

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RECEIVED
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KELLER ROHRBACK L.L.P.

IN RE NORTEL NETWORKS CORP.,) 03-MD-1537
)
"ERISA" LITIGATION ,) JUDGE JOHN T. NIXON

MEMORANDUM ORDER

Pending before the Court is Defendants' Renewed Motion to Dismiss Plaintiff's Second Amended Consolidated Class Action Complaint. (Doc. No. 63.) Plaintiffs have responded in opposition (Doc. No. 67) and Defendants have replied (Doc. No. 69). Also pending before the Court is Defendant Frank Andrew Dunn's Motion to Dismiss the Second Consolidated Class Action Complaint. (Doc. No. 80.) Plaintiffs' have responded in opposition (Doc. No. 84). For the reasons set forth below, Defendants' motions are GRANTED IN PART and DENIED IN PART.

I. Procedural Background

Plaintiffs have filed this putative class action requesting relief under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") on behalf of all current and former Nortel Networks Inc. ("Nortel U.S.") employees who are or were participants in Nortel's Long Term Investment Plan ("Plan") to recover losses to the Plan as a result of alleged breaches of fiduciary duties. Defendants are Nortel U.S. and its Canadian parent, Nortel Networks Corporation ("Nortel Corp."), Nortel Networks Limited ("Nortel Ltd."), and individual defendants.¹

¹Plaintiffs have named the individual members of the board of directors of Nortel as defendants including Dr. Manfred Bischoff, Hon. James J. Blanchard, John Edward Cleghorn, Frank Andrew Dunn, Robert Ellis, L. Yves Fortier, Robert Alexander Ingram, Hon. John P. Manley, Richard David McCormick, William Arthur Owens, Harry Jonathan Pearce, John

II. Factual Background

On February 15, 2001, Nortel Corp. issued a press release lowering its guidance for business performance for the first quarter and full year 2001. Upon Nortel Corp.'s announcement of the negative business forecast, its stock price plummeted. As a result, employees who invested in company stock through their 401(k) plan lost a significant portion of their retirement savings.

A. *The Plan*

This case involves Nortel's 401(k) plan. Nortel established the Plan as a benefit for its employees, and it is the "sponsor" of the Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). Pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), the Plan is established and maintained pursuant to a written instrument entitled "Nortel Networks Long-Term Investment Plan, Effective July 1, 1979" ("Plan Document").² Nortel U.S. also provided all employees with a Summary Plan Description ("SPD") and an Investment Plan Brochure ("IBP") which included information concerning the levels of risk for each investment fund.

The Plan allows its participants to contribute 1% to 15% of their eligible earnings, thereby deferring taxes on those earnings, subject to certain restrictions. Once the participants contribute, Nortel U.S. makes matching contributions on behalf of employees in cash, not

Andrew Roth, Guylaine Saucier, Sherwood Hubbard Smith, Lynton Ronald Wilson, Mary Cross, William Kerr, Katharine B. Stevenson, and John/Jane Does 1-10. Plaintiffs also name members of the Nortel Networks Investment Committee of Nortel Corp. and/or Nortel Ltd. including Katherine B. Stevenson, Douglas Beatty, David L. Burn, Oswald L. D'Mello, Nicholas DeRoma, William J. Donoval, John M. Doolittle, Frank Dunn, Michael Gollogly, William Kerr, MaryAnne Pahapill, Tracey L. Vickruck, and John/Jane Does 11-50.

²During the period relevant to this action there were three amended and restated versions of this instrument, however the provisions relevant to this motion remain the same throughout.

employer stock. Funds contributed to the Plan by participants and by Nortel are allocated by each individual Plan member to a number of "investment options." All decisions to change investments, and the timing of the change, is left to the employee.

Certain funds were listed in an exhibit to the Plan Document as available funds, including the Nortel Stock Fund, however, the final selection of the investment options to be offered to the participants was in the sole discretion of the Plan's fiduciaries. All investment options were diversified mutual funds, except one. The exception, the "Nortel Stock Fund," was a pool of money invested in Nortel stock. At the end of 1999, more than 52% of total Plan assets were invested in the non-diversified Nortel Stock Fund. During the class period, Plaintiffs allege the Nortel Stock Fund lost more than 75% of its value.

B. Claims

Plaintiffs seek relief for breach of fiduciary duty. Specifically Plaintiffs claim that Defendants breached their fiduciary duty to the Plan and its participants in several ways:

(a) offering and continuing to offer Company Stock as a retirement investment, when Nortel U.S. knew or had reason to know that Company Stock was not a prudent investment; (b) failing to remove Company Stock as a Plan Investment Option when Nortel U.S. knew or had reason to know that Company Stock was not a prudent investment; (c) failing to limit the Plan's over concentration in Company Stock, and individual participants' concentration in Company Stock, when Nortel U.S. knew or had reason to know that the Company Stock was not a prudent investment; (d) failing to properly exercise its discretionary authority to appoint, monitor the performance of, and timely remove (if and when appropriate) other Plan fiduciaries; (e) failing to provide complete and accurate information to other Plan fiduciaries, including the Director Defendants and the Doe Defendants concerning investment in Company Stock; (f) failing to provide complete and accurate communications to Plan participants that disclosed material facts concerning investment in Company Stock; (g) failing to make fiduciary decisions for the exclusive benefit of the Plan and its participants and beneficiaries; and (h) failing to engage an independent fiduciary in situations presenting potential conflicts of interest."

Complaint ¶ 103.

III. Standard of Review

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure “tests whether a cognizable claim has been pleaded in the complaint.” Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). In considering a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff’s factual allegations are accepted as true. See Wallin v. Norman, 317 F.3d 558, 561 (6th Cir. 2003). A motion to dismiss for failure to state a claim upon which relief can be granted must be viewed in the light most favorable to the non-moving party. See id. “In order for a dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint.” Bower v. Fed. Express Corp., 96 F.3d 200, 203 (6th Cir. 1996).

IV. Analysis

To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege that the defendant (1) was a fiduciary of an ERISA plan; (2) was acting within his capacity as a fiduciary; and (3) engaged in conduct constituting a breach of his fiduciary duty. See ERISA § 409, 29 U.S.C. § 1109. Defendants do not claim that they are not fiduciaries of the ERISA plan at issue, nor do they contend that they were not acting in their fiduciary capacity when they allegedly engaged in the conduct described in the complaint. Defendants do argue that ERISA cannot be manipulated into a class action mechanism for individualized and particularized investment decisions seeking monetary recovery. Additionally, they argue that they did not engage in

conduct constituting a breach of fiduciary duty by offering the Nortel Stock Fund as an investment option. The Court will address each of these arguments in turn.

A. Plaintiff's Cannot Bring a Class Action Suit Under ERISA

Defendants contend that Plaintiffs cannot bring a class action law suit seeking monetary recovery under ERISA for Plaintiffs' investment decisions which were individualized and particularized. They argue that this cannot be done for three reasons. First, Plaintiffs' claims are not made on behalf of the plan; second, misrepresentation is a claim under securities law and not ERISA; and third, Plaintiffs' allegations do not support a claim for monetary relief under ERISA § 502(a)(3).

i. Claims Are Not Made on Behalf of the Plan

Defendants first contend that Plaintiffs' § 502(a)(2) claims should be dismissed because they are claims for individualized recovery by plan participants, rather than "on behalf of the plan." They argue that the monetary recovery sought by Plaintiffs will not benefit the Plan itself, but instead will only serve the individual Plan participants who invested in Nortel stock. Therefore, they claim Plaintiffs cannot proceed under § 502(a)(2).

The Supreme Court in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 142 (1985), stated with regard to 502(a)(2) that "[a] fair contextual reading of the statute . . . makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of the plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." Defendants rely on two cases, Milofsky v. American Airlines, Inc., 404 F.3d 338, 343 (5th Cir. 2005) and In re Schering-Plough Corp. ERISA Litig., 387 F. Supp. 2d 392, 401 (D.N.J. 2004), that interpret Massachusetts Mutual in such a way as to bar relief if

the remedy sought would not benefit all plan participants. There are a small number of additional cases supporting the proposition. See, e.g., Horan v. Kaiser Steel Ret. Plan, 947 F.2d 1412, 1417-18 (9th Cir. 1991); Fisher v. J.P. Morgan Chase & Co., 230 F.R.D. 370, 375-76 (S.D.N.Y. 2005) (“Because plaintiffs seek recovery on behalf of a ‘specific subclass of participants’ and not on behalf of the Plan itself, they may not invoke the right of action contained in section 502(a)(2).”).

In contrast, the majority of courts, including the Sixth Circuit, reject this position, “noting that the Court in Massachusetts Mutual was addressing only the question whether an individual participant could recover under § 502(a)(2), not specifically whether a group of participants could recover.” Rogers v. Baxter International Inc. 2006 U.S. Dist. Lexis 7542, No. 04 C 6476, at *11 (N.D. Ill. Feb. 22, 2006) (emphasis omitted) (citing In re Schering-Plough Corp. ERISA Litig., 420 F.3d 231, 241 (3d Cir. 2005); Kuper v. Iovenko, 66 F.3d 1447, 1452-53 (6th Cir. 1995); Woods v. Southern Co., 396 F. Supp. 2d 1351, 1362 (N.D. Ga. 2005); In re CMS Energy ERISA Litig., 312 F. Supp. 2d 898, 912-13 (E.D. Mich. 2004); In re Honeywell Int’l ERISA Litig., 2004 U.S. Dist. LEXIS 21585, Civ. No. 03-1214 (DRD), 2004 WL 3245931, at *15 (D.N.J. Sept. 14, 2004); Kling v. Fidelity Mgmt. Trust Co., 270 F. Supp. 2d 121, 126 (D. Mass. 2003)). Additionally, since the filing of Defendant’s motion, both Milofsky and In re Schering-Plough have been overturned or vacated. Milofsky v. Am. Airlines, Inc., 404 F.3d 338 (5th Cir. 2005) reh’g en banc granted, No. 03-11087, 418 F.3d 429 (5th Cir. July 19, 2005) (vacating a Fifth Circuit panel’s decision holding that suits under § 502(a)(2) must benefit all plan participants); In re Schering-Plough Corp. ERISA Litig., 387 F. Supp. 2d 392, 401 (D.N.J. 2004) (holding that suits under § 502(a)(2) must benefit all plan participants), overruled by In re

Schering-Plough Corp. ERISA Litig., 420 F.3d 231 (3d Cir. 2005). Essentially, these courts agreed with the Sixth Circuit's finding in Kuper that

Defendants' argument that a breach must harm the entire plan to give rise to liability . . . would insulate fiduciaries who breach their duty so long as the breach does not harm all of the plan's participants. Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as the highest known to law.

Kuper, 66 F.3d at 1453 (internal citations omitted).

Following the Sixth Circuit and the majority of courts that have dealt with this issue, the Court finds that Plaintiffs may bring a claim under § 502(a)(2), even though the proposed putative class constitutes only a subset of the Plan's participants.

ii. Misrepresentation is a Securities Law and Not ERISA Claim

Plaintiffs allege in their complaint that Defendants failed to provide complete and accurate information to Plan participants, and in doing so breached their fiduciary duties. Defendants contend that Plaintiffs state a claim of misrepresentation under securities law and not one of a breach of fiduciary duty under ERISA because SEC filings are made in a corporate, not fiduciary, capacity, and there is no "duty to tip" under ERISA.

The Court finds that while it is true that Defendants' prepared their SEC filings in their corporate capacity and thus are not violating ERISA by making any misrepresentations in these filings, the situation changes when they incorporate the SEC filings into the SPDs. By incorporating SEC filings into SPDs, the fiduciaries then become liable under ERISA for the misrepresentations they make in the SEC filings, and for disseminating false information to plan participants. In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 743, 766-67 (S.D.N.Y. 2003).

Moreover, when defendants made a similar argument in In re Enron Corp. Sec. Derivative & ERISA Litig., 284 F. Supp. 2d 511, 565 (S.D. Tex. 2003), Judge Harmon found defendants' argument to be "in essence . . . an argument that the fiduciary should both breach his duty under ERISA and, in violation of the securities laws, become part of the alleged fraudulent scheme to conceal Enron's financial condition to the continuing detriment of current and prospective Enron shareholders, which include his plan's participants." Further, Judge Harmon stated, that

As a matter of public policy, the statutes should be interpreted to require that persons follow the laws, not undermine them. They should be construed not to cancel out the disclosure obligation under both statutes or to mandate concealment, which would only serve to make the harm more widespread; the statutes should be construed to require, as they do, disclosure by Enron officials and plan fiduciaries of Enron's concealed, material financial status to the investing public generally, including plan participants, whether "impractical" or not, because continued silence and deceit would only encourage the alleged fraud and increase the extent of injury.

Id. See also Worldcom, 263 F. Supp. 2d at 767 (rejecting the contention that ERISA obligations are trumped by securities laws); Rankin v. Rotts, 278 F. Supp. 2d 853, 874-76 (E.D. Mich. 2003) (same).

The Court finds the reasoning in Enron and WorldCom to be sound and thus DENIES Defendants' Motion to Dismiss on these grounds.

iii. 502(a)(3) Claims Do Not Support Monetary Relief

Defendants argue that Plaintiffs' ERISA § 502(a)(3) claims must be dismissed because monetary relief cannot be recovered under the guise of equitable relief. Defendants contend that Plaintiffs' underlying demand is for money damages for Plan participants who invested in Nortel Stock. Plaintiffs are thus seeking legal, monetary relief and cannot proceed under § 502(a)(3), which only allows for equitable relief. ERISA § 502(a)(3) affords three remedies: (1) injunctive

relief; (2) "other appropriate equitable relief"; and (3) enforcement of specific provisions or terms of a plan. Courts have generally rejected claims for monetary relief under § 502(a)(3), as Plaintiffs acknowledge in their response. Mertens v. Hewitt Assoc., 508 U.S. 248, 258-59 (1993); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002); Enron, 284 F. Supp. 2d at 570-73. Consequently, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs' claim under ERISA § 502(a)(3).

B. Failure to State a Claim Because the Plan is an Individual Account Plan

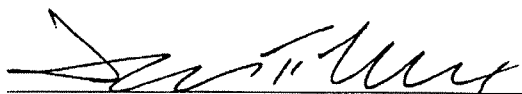
Lastly, Defendants claim that the Plan is an eligible Individual Account Plan under ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3). As such, Defendants argue that the Plan is exempt from ERISA's diversification requirements, which otherwise limit the amount of employer stock a plan is permitted to hold. Defendants also contend that they are entitled to a presumption of prudence, and that Plaintiffs have failed to rebut this presumption. However, the Court finds that it is inappropriate at this stage of the litigation to require that Plaintiffs rebut this presumption as they have not yet had the benefit of discovery to uncover relevant facts. As a result, the Court DENIES Defendants Motion to Dismiss on this claim.

V. Conclusion

As outlined above, the Court DENIES IN PART and GRANTS IN PART Defendants' Motion to Dismiss. The Court GRANTS Defendants' Motion with respect to Plaintiffs' claims for monetary relief under ERISA § 502(a)(3) and DENIES Defendants' motion with respect to Plaintiffs' remaining claims.

It is so ORDERED.

Entered this the 11th day of October, 2006.



JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT