants claim that the Complaint does not allege facts that, if proven, would establish that AOLTW exercised discretionary authority or control over the Plans' management, disposition of assets or administration. Id. Plaintiffs disagree, arguing that the Complaint properly alleges the fiduciary status of AOLTW. See Pl. Opp. at 16-22. Plaintiffs are correct. So long as the Complaint's allegations

regarding the defendants could arguably justify conferring fiduciary status, then the allegations are sufficient. Here, that is plainly the case with respect to AOLTW.[4] Therefore, the defendants' motion to dismiss on the ground that plaintiffs have not adequately alleged AOLTW's fiduciary status is denied.[5]

IV. The Complaint Does Not Properly Plead That TWE Is A Fiduciary

The Complaint contains only a single allegation with respect to TWE (a corporate partnership subsidiary of Time Warner), namely that TWE is the TWC Plan Sponsor. Compl. ¶ 11. As a matter of law, however, Plan sponsors are not ERISA

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[4] In the Complaint, in support of its claim that AOLTW was a fiduciary, plaintiffs assert, inter alia, that AOLTW communicated with Participants directly concerning the Stock Fund and its expected performance, made fiduciary representations to the Participants in its Form S-8 Registration Statement and exercised ultimate control over all of the fiduciary functions related to the Plan. See Compl. ¶¶ 92-102.

[5] No claims against AOLTW for alleged breaches of fiduciary duty by the Administrative Committees, the Investment Committees and the Board of Directors based on the doctrine of respondeat superior will be permitted. ERISA imposes liability *only* upon named fiduciaries and de facto fiduciaries who exercise actual or discretionary control or authority over the management or disposition of plan assets. ERISA § 3(21)(A); 29 U.S.C. § 1002(21)(A)(emphasis added). Nothing in the statute, however, permits a non-fiduciary to be held liable for breaches of fiduciary duties by others. Further, there is no reason to recognize an implied ERISA cause of action under the doctrine of respondeat superior, in light of the Supreme Court's "unwillingness to infer causes of action in the ERISA context, since the statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly'". Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (quoting Massachusetts Mut. Life Co. v. Russell, 473 U.S. 134, 146-47 (1985)(emphasis in original).

fiduciaries, unless specifically designated in the Plan (which is not the case here). See Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996).

To the extent that TWE was a fiduciary, it was through its role under the TWC Plan as the entity responsible for the appointment and removal of the Trustee and members of the Administrative and Investment Committees. See TWC Plan §§ 1.83, 11.1, 15.2. The Complaint, however, does not allege that TWE breached any fiduciary duty arising out of the appointment of the Trustee or other members of any Committee.[6] Def. Reply at 11. Accordingly, the whole of the Complaint is dismissed with respect to TWE for failure to plead TWE's fiduciary status.

V. The Complaint Is Dismissed With Respect To Bogart And Bressler For Failure To Properly Plead Fiduciary Status

The allegations in the Complaint with respect to Bressler are limited to the following: "Defendant Richard J. Bressler ("Bressler") served as Executive Vice President and Chief Financial Officer of Time Warner before the Merger." Compl. ¶ 31. There are no other allegations in the Complaint against Bressler. Given that a defendant's role as an executive of the employing company is, standing alone, insufficient to confer

[6] Confronted with this pleading deficiency, plaintiffs rather ham-handedly attempt to save the fiduciary allegations with respect to TWE by citing to Claim 3 of the Complaint (a claim not asserted against TWE).

fiduciary status, see C.F.R. §§ 2509.75-8, D-2, D-4 and D-5 (1975), these allegations are inadequate.

The pleadings with respect to Defendant Bogart are equally deficient. While the Complaint asserts that Bogart signed an SEC Form-8 on January 29, 2003, plaintiff appears to retract this assertion by omitting it from its opposition papers and instead relying on the fact that both Bogart and Bressler allegedly signed a different Form S-8 statement, this one dated January 11, 2001. Because that allegation is not in the Complaint, it cannot serve as the basis for the fiduciary allegations with respect to Bogart and Bressler. Accordingly, the Complaint is dismissed with respect to Defendants Bogart and Bressler for failure to adequately plead fiduciary status.

VI. All Claims Against The Board Defendants With Respect To TWC Plan Are Dismissed

Defendants contend that the Board Defendants[7] cannot be held liable for breach of fiduciary duty with respect to the TWC Plan because the TWC Plan does not name the Board as fiduciary and does not provide the Board with discretionary authority over the administration or investment policy of the Plan. Def. Memo at 16. In its opposition papers, plaintiffs ignore the argument,

[7] The Board Defendants are Akerson, Barksdale, Bollenbach, Case, Caufield, Gilburne, Hills, Levin, Mark, Miles, Novack, Parsons, Pittman, Raines, Turner and Vincent. Compl. ¶¶ 12-27.

apparently conceding the point. Accordingly, all claims against the Board Defendants with respect to TWC Plan are dismissed.

VII. Claim 1 States A Claim For Imprudent Investment Of Plan Assets[8]

In Claim 1, plaintiffs assert that all 47 defendants breached a fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, by failing to eliminate the Stock Fund as an investment option and by failing to sell all of the Plans' Stock Fund holdings. Specifically, the Complaint alleges that Defendants breached their fiduciary duty to act with "prudence" by (1) allowing the Plans to continue to offer the Company Stock Fund as an investment option under the Plans; and (2) allowing the Plans to purchase and hold shares in the Company Stock Fund when it was imprudent to do so. Compl. ¶¶ 145-53. Defendants contend that Claim 1 should be dismissed because none of the defendants, acting as fiduciaries, had the discretion to eliminate the Stock Fund.

Plaintiffs allege that all of the Defendants were authorized by the Plans and/or in fact exercised authority with respect to the Plan's assets. Compl. ¶¶ 78-102. Additionally, plaintiffs contend that the plain language of the Plans gives fiduciaries unlimited discretion with respect to the Investment

[8] Claim 1 is, however, dismissed with respect to Defendants TWE, Bogart and Bressler for failure to adequately allege their fiduciary status.

Funds, including the Company Stock Fund. Pl. Opp. at 31. In response, the defendants make 5 arguments: (1) the Board Defendants had no discretion to eliminate the Stock Fund as an investment option under the Savings and Thrift Plans; (2) the Investment Committee Defendants had no discretion over the Stock Fund for the Savings and Thrift Plans; (3) the Administrative Committee Defendants did not act in a fiduciary capacity with respect to investment decisions and had no discretion over investment policy for any of the plans; (4) selling AOLTW stock based on alleged material insider information would have violated the securities laws; and (5) no claim for co-fiduciary breach is cognizable. In addition, Fidelity argues that Claim 1 should be dismissed for failure to state a claim. Memorandum of Law In Support Of Defendant Fidelity Management Trust Company's Motion To Dismiss The Consolidated ERISA Complaint ("Fidelity Memo").

A. Claim 1 States A Claim With Respect To The Board Defendants

According to the defendants, with respect to the Savings and Thrift Plans, the existence of the Stock Fund as an investment option is part of the design of the Plans and thus the only way to eliminate the Stock Fund is to amend the Plans—and failure to amend is not a fiduciary act that can give rise to ERISA liability Def. Memo at 19-20. Plaintiffs disagree

and contend, inter alia, that the terms of the Plans did not require that the Company Stock Fund be offered. Pl. Opp. at 31. Without more factual development, it is impossible to ascertain the parameters of each of the Board Defendants' discretion. Because plaintiffs have alleged that the defendants were fiduciaries who, acting in their capacity as fiduciaries, breached that duty by imprudently allowing the Stock Fund to remain an investment option and failing to halt purchases or sell existing shares in the Stock Fund, under Swierkiewicz, they have stated a claim.

B. Claim 1 States A Claim With Respect To The Investment Committee Defendants

Defendants contend that the Investment Committee Defendants cannot be held liable for breach of fiduciary duty under Claim 1 with respect to the Savings and Thrift Plans because, under the Plans, the Investment Committee expressly was given no investment policy discretion over the Stock Fund. Def. Memo at 21 (citing Savings Plan § 14.11; Thrift Plan § 14.11). Plaintiffs disagree and claim that § 14.11 does not limit the Investment Committee's ability to "take action with respect to the Company Stock Fund." Pl. Opp. at 34. Again, without further factual development, the Court cannot resolve this issue. Because plaintiffs have alleged facts sufficient to put

the Investment Committee Defendants on notice of the claim against them, dismissal is inappropriate. See Swierkiewicz.

C. Claim 1 States A Claim With Respect To The Administrative Committee Defendants

As they do with respect to both the Board Defendants and the Investment Committee Defendants, defendants argue that Claim 1 should be dismissed with respect to the Administrative Committee Defendants because, inter alia, the Administrative Committee did not have any discretionary authority regarding the investment of Plan assets. Def. Memo at 22. For the same reason that dismissal is inappropriate with respect to the Board and Investment Committee Defendants, i.e., there is insufficient factual development to ascertain the parameters of their discretion, dismissal is also inappropriate with respect to the Administrative Committee Defendants. Under Swierkiewicz, plaintiffs have pled adequate information to put the Administrative Committee Defendants on notice of the claim against them.

D. The Securities Laws Do Not Provide A Basis For Dismissal Of Claim 1 At This Time

Defendants assert that plaintiffs' claim that defendants should have divested the Stock Fund of all Plan assets is not consistent with federal securities laws. More specifically, defendants claim that even assuming that the Stock Fund was an imprudent investment, the securities laws prevented the

defendants from selling AOLTW stock based upon alleged material non-public information. Def. Memo at 25. Plaintiffs disagree, claiming, inter alia, that defendants could have met their fiduciary obligations under ERISA without violating insider trading laws. Pl. Opp. at 36-40. Without further factual development, the Court is simply unable to determine the precise nexus between the securities laws and ERISA in the factual context of this case. As a result, dismissal is not appropriate on this ground.

E. The Complaint Fails To State A Claim For Co-Fiduciary Liability

According to the defendants, the Complaint suggests, "albeit ambiguously," that there may be co-fiduciary liability with respect to Claim 1. Def. Memo at 25 (citing Compl. ¶ 150). The Complaint, however, does not allege any facts that would give rise to a claim for co-fiduciary liability. Additionally, by not responding to defendants' arguments with respect to co-fiduciary liability, plaintiffs appear to concede the point; thus, to the extent it is premised on co-fiduciary liability, Claim 1 is dismissed.

F. Claim 1 Adequately Alleges That Defendant Fidelity Violated ERISA

Of the four claims in the Complaint, only Claim 1 is asserted against Defendant Fidelity. Fidelity contends that Claim 1 does not state a claim. The Court disagrees. In Claim

1, plaintiffs allege that Fidelity was a fiduciary with respect to the Plans.[9] Compl. ¶ 88. They further allege that Fidelity, acting in its capacity as a fiduciary, was obligated to "discharge its duties with respect to the Trust solely in the interests of the participants . . . and with the care, skill, prudence and diligence . . . [of] a prudent man acting in a like capacity . . ." Id. ¶ 89. Finally, plaintiffs allege that Fidelity breached its fiduciary duty by permitting the plans to purchase shares of the AOLTW Stock Fund when the Fund was not a prudent investment. Plaintiffs' Memorandum In Opposition To Defendant Fidelity Trust Management Company's Motion To Dismiss The Consolidated ERISA Complaint, dated November 4, 2003, at 9; Compl. ¶ 151. Under Fed. R. Civ. P. 8(a) and Swierkiewicz, plaintiffs have satisfied their pleading obligations and Claim 1, except to the extent it is premised on co-fiduciary liability,[10] will not be dismissed with respect to Defendant Fidelity.[11]

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[9] Fidelity concedes this point. Fidelity Memo at 12.

[10] Any claim(s) asserted against Fidelity based on co-fiduciary liability is dismissed.

[11] With the exception of the arguments relating to sufficiency of the fiduciary status allegations and the arguments in support of dismissal of Claim 4 of the Complaint, the defendants appear to have treated this motion to dismiss as a motion for summary judgment. As a reminder, a motion for summary judgment, not a motion to dismiss, is the appropriate way to "define disputed facts and dispose of unmeritorious claims," Swierkiewicz, 534 U.S. at 512.

VIII. Claim 2 States A Claim For Breach Of Fiduciary Duty[12]

In Claim 2, plaintiffs assert that all 47 defendants breached a fiduciary duty under ERISA § 404, 29 U.S.C. § 1104 by negligently misrepresenting and failing to disclose material information to Plan participants. Compl. ¶¶ 154-172. In response, Defendants contend that the Complaint's allegations are too generalized to put any Defendant on notice of how he or she might have been acting in a fiduciary capacity or in what way he or she purportedly breached any fiduciary duty. Def. Memo at 26. Nothing in Swierkiewicz, however, demands the specificity that the defendants request. So long as the complaint alleges that the defendants were fiduciaries, acting in their capacity as fiduciaries, who breached a fiduciary duty, then the Complaint, at least at the motion to dismiss stage, is adequate.[13]

IX. Claim 3 Adequately Alleges The Breach Of A Fiduciary Duty

In Claim 3, plaintiffs allege that the Board Defendants breached their fiduciary duties in the following ways: (a) they appointed only AOLTW employees who, by definition, lacked the

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[12] Claim 2 is dismissed with respect to TWE, Bogart and Bressler.
[13] Defendants also argue that Claim 2 should be dismissed because any alleged misstatements in SEC filings were not made in a fiduciary capacity. Def. Memo at 30-31. Even if that is true (this is not an issue that should be decided at the motion to dismiss stage), the fact that no defendant's status as a fiduciary is predicated solely upon his execution of an SEC filing compels denial of the motion to dismiss Claim 2.

independence necessary to make appropriate decisions; (b) they appointed Committee members who lacked the knowledge, skill and expertise to perform their responsibilities and failed to monitor their performance which permitted the Plans to make the imprudent investments as alleged above; and (c) to the extent that the Committees did not know the information alleged above concerning the imprudence of the Plan as an investment, which the Directors should have known, the Directors failed to inform the Committee of the information the Committee needed to know to perform its duties. Compl. ¶ 173(a)-173(c).

While the Claim 3 allegations may ultimately prove unable to survive summary judgment, at this stage, with respect to the Savings Plan and Thrift Plans only, Claim 3 satisfies the notice pleading standard of Swierkiewicz and will not be dismissed.[14]

X. Claim 4 Is Dismissed Because Sales Of AOLTW Stock Were Not Made In A Fiduciary Capacity

In Claim 4, plaintiffs allege that the Selling Defendants[15] breached a fiduciary duty of loyalty "when they sold millions of shares of AOL stock at the same time that they were publicly

[14] As stated previously, however, with respect to the TWC Plan, the Board Defendants cannot be liable under ERISA for claims arising out of the failure to appoint or monitor members of the TWC Plan Committees because the Board Defendants are not fiduciaries under the TWC Plan. See Wolf Decl. Ex. C, TWC Plan ¶ 11.1, ¶ 15.2. Accordingly, the portion of Claim 3 that is premised on the TWC Plan is dismissed.

[15] The Selling Defendants are Akerson, Barksdale, Case, Caufield, Gilburne, Kelly, Novack, Parsons, Pittman and Turner. Compl. ¶ 177.

touting their positive expectations from the Merger. . ." Compl. ¶ 176. This allegation does not state a claim under ERISA. Fiduciary liability attaches only to those actions that are performed in a fiduciary capacity, see, e.g., Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1459-60 (5th Cir. 1986), and a fiduciary's sale of securities held in a personal capacity is not a fiduciary act. See id. Claim 4 is thus dismissed in its entirety.

XI. Conclusion

With the exceptions of the fiduciary allegations regarding Defendants TWE, Bogart and Bressler, the allegations with respect to the Board Defendants vis-à-vis the TWC Plan, and the allegations contained in Claim 4, the Complaint contains a short and plain statement of the claims showing that the pleader is entitled to relief and providing defendants with adequate notice of the claims against them. Pursuant to Fed. R. Civ. P. 8 and Swierkiewicz, that is sufficient to withstand a motion to dismiss. Accordingly, while the motions to dismiss are granted with respect to the above exceptions, they are denied in all other respects.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
March 9, 2005