

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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In re CMS ENERGY ERISA LITIGATION

Master File No. 02-CV-72834

HON. GEORGE CARAM STEEH

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION FOR JUDICIAL NOTICE AND GRANTING IN PART AND
DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

INTRODUCTION

Currently before the court in this consolidated ERISA litigation is a Fed. R. Civ. P. 12(b)(6) motion to dismiss brought by defendants CMS Energy Corporation ("CMS"), Consumers Energy Company ("Consumers"), CMS Marketing Services and Trading Company ("CMS MST"), Victor J. Fryling, Laura L. Mountcastle and Preston Hopper; a Fed. R. Civ. P. 12(b)(6) motion to dismiss brought by individual defendants Preston D. Hopper, David W. Joos, William T. McCormick, Jr., Tamela W. Pallas, and Allan M. Wright; and the defendants' request for judicial notice per Fed. R. Evid. 201, in connection with motions to dismiss, of two versions of defendants' Employees' Savings and Incentive Plan and Employee Stock Ownership Plan ("Plan").

BACKGROUND

At issue in this ERISA litigation is a retirement plan, established and sponsored by CMS, Consumers and CMS MST as an employee benefit (the "Plan"). The Plan has two components, both allowing for investment in CMS stock. One part is a 401(k) Savings Plan, allowing for employees' direction of contributions into an investment of

their choosing; the 401(k) plan gives employees 10 investment options, including Fund CS, which consists primarily of CMS stock. Prior to January 1, 2001, participating employees could contribute up to 16% of their pay to the Plan; thereafter, they were permitted to contribute up to 25% of their pay. The other is an Employee Stock Ownership Plan (ESOP), where matching contributions up to 3% of an employee's salary were directed into the participating employee's ESOP account. Incentive contributions were sometimes contributed to employees' ESOP accounts as well.

Under the 401(k) portion of the Plan, according to § 5.5(a), participants decided how to allocate their account assets among the investment options offered to them. According to the Plan terms, the matching contributions made by participants' employers, as well as incentive contributions, were made primarily in the form of CMS stock and allocated to Fund CE. Plan, §§ 5.11; 5.13. According to § 7 of the Plan, Fund CE "consists of CMS Energy Corporation common stock and temporary investments.

The ERISA claims in this litigation, like the securities claims in the court's companion securities action, *In re CMS Energy Securities Litigation*, #02-72004, stem from certain wholesale electricity trading transactions undertaken by CMS from mid-2000 through January 2002. Specifically, CMS is alleged to have engaged in "round-trip" electricity trades, where purchases and sales of electricity happened simultaneously, with the same parties and at the same price. The Amended Consolidated Complaint in this litigation ("ACC") alleges that these trades, while having no effect on the net earnings of CMS, indicated an increased buying and selling volume (ACC, ¶ 60), by including \$4.4 billion of revenues and expenses which "had no

economic substance, violated GAAP and rendered the financial statements of CMS materially false." (ACC, ¶ 64). The CMS stock price is alleged to have dropped after CMS voluntarily stopped making round trip trades in January 2002 and an investigation of the practice become public in May 2002. (ACC, ¶ 34).

These motions filed by all defendants to this matter seek the dismissal of the entirety of plaintiffs' Amended Consolidated Complaint ("ACC"), filed January 15, 2003, and, in connection with those motions, the taking of judicial notice of the Plan as of the date of January 1, 1997 and, a second version as of the date of January 1, 2001. The consolidated CMS ERISA cases, accepted as companions to this court's pending CMS Energy litigation, allege the following four causes of action via the ACC:

1. **Failure to Prudently and Loyalily Manage Plan Assets (Breaches of fiduciary and co-fiduciary duties in violation of ERISA, 29 U.S.C. § 1104(a)(1)(A)-(D), 29 U.S.C. § 1105 by Employer Named Fiduciaries, Insider Director Defendants, and Plan Administrator Defendants)**
2. **Failure to Provide Complete and Accurate Information to Participants and Beneficiaries (Breaches of fiduciary and co-fiduciary duties in violation of §§ 404 and 405 of ERISA, 29 U.S.C. § 1104 and 1105 by the Employer Named Fiduciaries, Insider Director Defendants, and Plan Administrator Defendants)**
3. **Failure to Monitor the Plan's Fiduciaries (Breaches of fiduciary and co-fiduciary duties in violation of ERISA, 29 U.S.C. § 1104(a)(1)(A)-(D), 29 U.S.C. § 105 by Employer Named Fiduciaries and Insider Director Defendants)**
4. **Causing the Plan to Engage in a Prohibited Transaction by Acquiring CMS Stock for the Plan for More than Adequate Consideration (Violation of §§ 406 and 407 of ERISA, 29 U.S.C. § 1106 and 1107 by the Employer Named Fiduciaries and Insider Director Defendants)**

As seen above, the ACC asserts claims against different fiduciary categories:

Employer Named Fiduciaries (Consumers, CMS and CMS Marketing); Plan

Administrator Fiduciaries (the estate of McNish¹ and Mountcastle); and Insider Director Fiduciaries (Victor J. Fryling, David W. Joos, William T. McCormick, Jr., Allan M. Wright, Tamela W. Pallas, and Preston D. Hopper).² Laura Mountcastle, Victor J. Fryling and Preston Hopper are included in the three corporate defendants' motion to dismiss (the "CMS motion"), and Preston Hopper and the remaining individual defendants filed a separate motion to dismiss, in which those defendants both join in the CMS motion and make additional arguments. The court has now considered the parties' briefings, oral arguments, and supplemental briefings³ in this matter, and its discussion of and determination on these requests is set forth below.

STANDARD

In deciding a motion to dismiss, the court must accept the allegations of the complaint as true, and may only dismiss the complaint if plaintiffs "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The plaintiffs' allegations must be construed in the light most

¹ Defendant Estate of Thomas McNish, although not originally included in these motions, has filed his joinder in all defendants' motions to dismiss the ACC.

² Note: plaintiffs asserted in a response brief, p. 4, that they had alleged causes of action against a fourth category of defendant, Plan Committee Fiduciaries (Finance and Pension Committees of Consumers and CMS), and defendants' motions, as filed, sought dismissal of the Plan Committee Fiduciaries. However, following the briefing and hearing on this cause, plaintiffs filed a voluntary dismissal of the finance and pension committees of the boards of directors of CMS and Consumers pursuant to Fed. R. Civ. P. 41(A)(1)(i).

³ In the months following oral argument, both plaintiffs and defendants submitted substantial proposed "supplemental authority" in this matter, to draw the court's attention to recent cases decided in this area of law. The court has accepted and considered such supplemental authority; however, to the extent the court did not rule on the parties' motions for leave to file supplemental briefings, those requests are hereby granted.

favorable to the plaintiffs. Bower v. Federal Express Corp., 96 F.3d 200 (6th Cir. 1996); Sinay v. Lamson & Sessions, 948 F.2d 1037, 1039 (6th Cir. 1991). In order for dismissal to be proper, it must appear beyond a doubt that the plaintiff could not recover under any set of facts which might be presented consistent with the complaint's allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

ANALYSIS

A. DEFENDANTS CMS, CONSUMERS, CMS MST, FRYLING, MOUNTCASTLE, AND HOPPER'S REQUEST FOR JUDICIAL NOTICE OF PLANS

Relying on Amini v. Oberlin College, 259 F.3d 493, 502 (6th Cir. 2001) and other persuasive authority, the above defendants request that the court take judicial notice of two versions of the Employees' Savings and Incentive Plan and Employee Stock Ownership Plan, with respective effective dates of January 1, 1997 ("1997 Plan") and January 1, 2001 ("2001 Plan"). Plaintiffs do not oppose the taking of judicial notice of the 1997 Plan, but oppose such court action as to the 2001 Plan, stating that there is a factual dispute as to whether the Consumers Board ever adopted the 2001 Plan document. Because the parties are in agreement concerning the 1997 Plan, the court will grant the motion for judicial notice as to that document.

In making a determination to consider the 2001 Plan, the court notes that the 2001 Plan is specifically discussed in the ACC, and a copy of the 2001 Plan was attached to the Declaration of Derek Loeser, filed in support of plaintiffs' opposition to defendants' motions to dismiss. Furthermore, defendants show that the Consumers Board approved a resolution adopting the substance of the 2001 Plan in August 2001, attached as Exhibit B to defendant's reply. Plaintiffs indeed rely on the Plan in making

such specific reference to it, both in their complaint and argument on these motions to dismiss. Plaintiffs in fact filed a supplemental response to this request, in which they do not object to the court's consideration of the document⁴ in connection with this motion to dismiss, but only request that the court leave the "fact issue regarding the effective date of the 2001 Plan Document for another day" (Plaintiffs' supplemental response, p. 4).

This argument of plaintiffs is well-taken. Given plaintiffs' agreement that the document be considered in relation to this motion, the court need not grant defendants' request for judicial notice of the 2001 Plan pending further factual development concerning its effective date. However, although the 2001 Plan is not attached to the plaintiffs' ACC, it is both referenced therein and central to the plaintiffs' claims in this litigation, and will be considered by the court as though it had been attached to the complaint. Weiner v. Klais & Co., Inc., 108 F.3d 86, 89 (6th Cir. 1997).

B. ERISA'S FIDUCIARY STANDARDS

Prior to addressing the defendants' motions to dismiss, the court will briefly discuss fiduciary standards under ERISA. Fiduciary duties are specifically enumerated in ERISA § 404(a)(1):

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

⁴ The court notes plaintiffs proviso concerning whether the 2001 Plan Document under consideration here is the same as the draft document referred to in the August 16, 2001. Board minutes, which, for the purposes of this motion, the court assumes it is.

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan....

29 U.S.C. § 1104(a)(1). ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). The duties with which an ERISA fiduciary is charged are "the highest known to the law." Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996) (quoting Donovan v. Bierwirth, 680 F.2d 263, 271 (2nd Cir.), cert. denied, 459 U.S. 1069 (1982)).

In the Sixth Circuit Kuper v. Iovenko decision, 66 F.3d 1447 (6th Cir. 1995), the court described the fiduciary duties enumerated under § 404(a) as having "three components:" one is a "duty of loyalty" pursuant to which "all decisions regarding an ERISA plan 'must be made with an eye single to the interests of the participants and beneficiaries.'" Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154, 1162 (6th Cir. 1988) (quoting Bierwirth, 680 F.2d at 271); another is the "prudent man" obligation, imposing "an unwavering duty" to act both "as a prudent person would act in a similar situation," "with single-minded devotion" to the plan participants and beneficiaries. Id. The third component identified by the Kuper court was the responsibility of the ERISA fiduciary to "act for the exclusive purpose" of providing benefits to plan beneficiaries. Id. (quoting Bierwirth, 680 F.2d at 271). Kuper, 66 F.3d at 1458. As stated in the case

of Chao v. Hall Holding Co., Inc., 285 F.3d 415, 426 (6th Cir. 2002). "[w]hen enforcing these duties, 'the court focuses not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction.'" Chao, 285 F.3d at 426 (quoting Howard, 100 F.3d at 1488). That court also noted that personal liability for the fiduciary can result from a failure to meet these high standards. Id., pointing to 29 U.S.C. § 1109(a).

C. INDIVIDUAL DEFENDANTS' (PRESTON D. HOPPER, DAVID W. JOOS, WILLIAM T. MCCORMICK, TAMELA W. PALLAS, and ALLAN M. WRIGHT) MOTION TO DISMISS

As stated above, the group of individual defendants moving separately to dismiss the claims lodged against them consists of Preston D. Hopper, David W. Joos, William T. McCormick, Tamela W. Pallas, and Allan M. Wright. These defendants join in the arguments addressed below and assert several additional grounds for dismissal of the ACC claims lodged against them.

Insufficient Allegations to Establish Officers and Directors as Fiduciaries of the Plan

In summary, counts one, two and three allege these defendants' failure to "prudently and loyally manage plan assets," citing 29 U.S.C. §§ 1104(a)(1)(A)-(D), 1105 (Count I), to "provide complete and accurate information to participants and beneficiaries," citing §§ 1104, 1105 (Count II), and to "monitor the Plan's fiduciaries," citing 29 U.S.C. §§ 1104(a)(1)(A)-(D), 1105 (Count III)⁵.

The individual defendants first argue in their motion to dismiss that they, who are not specifically mentioned in the Plan, are not made fiduciaries simply by virtue of their

⁵ This claim is asserted against only the Inside Director and Employer fiduciaries.

positions as officers and directors of CMS, Consumers and/or CMS Marketing. The individual defendants further assert that no specific facts are alleged which might impose any fiduciary duties on them, and that absent any discretionary authority or control exercised by these individuals over the Plan, their status as corporate directors and/or officers does not make them fiduciaries. This latter argument is taken up in more detail in the individual defendants' third argument, which asserts that there is nothing in the complaint concerning the origin of the individuals' alleged fiduciary duties to the Plan, or actions they took which might have made them owe such duties.

Pertinent here, as set forth in the defendants' briefing, a person is a fiduciary under ERISA to the extent

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). Defendants cite to Hamilton v. Carell, 242 F.3d 992, 998 (6th Cir. 2001) and Hunter v. Caliber Systems, Inc., 220 F.3d 702, 718 (6th Cir. 2000) to emphasize that the conduct at issue must be examined by the court to determine if an individual has fiduciary duties under ERISA. Plaintiffs do not dispute this, but assert that these individual insider director defendants were fiduciaries both 1) because as board members they had the power to appoint the Plan administrator, and 2) because as board members they conducted the business of the employer named fiduciaries, which included the general administration of the Plan. See 1997 Plan Document, p. 22, § 11.1; 2001 Plan Document, p. 28, § 11.1. Plaintiffs also contend that the insider

director defendants, via board decisions, directed the Trustee regarding investment of Plan assets. See 1997 Plan Document, § 6.2; 2001 Plan Document, § 6.2.

The Plan states

11.1 Administration of the Plan. The Employers shall be responsible for the general administration of the Plan and for carrying out the provisions thereof. They may establish rules and regulations to carry out the provisions of the Plan; and in making any determinations, rules, or regulations they shall pursue uniform policies and shall not discriminate in favor of or against any Employee or Member. The Board of Directors of Consumers shall appoint such persons, who may be Members under the Plan, as it determines at any time to act as Plan Administrator in all dealings under the Plan. The Employers are hereby designated as the Named Fiduciaries and Plan sponsors for the Plan.

Plan, § 11.1 (identical in 1997 and 2001 versions). The substance of §6.2 of the Plan documents (only slightly different in the two versions) provides that contributions of Plan participants will be allocated to funds by the Trustee, pursuant to the Employers' directions. Plaintiffs distinguish the situation here from Confer v. Custom Engineering Co., 952 F.2d 34 (3d Cir. 1991), and cite to Vivien v. WorldCom, No. C 02-01329, 2002 WL 31640557 at *3-4 (N.D. Cal. July 26, 2002) to argue that ERISA imposes no requirement that these defendants be named individually in the Plan to be considered fiduciaries.

The court agrees with plaintiffs that ERISA law includes no bright line rule that a Plan itself must use an individual's name to confer fiduciary responsibilities on that individual. Moreover, as seen above, § 11 of the Plan gives general and broad Plan administration responsibilities to the Employers, and specifically gives the Board of Directors of Consumers the responsibility of naming the Plan Administrator. Plan, § 11.1. The court further agrees with plaintiffs that those facts distinguish this matter, in

part, from the case of Confer, and agrees with plaintiffs that the Sixth Circuit has yet to address the ruling in Confer that officers are not deemed ERISA fiduciaries in the absence of express individual discretionary authority for plan administration. It is also significant that these issues in Confer were addressed following discovery in a decision on a summary judgment motion, unlike the procedural posture of this motion.

Properly framed, the issue presently before the court as to counts one and two is whether, considering the ACC in a light most favorable to plaintiffs, these defendants are appropriately alleged to have assumed any responsibility to prudently and loyally manage plan assets; provide complete and accurate information to participants and beneficiaries; or to monitor Plan fiduciaries, thereby acting as "discretionary" fiduciaries, Drennan v. General Motors Corp., 977 F.2d 246, 250-51 (6th Cir. 1992), and whether such responsibilities were breached. Additionally, unlike Confer, the allegations here center on the defendants' failure to act, rather than specific acts which were themselves alleged to be breaches of fiduciary duty.

The reply brief of defendants Wright, Pallas, and Hopper argues that, concerning plaintiffs' contention that defendants should have eliminated CMS stock as a Plan investment option as a part of their asset management duties, such a change in Plan "architecture" could be made only through amendment or termination of the Plan. As that argument goes, made in more than one of the briefs supporting dismissal, making such a change in a Plan is not the function of a fiduciary. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 443-44 (1999); Akers v. Palmer, 71 F.3d 226, 230 (6th Cir. 1995), and the decision to change (or not change) a Plan cannot create liability on the part of such a decision maker. See also In re McKesson HBOC, Inc. ERISA Litigation.

No. C00-20030, 2002 WL 31431588 at *8, n.8 (N.D. Cal. 2002). The court is in agreement with this argument, and to the extent Count I hinges on defendants' failure to *amend* the Plan, such claims are hereby dismissed.

Although the court agrees with defendants' position that an amendment of the Plan would not be a fiduciary act, it appears that plaintiffs' claim in Count I that "these fiduciaries continued to offer CMS stock as an investment option for the Plan..." (§ 85) does not solely complain of a lack of Plan *amendment*, as defendants suggest. Rather, plaintiffs complain of the *lack of any action* taken by Plan fiduciaries, which might include other measures to protect participants' assets, such as a suspension of investment in CMS stock funds, or requiring investments in the ESOP to be held in cash until an assessment of the prudence of CMS stock investment could be made. Therefore, to the extent any of the individual defendants are properly alleged to be fiduciaries, addressed next, the court will not dismiss Count I for failure to state a claim.

The court notes a paucity of precedent for its next determination: whether these individual defendants can be maintained in this action for breach of fiduciary duties under Counts I-III. In the WorldCom litigation cited by plaintiffs, the district court found that the allegations concerning two individual officers and directors' discretionary control over the management and administration of the plan were sufficient under a 12(b)(6) analysis. WorldCom, 2002 WL 31640557 at *4. That case, however, lacks sufficient detail to be of particular help to this court. Defendants' argument is similar to that made by directors in the McKesson ERISA litigation, in which the McKesson plan designated the company as the named fiduciary, and did not identify the board as a fiduciary. McKesson, 2002 WL 31431588 at *28-29. Those facts are analogous to this situation,

where the Board of Consumers is specifically given the power to appoint a Plan administrator⁶, but the "Employers" *cumulatively* are the "Named Fiduciaries," and have all responsibility for administration and the making of rules, regulations and determinations under the Plan.

The discretion given to the "Employers" in the Plan is broad: as stated above, they are "responsible for general administration of the Plan and for carrying out the provisions thereof," and "may establish rules and regulations to carry out the provisions of the Plan." Plan, § 11.1. Of these individual defendants, Hopper, Pallas and Wright served only on the CMS Marketing Board of Directors, whereas Joos and McCormick sat on the CMS and Consumers Boards of Directors. In the McKesson matter, all but one of the defendant directors was alleged to have been a member of the Compensation Committee, which, under that plan was responsible for "investment policy for the Plan." *Id.* at *29. No such responsibility is allocated in the Plan under review in this case.⁷ In fact, "investment policy" is not a specifically assigned function under the Plan. In the McKesson litigation, the court found that

[o]n the face of the Plan, it appears that the Compensation Committee is granted responsibility for overall investment policy of the Plan. Accordingly, members of the Compensation Committee are proper

⁶ The defendants appear to argue, at various points in the briefings, that the Consumers Board's exclusive power to appoint a Plan administrator implies that such appointment is the sum total of powers conferred on Consumers, which the court rejects for the reasons stated herein.

⁷ Although, arguably, the portion of § 11.1 stating that the Employers, "in making any determinations, rules, or regulations [they] shall pursue uniform policies and shall not discriminate in favor of or against any Employee or Member," implies that any such investment policy would be made by the Employers.

