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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Richard R. Furstenau and David G. Ingber, on behalf of all other persons similarly situated and on behalf of the AT&T Long Term Savings Plan for Management Employees, Plaintiffs, v. AT&T Corp., AT&T Savings Plan Committee, AT&T Investment Management Corporation, Fidelity Management Trust Company, Michael Armstrong, Kenneth T. Derr, M. Kathryn Eickhoff, Walter Y. Elisha, George M.C. Fisher, Donald V. Fites, Ralph S. Larsen, John C. Malone, Donald F. McHenry, Michael I. Sovern, Sanford I. Weill, Thomas H. Wyman, John D. Zeglis, Harold.W. Burlingame, Mirian Graddick, Laurence C. Seifert; Hossein Eslambolchi and Barbara Peda, Defendants.	Civil Action No.: 02-CV-5409 **CLASS ACTION**

PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Richard R. Furstenau[1] submits this reply to Defendants' Memorandum in Opposition to Class Certification ("Opposition"). Defendants' Opposition argues that class certification is inappropriate because individual issues override common issues. Defendants are

[1] The parties have entered into a stipulation of dismissal dismissing Plaintiff David Ingber from this case.

wrong for two reasons. First, there are no individual issues in this case. Second, despite the fact that Plaintiff primarily seeks certification under Rule 23 (b)(1), Defendants claim that certification is inappropriate because of alleged minor individualized issues that are not relevant to the test for satisfying Rule 23 (b)(1). In making this argument, Defendants wrongly attempt to graft the requirements of Rule 23(b)(3) that common issues predominate into the commonality, typicality and adequacy provisions of Rule 23(a). These efforts should be rejected.

As discussed below, Plaintiff's core claim that Plan assets were imprudently invested does not even remotely concern the issue of reliance– the investments were imprudent regardless of whether Participants relied on any misrepresentations. The same is true with Plaintiff's claim that Defendants breached their fiduciary duty to disclose material information. As to Plaintiff's misrepresentation claim, there are no issues of individualized reliance because the claim belongs to the Plan and is based on Plan-wide misrepresentations and not on individual representations to Participants.

I. PLAINTIFF SEEKS RELIEF IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE PLAN

Defendants ignore the fact that Plaintiff brings this action in a representative capacity on behalf of the Plan, pursuant to ERISA § 502(a)(2) which authorizes civil enforcement of a fiduciary's violation of § 409, and that relief under § 502(a)(2) is awarded to the Plan not to individual Participants.[2] As the Supreme Court explained,

> [W]hen the entire section [§ 409] is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the onset as one with respect to a plan, but the potential personal liability of the fiduciary is to make good to

[2] The Plan-wide nature of the relief sought under § 502(a)(2) is also why Plaintiff believes that class certification under Rule 23 may be unnecessary. See Thompson v. Avondale Indus., Inc., No. Civ. A. 99-3439; 2001 WL 1543497 (E.D. La. Nov. 30, 2001), a copy of which is attached hereto as Exhibit A.

such plan any losses to the plan.

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985) (emphasis added). For this reason, the Complaint makes clear that Plaintiff seeks relief on behalf of the entire Plan. Complaint, ¶ 73-74 (Defendants breached their ERISA fiduciary duties by making misrepresentations and non-disclosures and "are personally liable *to make good to the Plan any losses to the Plan* resulting from each breach"); ¶ 88-90 (Defendants breached their fiduciary duty to prudently manage Plan assets and "are liable to personally make good *to the Plan any losses to the Plan* resulting from each breach").[3] In light of the clear language of the statute and these allegations, Defendants cannot reasonably suggest that Plaintiff is seeking individual relief.[4]

II. THE REQUIREMENTS OF RULE 23 HAVE BEEN MET

A. Commonality

[3] Plaintiff's request for damages "in the amount of any losses the Plan suffered to be allocated among the Participants' individual accounts in proportion to the accounts' losses" further demonstrates that the relief requested under § 502(a)(2) flows to the Plan. This request reflects the fact that relief to the Plan will ultimately be distributed to Participants in the Plan. E.g., Rankin v. Rots, F.R.D.; 2004 WL 831124, *7 (E.D.Mich., April 16, 2004), a copy of which is attached hereto as Exhibit B. ("[Plaintiff] is also suing on behalf of the Plan for breach of fiduciary duty. If successful, as stated above, damages will presumably flow to the Plan and in turn, to class members, including [plaintiff]").

[4] Defendants contend that because Plaintiff also alleges § 502(a)(3) claims, the claims under § 502(a)(2) are duplicative and should be viewed as claims for individual relief. Defendants have it backwards. The heart of Plaintiff's allegations is that Defendants breached their fiduciary duties to the entire Plan through a single course of conduct directed towards the Plan and all of its Participants and thereby harmed the entire Plan. Consequently, it is the Plan-wide claims that are at the center of this case. Furthermore, § 502(a)(3) is a catch-all provision to permit recovery for violations not otherwise covered by the statute. Varity Corp. v. Howe, 516 U.S. 489, 510 (1996). Here, however, § 502(a)(2) explicitly governs Plaintiff's claims. The claims under § 502(a)(3) may therefore be unnecessary. Plaintiff included these claims out of an abundance of caution to preserve against the possibility that the relief to the Plan under 502(a)(3) might be different than that afforded to the Plan under 502(a)(2).

As set forth below in the discussion of Rule 23 (b)(3), there are no individual issues in this case. Moreover, commonality is satisfied under Rule 23(a) if there is just **one** question of fact or law common to the class. Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57-58 (3d Cir. 1994). Significantly, Defendants do not deny the fact that there are many common questions of fact and law in this case. Instead, Defendants erroneously argue that two material individual issues exist (reliance and the § 404(c) defense) and somehow negate or override all of the common issues that demonstrate satisfaction of Rule 23 (a) Opposition at 9-13. Perhaps because this argument is directly contrary to the standard set forth in Baby Neal , Defendants cite no case similar to this in which a court has found a lack of commonality. See Rankin v. Rots, 2004 WL 831124 * 4 ("a claim for breach of the duty of prudence ... clearly presents a common issue")(Exh. B hereto); Kolar v. Rite Aid Corp., 2003 WL 1257272*2 (E.D. Pa. Mar. 11, 2003), a copy of which is attached hereto as Exhibit C, ("There are also obvious questions of law or fact common to the class including "whether the individual defendants violated their ERISA fiduciary duties by imprudently allowing the Plans to invest in Rite Aid stock"), Babcock v. Computer Assoc., Int'l, 212 F.R.D. 126, 130 (E.D.N.Y. 2003) (Common questions include "whether the defendants failed to provide class members with the proper investment options under the Plan" and "whether the defendants failed to diversify the assets of the Plan").

In response to these arguments, Defendants cite breach of fiduciary duty cases based on inapposite factual allegations of misrepresentations. Opposition at 10-11. These cases, which are nothing like Plaintiff's imprudent investment claims in this case, denied certification because of the requirement that class members establish individual reliance. These cases should not apply in this case because, as set forth below, individual reliance is not an issue with respect to Plaintiff's imprudent investment and nondisclosure claims, and only one part of one of

Plaintiff's claims involves misrepresentations and remotely concerns reliance. Consequently, breach of fiduciary duty cases alleging the improper investment of plan assets in company stock similar to this case have uniformly found commonality under Rule 23 (a) notwithstanding a potential issue of individual reliance. Rankin, 2004 WL 831124 at *4 (Exh.B hereto); Nelson v. IPALCO Enterprises, Inc., 2003 WL 23101792 *4 (S.D. Ind. Sept. 30, 2003), a copy of which is attached hereto as Exhibit D; Koch v. Dwyer, 2001 WL 289972, *3 (S.D.N.Y. Mar. 23, 2001), a copy of which is attached hereto as Exhibit E; In re Ikon Office Solutions, Inc., 191 F.R.D. 457, 462-465 (E.D.Pa. 2000); Feret v. Corestates Financial Corp., 1998 WL 512933, *8-9 (E.D.Pa. 1998), a copy of which is attached hereto as Exhibit F.

B. Typicality and Adequacy

Defendants make the same commonality arguments with respect to typicality and adequacy. In making these arguments, Defendants completely ignore the law cited in Plaintiffs' initial memorandum that the typicality requirement is met if, even despite a relatively pronounced "factual difference, the individual Plaintiff and the class allege the same legal theory, based on the same course of conduct." (Plaintiff's Initial Mem. at 11), See also Rankin, 2004 WL 831124 at 5 (Exh. B hereto). Plaintiff's claims are typical because he "must still prove the same core issues of whether defendants acted as fiduciaries and whether they breached their fiduciary duties." Id. (the "appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs.") Id. Moreover, as set forth in the discussion of Rule 23(b)(3), these individualized issues do not even exist.

With respect to adequacy, Defendants again repeat the same commonality argument. Opposition at 16-17.[5] However, commonality is not adequacy. As outlined in Plaintiff's

[5] Defendants do not contest the adequacy of Plaintiff's counsel.

opening memorandum, the "adequacy" requirement is satisfied where a plaintiff's interests do not conflict with those of other members of the class they seek to represent. See also, Valley Drug Company v. Geneva Pharmaceuticals, Inc. , 350 F. 3d 1181, 1189 (11th Cir. 2003)(conflict must be "fundamental"). Plaintiff meets this test because his claims are identical to and precisely aligned with those of the class.

Finally, in a further attempt to merge commonality into typicality and adequacy, Defendants argue that Plaintiff is neither typical nor adequate because he is personally subject to unique defenses concerning reliance and § 404(c). Even assuming that issues of reliance and § 404(c) could give rise to unique defenses (which, as discussed below with respect to Rule 23(b)(3), they do not), typicality and adequacy would still exist even if Plaintiff were subject to these unique defenses. Rankin, 2004 WL 831124 *5 (Exh. B hereto). In another variation of the reliance argument, Defendants claim that Plaintiff did not read (and therefore did not rely on) their misrepresentations. Opposition at14-15. In addition to the fact that, as set forth below, it is irrelevant whether Plaintiff read the misrepresentations, in Rankin the defendants also claimed that the plaintiff was subject to unique defenses because "she never read the Plan or Plan documents, never read any press releases or Kmart financial statements, never followed Kmart's business practices or financial condition, never followed the performance of her investment, and never apprized herself with investment options under the Plan." Id.*5. The court flatly rejected this argument as a bar to certification because plaintiff would still need to prove the core common course of conduct. Id.

Defendants also contend that Plaintiff is not typical because he held onto his stock. First, this argument is not a basis for a finding of a lack of typicality. Ikon, 191 F.R.D. 457, 465-66 (rejecting argument that plaintiffs were atypical because they held stock following their

awareness of fraudulent activity and disclosure of truth.) Second, Defendants' argument is factually inaccurate. While Plaintiff believes that the Fund may now be a good long-term investment--that is only because the Fund lost most of its value after the truth about AT&T's business came out. As Plaintiff explained, once the artificial inflation was removed from the Fund, it was too late to sell—the damage had already been done. See Furstenau Dep. at 102, 212-213.

C. Plaintiff's Claims Should Be Certified Under Rule 23(b)(1)

Defendants' sole objection to certification under Rule 23(b)(1) is that Plaintiff "has not identified the specific facts of this case that warrant Rule 23(b)(1) class certification." Opposition at 18. This argument completely ignores the allegations of the Complaint. Because Plaintiff seeks Plan-wide relief, success necessarily results in Plan-wide relief while failure to prove a breach of fiduciary duty would necessarily preclude actions by other plan participants. See Rankin, 2004 WL 831124 at *10 (Exh. B hereto) (Certifying virtually identical claims under 23(b)(1)(A) and (B) because "a failure to certify a class could expose defendants to multiple lawsuits and risk inconsistent decisions" and "adjudication of [plaintiff's] claims will likely be dispositive of the claims of other potential class members");Ikon, 191 F.R.D. 457, 466; Kolar v. Rite Aide Corp., 2003 WL 1257272, *3 ("inconsistent or varying adjudications would be intolerable for the employees of the same employee benefit plans)(Exh. C. hereto).

As these cases demonstrate, this is not the first time that Rule 23(b)(1) certification of ERISA breach of fiduciary duty claims involving the type of conduct alleged in this case has been addressed by a court. In addition to the authorities cited above, ERISA breach of fiduciary duty cases granting class certification under 23(b)(1) include: Koch v. Dwyer, 2001 WL 289972 (Exh. E hereto); Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 397 (E.D. Pa. 2001);

Bunnion v. Consolidated Rail Corp., 1998 WL 372644 (E.D. Pa. May 14, 1998), a copy of which is attached hereto as Exhibit G; Kane v. United Independent Union Welfare Fund, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998), a copy of which is attached hereto as Exhibit H; Feret, 1998 WL 512933(Exh. F hereto); Gruby v. Brady, 838 F. Supp. 820, 827 (S.D.N.Y. 1993) and Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co., 140 F.R.D. 474, 479 (S.D. Ga. 1991). Indeed, the Advisory Committee Notes to the 1996 Amendment of Fed. R. Civ. P. 23 (b)(1)(B) specifically state that certification under Rule 23 is especially appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries. This is the paradigm case for Rule 23(b)(1) certification.

Defendants ignore these authorities and rely on a single case that considered and rejected many of the arguments advanced by Defendants against class certification in deciding that the claims met all of the requirements of Rule 23(a). Nelson v. IPALCO Enterprises, Inc., 2003 WL 23101792**3-9 (Exh. D hereto) (rejecting challenges to Rule 23(a) based on reliance; "plaintiffs satisfy all four criteria of Rule 23(a)"). While the Nelson court decided to certify the claims under 23(b)(3) because it was concerned that certain issues might require an opt-out provision, Nelson further demonstrates that a class should be certified and severely undermines the argument that Plaintiff's claims should not be certified on any basis.

As for the Nelson court's decision to certify a class under Rule 23(b)(3) as opposed to 23(b)(1), as the Court in Rankin recently explained:

> The Court finds the reasoning in Ikon and Bunnion more persuasive than the reasoning in IPALCO. Rankin's claims relate to defendants unitary actions with regard to the Plan. Defendants treated the entire class identically. Although there may be factual differences as to whether, in the case of voluntary employee contributions, a class member relied on any alleged misrepresentations, the alleged misrepresentations are alleged to have been made to the entire class of participants. This is not a case where defendants are alleged to have had individualized communications with a participant. Rather, this is a case where

> defendants' uniform communications with its participants and its uniform decisions with respect to the employer matching portion of the Plan forms the basis for Rankin's claims.

Rankin, 2004 WL 831124*10 (Exh. B hereto). Plaintiff believes that the rationale articulated in Rankin (and the cases similarly decided) more accurately reflect the essential nature of Plaintiff's Plan-wide ERISA breach of fiduciary duty claims and the Advisory Committee's views of Rule 23.

D. Plaintiffs' Claims Also Satisfy The Requirements of Rule 23(b)(3)

Notwithstanding Nelson, Defendants claim that common issues do not predominate in this case because of the need for individual determinations on four issues: (1) Participant reliance on the alleged misrepresentations; (2) Participant's independent control over investments under 404(c); (3) the existence of unique defenses; and (4) damages. Opposition at 20. Defendants are wrong.

To begin, the questions of whether individual issues of reliance or independent control under § 404(c) exist (let alone predominate) concern only one alternate aspect of one of Plaintiff's claims. There are no issues of reliance with respect to the imprudent investment claim alleged in Count II. Moreover, the only claim for which the issue of reliance could conceivably be raised is that portion of Count I in which Plaintiffs allege that Defendants breached their fiduciary duty to disclose by misrepresenting material information. Even with respect to this Count, however, the issue of reliance only applies to that portion of the claim alleging negligent misrepresentations. Reliance does not apply with respect to the material omission claim alleged in Count I because reliance should be presumed–Participants cannot rely on information that was not given to them. See E.g., Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (dispensing with requirement of individual proof of reliance where a duty to disclose material

information has been breached).

Likewise, § 404(c) issues pertain only to the claim that it was imprudent to invest Plan assets in AT&T stock. First, § 404(c) issues do not pertain to the claim that it was imprudent to offer the AT&T Stock Fund as an investment option in the Plan. In re Enron Corp. Securities, Derivative & ERISA Litigation, 284 F.Supp.2d 511, 578-9 (2003); Nelson, at 6-7 (Exh. D hereto) (drawing distinction between creating plan investment structure and making plan investments).

The Court in Enron stated:

> Even if the Savings Plan were to qualify as a § 404(c) plan, . . . the act of designating investment alternatives . . . is a fiduciary function . . . [and][a]ll of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan.

In re Enron Corp., 284 F.Supp 2d at 578-9, *quoting* Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed.Reg. 46,906, 924 n. 27, 1992. Second, § 404(c) issues have no bearing on the claim that Defendants breached their fiduciary duty to provide complete and accurate information. In re Unisys Sav. Plan Litig., 74 F.3d 420, 445 n. 22, 447 (3d Cir. 1996) ("accurate and complete information regarding the investments [Defendant] made for [the investment option] is essential to the section 1104(c) control"; plans must disclose the "financial condition and performance of the investments" and "developments which materially affected the financial status of the investments."); Allison v. Bank One-Denver, 289 F.3d 1223 at 1238 (10th Cir. 2002 (failure of Defendants to provide plan participants with knowledge of the risk involved in choosing an investment "runs contrary to any conclusion that the participants had any meaningful control over their investment choices" under § 1104(c).) Indeed, if Plaintiff prevails on the misrepresentation/non-disclosure claim, § 404(c)

will be out of this case altogether. Thus, even assuming the existence of individual issues concerning reliance and § 404(c), (which Plaintiff denies) those issues would represent a small part of this case. See Ikon, 191 F.R.D. 457, 466 ("potentially individualized questions do not affect any of the essential aspects of the class action, which are the common course of conduct by the defendants towards the putative class and the significance of the misrepresentations, if any.")

More important, Defendants are wrong about the need for individual determinations with respect to either issue. As discussed above, Plaintiff's claims belong to the Plan and not to individual participants in the Plan. Rankin, 2004 WL 831124 at *7 (Under § 502(a)(2), "a plaintiff cannot seek recovery on their own behalf, but rather only on behalf of the plan.") Thus, there is no issue of individual reliance. Defendants counter by citing to a string of cases that say a plaintiff must establish individual reliance in order to make out a claim under ERISA for breach of fiduciary duty based on misrepresentations. See Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. & Research Fund., 334 F.3d 365, 384 (3d Cir. 2003); Daniels v. Thomas & Betts Corp., 263 F.3d 66, 73 (3d Cir. 2001); Adams v. Freedom Forge Corp., 204 F.3d 475, 492 (3d Cir. 2000); Peterson v. AT&T Corp., No. Civ. A 99-4982; 2004 WL 190295 (D.N.J. Jan. 9, 2004), a copy of which is attached hereto as Exhibit I.

Defendants' reliance on this line of cases is misplaced because none of these authorities involved plan-wide claims based on plan-wide misrepresentations under § 502(a)(2). Rather, each case addresses claims for individual relief involving individual misrepresentations to individual participants. None of the cases cited addresses why individual reliance would be necessary for a plan-wide § 502(a)(2) claim brought in a representative capacity on behalf of a

plan.[6]

Finally, even assuming that individual reliance was relevant to a Plan-wide claim, common questions would still predominate for the additional reason that each Participant should be presumed to rely on the market price of AT&T stock. In this case, Plaintiff alleges that Defendants breached their duty to provide complete and accurate information in AT&T's SEC filings which became fiduciary representations as a result of their incorporation into the Plan documents. Because of this breach, the market price of AT&T stock and, therefore, the price of the AT&T Stock Fund, were artificially inflated, because the price of the Fund (and AT&T stock) is based on all material information available, including the information made available to the Plan and its Participants, and incorporates that information into the price of the Fund shares. Basic Inc. v. Levinson, 485 U.S. 224 (1988). As the Supreme Court explained, "the market is performing a substantial part of the valuation process performed by the investor in a face-to face transaction. The market is acting as the unpaid agent of the investor, informing him that given all information available to it, the value of the stock is worth the market price." Id. at 244 (quotations omitted). "Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." Id. at 241-42 (quotations omitted). As the Plaintiff himself testified, he properly relied on the market to set a fair price for Fund shares. Furstenau Dep. at 236-37. For this reason, it does not matter whether Plaintiff read the allegedly misleading SEC filings, (Opposition at 14-15) –that information was already relied upon by the market in setting the price of Fund shares.

To the extent Defendants argue that a presumption of reliance should not apply because

[6] Even if the Court were to consider individual reliance, because of the Plan-wide nature of the communications, reliance is not a bar to certification. Rankin, 2004 WL 831124 at *10. The Complaint alleges that Defendants treated the entire class identically by making uniform communications. Thus, "individualized issues do not predominate." Id.

Plaintiff's claims arise under ERISA rather than the Securities laws, they are wrong. Material misrepresentations or omissions have the same effect on the Fund as they do on securities in general, and Participants can be expected to rely on the integrity of the price of the Fund as a reflection of its value in exactly the same way that investors in a 10b-5 securities case do. Basic, 485 U.S. at 244-48. Indeed, under 29 U.S.C. § 1002 (18), ERISA defines "adequate consideration" as the price of the security prevailing on a national securities exchange." Plainly, Congress expected that Participants would rely on the operation of the market to reflect and incorporate all available information into the price of investments in the Plan so that the market price is conclusively viewed as the fair price.[7]

Perhaps most important, just as a presumption of reliance supports "the congressional policy embodied in the 1934 Act," Basic, 485 U.S. at 245, applying the market presumption to an ERISA case involving Plan-wide misrepresentations and omissions supports the legislative objectives of ERISA in protecting employee retirement assets by authorizing participants to bring suit on behalf of the Plan for Plan-wide relief. Indeed, where an employer seeks to cause a plan to invest in company stock, the duty to protect participants is even greater because of the influence companies could exert on their employees. See H.R. Conf. Rep. No. 1280, 93th Cong., 2nd Sess. 1974, 1974 WL 11542, *5086, the pertinent part of which is attached hereto as Exhibit

[7]Furthermore, all of the practical considerations for applying the presumption of reliance to securities cases apply to this context as well. "Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult . . . Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed or if the misrepresentation had not been made would place an unnecessarily unrealistic evidentiary burden . . . ." Basic Inc., 485 U.S. at 245 (Citations omitted). In addition, "[a]rising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties." Id. The same considerations apply to Plaintiff's Plan-wide claim for Defendants' breach of fiduciary duty to disclose.

J. ("The conferees expect that the regulations will provide more stringent standards . . . where the investments may inure to the direct or indirect benefit of the plan sponsor since, in this case participants might be subject to pressure with respect to investment decisions."). Failure to apply the presumption in this case would render ERISA' plan-wide enforcement provisions and the protection afforded by the statute meaningless. Cf. Basic, 485 U.S. at 242 ("This case required resolution of several common questions of law and fact . . . . proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action").

Likewise, there are no individual issues of independent control because whether § 404(c) is applicable should be assessed on a Plan-wide basis. Unisys., 74 F.3d 420 is directly on point. In that case, the Third Circuit made clear that independent control is assessed on a plan-wide basis based on objective criteria. First, "a participant's or a beneficiary's control under [§ 404(c)] stems from a plan's specific provisions, not from elements which lie outside the plan's structure and which may arguably amount to control in connection with a single transaction." Id. at 446. Second, for a fiduciary to prevail under § 404(c), "it must establish that the Plans provided information sufficient for the average participant to understand and assess . . . the investments in which assets in each fund were placed; the financial condition and performance of the investments; and developments which materially affected the financial status of the investments." Id. at 447 (emphasis added). Third, if the dissemination of information "was not performed pursuant to a plan term but was merely situational, an isolated response to a crisis in one investment . . . the statute's relief would be unavailable." Id. Fourth, whether the disclosures "communicated to the average participant the information . . . critical to [defendant's] 404(c) defense are questions of fact properly left to the factfinder to decide at

trial." Id. (emphasis added). Unisys makes clear that §404(c) raises a single set of factual issues that are common to the entire class. Thus, Defendants' § 404(c) attack on commonality, typicality, adequacy and predominance under Rule 23(b)(3) are mistaken and should be rejected.[8]

Finally, Defendants claim incorrectly that there are individual damages issues. If Plaintiff proves his claims, the Plan will be entitled to recover not only for its losses, but also the value of lost earnings it would have enjoyed had Plan assets not been invested imprudently. As with § 404(c), the assessment of the Plan's lost earnings involves an objective assessment of prudent alternatives available to the Plan, not a subjective assessment based on the circumstances of individual Participants.

III. THERE ARE NO INTRACLASS CONFLICTS

Defendants also try to persuade the Court that this Plan-wide ERISA breach of fiduciary duty case entails a unique "retention" conflict which pits Participants in the Plan who do not wish to liquidate their investments in the AT&T Stock Fund against those that do. Opposition. at 22. Defendants base this notion on the erroneous contention that Plaintiff seeks class certification "with the goal of having a stock fund be declared permanently imprudent." Id. This is absolute nonsense.

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[8]Wiseman v. First Citizens Bank & Trust Co., 212 F.R.D. 482 (W.D.N.C. 2003)("Weisman I"), the only case besides Unisys cited by Defendants, should be disregarded. For one thing, Wiseman I did not carefully analyze whether the Plan at issue complied with § 404(c); it merely assumed that it did and therefore involved individual issues. Indeed, that court's opinion in Wiseman II backs away from that assumption and focuses instead (albeit erroneously for the same reasons discussed above with respect to other "detrimental reliance" cases cited by Defendants) on individual issues of reliance as a bar to certification. Wiseman v. First Citizens Bank & Trust Co., 215 F.R.D. 507,510 (W.D.N.C. 2003). More important, to the extent Wiseman's initial language about 404(c) is contrary to Unisys, it was improperly decided and should be rejected.

Plaintiff does not seek a class with the goal of having the AT&T Stock Fund declared permanently imprudent. Rather, this case is intended to determine whether the Fund was imprudent *during the Class Period* at the price at which it was offered. Any damages awarded to the Plan will therefore have no bearing whatsoever on any Participant's ability to purchase, hold or sell investments of the AT&T Stock Fund in the Plan. Moreover, this precise argument was considered and rejected by this Court in the AT&T securities case, and the same should happen here. See In re AT&T Corp. Sec Litig., No. 3:00 cv 5364 (GEB)(D.N.J. Sept. 17,2002), slip. op. at 16-20 (Ex. 4 to the Opposition).

IV. THE TIME PERIOD AND DEFINITION OF THE CLASS ARE PROPER

Finally, Defendants raise numerous challenges to the definition of the class to be certified in this case. First, Defendants contend that the class should not include Participants in the AT&T Wireless Fund. Based on evidence recently provided during discovery, Plaintiff amends the class definition to certify a class only on behalf of Participants with interests in the AT&T Stock Fund and deletes any reference to interests in the AT&T Wireless Fund.

Second, Defendants argue that the time period of the class should be changed from September 15, 1999 through December 28, 2000 to December 6, 1999 to May 1, 2000. In so doing, Defendants confuse this case with a securities case. Unlike a securities fraud case where the class period is set by the date of an alleged misrepresentation and the subsequent corrective disclosure, the class period for breach of fiduciary duty claims based on imprudent investments is determined by the time period during which such investments were in fact imprudent. Plaintiff will establish this period through expert testimony to be offered at trial.

Again relying solely on the securities laws, Defendants also seek to limit the class to purchasers of the AT&T Stock Fund, excluding those that merely held the Fund during the Class

Period. ERISA places no "holder claim" limitation on the scope of liability of fiduciaries. See Ikon, 191 F.R.D. 463-465. The reason for this is obvious. A Plan fiduciary's duty to ensure that plan assets are prudently invested is ongoing — investments must be continuously reviewed to ensure prudence, and changed when necessary to avoid keeping investments that, although prudent when made, subsequently become imprudent. It is the failure to make those changes with respect to the AT&T Stock Fund that gives rise to "holder liability."

VI. CONCLUSION

Based on the forgoing, Plaintiff's Motion should be granted.

Dated: May 10, 2004

Respectfully submitted

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