**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

**IN RE SPRINT CORPORATION**
**ERISA LITIGATION**

**Case No. 03-2202-JWL**

**This Order Relates to All Cases**

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# MEMORANDUM AND ORDER

## I. Introduction

This is a putative class action involving claims of alleged breaches of fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1000-1461. Plaintiffs assert claims in these consolidated cases as participants in and on behalf of three different 401(k) retirement savings plans against defendants Sprint Corporation (Sprint), various committees that administered the plans, Sprint employees who served as members of the committees, individuals who are or were members of Sprint's board of directors (collectively, the Sprint defendants), and the trustee of the plans, Fidelity Management Trust Company (Fidelity). The thrust of plaintiffs' claims is that defendants breached their fiduciary duties by allowing the plans to remain heavily invested in Sprint stock despite knowing based on public and nonpublic information that the value of the stock had eroded and it had become significantly overvalued.

The court resolved the defendants' initial motions to dismiss in a prior memorandum and order dated May 27, 2004. *See generally In re Sprint Corp. ERISA Litig.*, No. 03-2202-JWL, 2004 WL 1179371, at *1-*25 (D. Kan. May 27, 2004). At that time, the court, in relevant part, granted the Sprint defendants' motion to dismiss plaintiffs' imprudent investment and disclosure claims against the individual members of Sprint's board of directors (the director defendants) because the plan documents revealed that the director defendants were not plan fiduciaries with respect to investments and disclosing information. The court, however, dismissed those claims against the director defendants without prejudice to plaintiffs amending their complaint to reassert the co-fiduciary aspect of those claims. Plaintiffs subsequently filed a second consolidated amended complaint that asserts a separate Claim IV against all of the Sprint defendants for co-fiduciary liability.

This matter is presently before the court on the Sprint defendants' motion to dismiss this co-fiduciary claim (doc. 79). For the reasons explained below, the court will grant the motion in part and deny it in part. Specifically, the court will deny this motion with respect to plaintiffs' co-fiduciary claim against the director defendants. With respect to the co-fiduciary claim against the other Sprint defendants, however, the court will grant the motion without prejudice to plaintiff filing an amended complaint no later than October 8, 2004, that reasserts those claims and clarifies their factual basis.

## II. Facts

In the court's memorandum and order dated May 27, 2004, the court discussed in detail the nature of plaintiffs' allegations in this case. In the interest of brevity, the court will not reiterate those allegations here. Instead, the court will focus its discussion on the allegations contained in plaintiff's newly asserted separate, co-fiduciary claim against the Sprint defendants.

In this claim, plaintiffs first categorically allege that all of the Sprint defendants are liable as co-fiduciaries for the acts of the other defendants. *See* Second Consolidated Am. Compl. ¶ 130.

Plaintiffs then assert more specific allegations to support their co-fiduciary claim against the director defendants. Plaintiffs allege that the director defendants are liable for the other defendants' breaches of fiduciary duties as alleged in Claim I, which is the claim that alleges that the other defendants breached their fiduciary duties by allowing the plans to continue to invest so heavily in Sprint stock while the stock eroded into an imprudent investment. *Id.* ¶ 131. Plaintiffs allege that the director defendants are liable on a co-fiduciary theory insofar as they breached their fiduciary duties to monitor the other fiduciaries that they appointed (Claim III), which enabled those appointed fiduciaries to breach their fiduciary duties of prudence. *Id.* ¶ 131(a). In addition, plaintiffs allege that the director defendants knew a variety of specifically identified public and nonpublic information which revealed that Sprint stock was an imprudent investment and they knew that the other defendants breached their fiduciary duties by allowing the plans to continue to invest so heavily in Sprint stock. *Id.* ¶ 131(b). In particular, the director defendants knew that Sprint's business profile had transformed from that of a traditional long distance carrier to that of a more high tech company, that the ION and Clear Pay programs were not going well, and that regulators were probably going to block the anticipated WorldCom merger, hence the director defendants knew that the other Sprint defendants had breached their fiduciary duties by allowing the plans to continue to invest so heavily in Sprint stock. *Id.* ¶ 131(c). The director defendants also knew that the other defendants had failed to disclose the conflicts of interest that had arisen from the tax shelters employed by Sprint's top two executives, Messrs. Esrey and LeMay, as evidenced by the fact that the director defendants had repeated discussions with Messrs. Esrey and LeMay starting as early as 2000 regarding problems arising from the tax shelters, and the director defendants knew that the other Sprint defendants were in breach of their fiduciary duties because Sprint stock had become an imprudent investment. *Id.* ¶ 131(d). The director defendants also knew that the other Sprint defendants had a pattern and practice of incorporating Sprint's financial statements into the summary plan descriptions (SPDs) and that plan participants would rely on the misinformation that was incorporated by reference into the SPDs. *Id.* ¶ 131(f). Misinformation in the financial statements artificially inflated the market price of Sprint securities, thus making Sprint stock an imprudent investment. *Id.* ¶ 131(g).

Plaintiffs likewise allege that the director defendants are liable as co-fiduciaries for the other Sprint defendants' breaches of fiduciary duties as alleged in Claim II, which is the claim that alleges that the Sprint defendants breached their fiduciary duties of truthful disclosure relating to plan investments. *Id.* ¶ 132. Again, plaintiffs allege that the director defendants are liable on a co-fiduciary theory insofar as they breached their fiduciary duties to monitor the other fiduciaries that they appointed (Claim III), which enabled the other Sprint defendants to breach their respective duties of truthful disclosure. *Id.* ¶ 132(a). In addition, plaintiffs allege that the director defendants knew that the other fiduciaries failed to disclose the conflicts of interest that arose from the tax shelters and, consequently, the anticipated departures of Messrs. Esrey and LeMay and the undisclosed search to replace Mr. Esrey. *Id.* ¶ 132(b)-(d). Further, the director defendants enabled the other Sprint defendants' breaches of fiduciary duties and/or failed to take reasonable steps to remedy those breaches by signing Sprint's 2001 Form 10K which misrepresented Messrs. Esrey and LeMay's anticipated long term employment with Sprint, and this form was incorporated by reference into the SPDs. *Id.* ¶ 132(e). Also, Messrs. Esrey and LeMay negligently misrepresented to plan participants the fact that Sprint stock would be a lucrative investment, and they made these representations in their capacities as directors. *Id.* ¶ 132(f). The director defendants also knew that the other Sprint defendants were in breach of their fiduciary duties by failing to disclose to plan participants that the ION and Clear Pay programs were not going well and that the WorldCom merger was likely going to be blocked by regulators. *Id.* ¶ 132(g)-(h). Further, director defendants Meyer, Esrey, and Krause signed SEC forms that contained misleading information which they knew would be incorporated by reference into the SPDs, yet they failed to prevent the other fiduciaries from conveying this misleading information to plan participants. *Id.* ¶ 132(i).

The Sprint defendants now move the court to dismiss plaintiffs' co-fiduciary claim on the grounds that the allegations in plaintiff's second amended complaint fail to state a claim under an ERISA co-fiduciary liability theory. Specifically, they contend that the court should dismiss this claim against the director defendants on the grounds that the director defendants cannot be held liable: (1) under the enabling prong of the co-fiduciary liability statute because plan investments and disclosures are not within the scope of the director defendants' specific fiduciary responsibilities; and (2) under the other two prongs of the co-fiduciary liability statute because plaintiffs fail to allege specific facts showing that the director defendants had actual knowledge that the other defendants were breaching their fiduciary duties. In addition, the Sprint defendants contend that the court should dismiss the co-fiduciary claim against the other Sprint defendants because plaintiffs' complaint simply parrots the language of the co-fiduciary liability statute with respect to these defendants.

## III. Legal Standard for a Motion to Dismiss

The court will dismiss a cause of action for failure to state a claim only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief," *Poole v. County of Otero*, 271 F.3d 955, 957 (10th Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). The issue in resolving a motion such as this is "not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quotation omitted).

## IV. Analysis

For the reasons explained below, the court finds the Sprint defendants' arguments regarding plaintiffs' co-fiduciary claim against the director defendants to be without merit. Plaintiffs have adequately alleged that the director defendants breached their fiduciary duties in a manner that enabled the other defendants to breach their fiduciary duties. Further, taking all reasonable inferences in plaintiffs' favor, plaintiffs have adequately alleged that the director defendants had actual knowledge of the breaches of fiduciary duties by the other defendants. Thus, the court will deny the motion to dismiss plaintiffs' co-fiduciary claim against the director defendants. The court will, however, grant the motion with respect to the other Sprint defendants because plaintiffs have failed to clarify the factual basis for their co-fiduciary claims against those defendants, but the court will grant this aspect of the motion without prejudice to plaintiffs filing an amended complaint to correct this pleading deficiency.

## A. Co-Fiduciary Claim Against the Director Defendants

ERISA § 405(a) provides the statutory basis for co-fiduciary liability. It provides as follows:

> In addition to any liability which he [or she] may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he [or she] participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his [or her] failure to comply with section 1104(a)(1) of this title in the administration of his [or her] specific responsibilities which give rise to his [or her] status as a fiduciary, he [or she] has enabled such other fiduciary to commit a breach; or
>
> (3) if he [or she] has knowledge of a breach by such other fiduciary, unless he [or she] makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a). A necessary predicate for co-fiduciary liability under any of these three subsections is of course that another fiduciary must have committed a breach of fiduciary duty. Under § 405(a)(1), a co-fiduciary is liable for the other fiduciary's breach of fiduciary duty when: (1) the co-fiduciary had actual knowledge of the other fiduciary's breach; (2) the co-fiduciary knowingly participated in the breach or undertook to conceal it; and (3) damages resulted therefrom. *See Donovan v. Cunningham*, 716 F.2d 1455, 1475 (5th Cir. 1983) (emphasizing the actual knowledge requirement); *In re Enron Corp. Securities, Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 580-81 (S.D. Tex. 2003) (listing these elements); *cf. Willett v. Blue Cross & Blue Shield*, 953 F.2d 1335, 1341-42 (11th Cir. 1992) (applying § 405(a)(1)). Under § 405(a)(2), a co-fiduciary is liable for the other fiduciary's breach of

fiduciary duty when the co-fiduciary's failure to comply with his or her own duties under ERISA enabled the fiduciary to commit the breach; this is "the broadest type of co-fiduciary liability without any requirement of knowledge about what the [other ]fiduciary is doing." *Enron*, 284 F. Supp. at 581. Under § 405(a)(3), a co-fiduciary is liable for the other fiduciary's breach of fiduciary duty when: (1) the co-fiduciary has actual knowledge of the other fiduciary's breach; (2) the co-fiduciary failed to make reasonable efforts to remedy the other fiduciary's breach; and (3) damages resulted therefrom. *See Silverman v. Mutual Ben. Life Ins. Co.*, 138 F.3d 98 (2d Cir. 1998) (listing these elements); *Donovan*, 716 F.2d at 1475 (emphasizing the actual knowledge requirement); *Enron*, 284 F. Supp. 2d at 581; *cf. Willett* (applying § 405(a)(3)).

In this case, the court has no difficulty concluding that the allegations contained in plaintiffs' newly asserted co-fiduciary Claim IV adequately state a claim against the director defendants under the enabling prong, § 405(a)(2), and the failure-to-remedy prong, § 405(a)(3). The enabling prong is satisfied insofar as plaintiffs allege that the director defendants breached their fiduciary duties with respect to monitoring and appointing other fiduciaries (Claim III), and that the director defendants' breach of those fiduciary duties enabled the appointed fiduciaries to breach their fiduciary duties of prudence and truthful disclosure. The failure-to-remedy prong is satisfied insofar as plaintiffs allege that the director defendants had actual knowledge of a variety of information and breaches of fiduciary duties by the other defendants, yet the director defendants failed to take reasonable measures to remedy those other defendants' breaches of fiduciary duties. Thus, plaintiffs have adequately stated a claim for co-fiduciary liability against the director defendants. *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 833 (S.D. Ohio 2004) (denying motion to dismiss co-fiduciary claim where the plaintiffs' allegations amply put the defendants on notice of the nature of the claim); *Kling v. Fidelity Mgmt. Trust Co.*, 323 F. Supp. 2d 132, 144-45 (D. Mass. 2004) (same, where the complaint alleged that the defendants failed to remedy other fiduciaries' breaches with knowledge of the breaches and that the defendants' failure to monitor the appointed fiduciaries enabled those fiduciaries to breach their duties); *In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 909-10 (E.D. Mich. 2004) (same, where the complaint alleged that the defendants knew of the other fiduciaries' practices but took no action to prevent harm to the ERISA plan).

The Sprint defendants' arguments to the contrary are without merit. First, the Sprint defendants point out that the court dismissed with prejudice plaintiffs' non-co-fiduciary imprudent investment and disclosure claims against the director defendants, and they argue that the director defendants therefore cannot be held liable under the enabling prong of the co-fiduciary liability statute (i.e., § 405(a)(2)) for the other fiduciaries' imprudent investments and disclosures. The court disagrees. The issues of primary liability and co-fiduciary liability are governed by separate statutes within ERISA, and nothing in those statutes purports to make the two forms of liability co-extensive. The two theories are separate and distinct. Otherwise, the enabling prong of the co-fiduciary liability statute would be superfluous to the statutes imposing liability for primary violations, and this would be contrary to the express language of the co-fiduciary liability statute which imposes co-fiduciary liability "[i]n addition to" liability for primary violations. *See, e.g.*, *Kling*, 323 F. Supp. 2d at 143 (noting that although the defendants' alleged failure to perform certain acts that fell outside of the scope of their fiduciary responsibilities could not give rise to primary liability, those allegations could nevertheless be actionable under the co-fiduciary statute); *see also* 29 C.F.R. § 2509.75-8 (2000) (recognizing limitations on directors' primary fiduciary liability "*apart from co-fiduciary liability* arising under circumstances described in section 405(a)" (emphasis added)). The two cases cited by defendants in support of their argument to the contrary are entirely unpersuasive. One of the cases cited by defendants, *Somers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 883 F.2d 345 (5th Cir. 1989), simply stands for the proposition that a person must be a fiduciary in order to be held liable as a co-fiduciary. *Id.* at 351-52. This holding comports with the plain language of the co-fiduciary statute, which imposes co-fiduciary liability on "a fiduciary with respect to a plan." § 1105(a). This point of law is of no value to the director defendants because the court has already ruled that plaintiffs' complaint adequately alleges that they were fiduciaries with respect to the plans to the extent of their fiduciary duties to appoint and monitor other fiduciaries. The other case cited by defendants, *Brandt v. Grounds*, 687 F.2d 895 (7th Cir. 1982), likewise does not support the broad proposition that they advance. In *Brandt*, the Seventh Circuit simply held that the facts of that case did not give rise to liability under the enabling prong, *id.* at 898-99, not that liability under the enabling prong is co-extensive with primary liability.

Second, the Sprint defendants emphasize that co-fiduciary claims based on § 405(a)(1) or § 405(a)(3) require the co-fiduciary to have actual knowledge of the breach by the other fiduciary. While the court agrees that this is the correct legal principle, the allegations in plaintiffs' second consolidated amended complaint easily satisfy this standard. Taking all reasonable inferences from the allegations in favor of plaintiffs, as the court must on a motion to dismiss, the court cannot say that it appears beyond a doubt that plaintiffs cannot prove any set of facts that would entitle them to relief on this theory. Plaintiffs have adequately alleged that the director defendants knew that the other fiduciaries were breaching their fiduciary duties and yet the director defendants failed to take reasonable measures to remedy those breaches. Thus, the Sprint defendants' argument regarding the actual knowledge requirement of § 405(a)(1) and (3) is without merit at this procedural juncture.

Lastly, the Sprint defendants rely on the court's prior order in this case in which the court held that plaintiffs' allegations were insufficient to state a claim against the director defendants based on a co-fiduciary liability theory and the factual allegations in plaintiffs' second consolidated amended complaint essentially mirror the factual allegations previously asserted. This argument, however, makes too much of the court's prior ruling on this issue. The court's prior ruling was a narrow one that dismissed plaintiffs' co-fiduciary liability claim against the director defendants *solely* because the allegations in plaintiffs' first consolidated amended complaint did not specify the factual basis for plaintiffs' co-fiduciary claim, but instead simply parroted the language of the co-fiduciary liability statute. Thus, the court was unable to deny the Sprint defendants' motion to dismiss the co-fiduciary claim against the director defendants because plaintiffs' complaint did not give these defendants notice of the factual basis for plaintiffs' co-fiduciary claim against them. Notably, though, the court dismissed that claim without prejudice precisely because the court envisioned that plaintiffs could allege facts that would state a claim based on a co-fiduciary liability theory. Plaintiffs' second consolidated amended complaint now remedies the prior pleading deficiency and provides the director defendants with adequate notice of the factual nature of plaintiffs' co-fiduciary claims against them. Thus, the Sprint defendants' reliance on the court's prior order on this issue is misplaced.

**B. <u>Co-Fiduciary Claim Against the Other Sprint Defendants</u>**

Insofar as plaintiffs' co-fiduciary claim against the other Sprint defendants is concerned, however, that claim suffers from the same pleading deficiencies discussed by the court in its prior order with respect to plaintiffs' co-fiduciary claim against the director defendants and Fidelity. That is, paragraph 130 of plaintiffs' co-fiduciary Claim IV simply parrots the statutory language of the co-fiduciary liability statute and conclusorily alleges without any factual detail that all of the Sprint defendants are liable under this statute for the other defendants' breaches of fiduciary duties. This generic allegation fails to put the other Sprint defendants on notice of the factual nature of plaintiffs' co-fiduciary claims against them, and therefore fails to satisfy even the liberal notice pleading standards of the Federal Rules of Civil Procedure. Accordingly, the Sprint defendants' motion to dismiss plaintiffs' co-fiduciary claim against the other Sprint defendants is granted. *See, e.g.*, *Herrington v. Household Int'l, Inc.*, No. 02C8257, 2004 WL 719355, at *10 (N.D. Ill. Mar. 31, 2004) (dismissing co-fiduciary claim where conclusory allegation did not provide sufficient facts to meet the liberal requirements under the notice pleading standards); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02C8324, 2004 WL 407007, at *8 (N.D. Ill. Mar. 3, 2004) (dismissing co-fiduciary claim where plaintiffs "impermissibly lumped all Defendants together without explaining how a particular Defendant enabled another fiduciary to commit a breach or took no reasonable efforts to remedy a knowledge of the breach" because the allegations were insufficient to put defendants on notice of the particular charges against each defendant); *In re McKesson HBOC, Inc. ERISA Litig.*, No. 00-20030, 2002 WL 31431588, at *17 (N.D. Cal. Sept. 30, 2002) (dismissing co-fiduciary claim where the plaintiffs' allegations were insufficient to put each defendant on notice of what he, she, or it had done to give rise to liability). Nevertheless, the court can once again envision that a factual basis for these claims may very well exist, and therefore this aspect of plaintiffs' co-fiduciary claims is dismissed without prejudice to plaintiff filing an amended complaint that remedies this pleading deficiency on or before October 8, 2004.

In so holding, the court expressly rejects plaintiffs' law-of-the-case argument. Plaintiffs argue that the court denied all aspects of defendants' prior motions to dismiss which the court did not expressly grant, and therefore the law of the case doctrine prohibits the court from revisiting this aspect of the claim. The law of the case doctrine dictates that a court's previous rulings "should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *accord McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1034 (10th Cir. 2000) (quotation omitted). Here, however, the court has not previously decided the issue of whether plaintiffs' complaint adequately states a claim against the other Sprint defendants based on a co-fiduciary liability theory. The defendants' arguments in conjunction with their prior motions to dismiss addressed plaintiffs' co-fiduciary liability claim only insofar as it pertained to the director defendants and Fidelity. Defendants did not previously ask the court to dismiss plaintiffs' co-fiduciary liability claim against the other Sprint defendants. Thus, although plaintiffs are correct that the court "otherwise denied" defendants' prior motions to dismiss, the issue of whether plaintiffs' complaint adequately stated a co-fiduciary claim against the other Sprint defendants was not at issue at that time. Accordingly, the law of the case doctrine is not applicable here.

**IT IS THEREFORE ORDERED BY THE COURT** that the Sprint defendants' motion to dismiss (doc. 73) is granted in part and denied in part. Specifically, it is denied with respect to plaintiff's co-fiduciary claim (Claim IV) against the director defendants. On the other hand, it is granted with respect to plaintiff's co-fiduciary claim against the other Sprint defendants, but it is granted without prejudice to plaintiffs filing a third consolidated amended complaint on or before **October 8, 2004**.

**IT IS SO ORDERED** this 24th day of September, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge