

In re Tyco Int'l Ltd MDL (02-352) MD-03-1335-B 12/29/03

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

In re Tyco International, Inc.
Multidistrict Litigation (MDL 1335)

MDL DOCKET NO. 02-1335-B

DERIVATIVE ACTION

Civil No. 02-352-B

Opinion No. 2003 DNH 230

O R D E R

Defendants contend that I should deny plaintiffs' motion to further amend the derivative complaint because the proposed amendment would be futile. While I recognize that I have the power to deny a motion to amend on this basis, see Hatch v. Dep't for Children, Youth and Their Families, 274 F.3d 12, 18 (1st Cir. 2001), I am reluctant to do so here because the motion has been filed at an early stage of the litigation, the proposed amendment significantly changes the focus of the litigation, plaintiffs' ability to proceed at all may well depend on whether the amendment is permitted, the amended complaint is factually and legally complex, and the amended claims are not frivolous. Instead, I can more reliably address challenges to the amended

claims by granting the motion to amend and permitting defendants to file a new motion to dismiss that incorporates both their challenges to the prior complaint (to the extent that they remain viable in light of the amendment) and their challenges to plaintiffs' new allegations. Accordingly, I grant the motion to amend (doc. no. 46), deny defendants' motion to dismiss the prior complaint (doc. no. 51) without prejudice, and direct defendants to file a new motion to dismiss the second amended complaint.

On or before January 8, 2004, the parties shall agree on a briefing schedule and submit a proposed order establishing deadlines and page limits for memoranda addressing the motion to dismiss.

SO ORDERED.

Paul Barbadoro
Chief Judge

December 29, 2003

cc: All Counsel of Record