Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

No. ____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE TYCO INTERNATIONAL LTD., MULTIDISTRICT LITIGATION	)	On Petition for Leave to Appeal from the District of New Hampshire
	)	
	)	02-MDL-1335-B
	)	**ERISA ACTION**
	)	Civil Action No. 02-CV-1357-PB
	)	Hon. Paul Barbadoro
	)	*Judge Presiding*

PETITION OF TYCO INTERNATIONAL LTD. PURSUANT TO RULE 23(f) FOR LEAVE TO APPEAL FROM THE DISTRICT COURT'S CLASS CERTIFICATION ORDER

Francis P. Barron
Stephen S. Madsen
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

David Boies
Ann Galvani
David Shapiro
BOIES SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

Theodore B. Olson
Douglas R. Cox
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP

Attorneys for Defendant Tyco International Ltd.
[Additional co-counsel on inside cover]

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

Edward A. Haffer
SHEEHAN PHINNEY BASS & GREEN
Hampshire Plaza
1000 Elm Street
P.O. Box 3701
Manchester, NH 3105 3701
(603) 627-8115

Elizabeth F. Edwards
Bryan A. Fratkin
McGUIREWOODS LLP
901 East Cary Street
Richmond, VA 23219
(804) 775-1000

August 29, 2006

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

FED. R. APP. P. 26.1 DISCLOSURE STATEMENT

Petitioner, Tyco International Ltd., is a publicly held corporation with no parent company. No publicly held company owns 10% or more of Petitioner's stock.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

TABLE OF CONTENTS

Page

Fed. R. App. P. 26.1 Disclosure Statement i

Table of Authorities iii

INTRODUCTION 1

BACKGROUND 4

QUESTION PRESENTED 8

REASONS FOR GRANTING THE PETITION 9

I. The Class Certification Order Satisfies This Court's Criteria For Immediate Interlocutory Review. 9

A. The Order Implicates Fundamental Questions Of Law That Are Unlikely To Be Litigated To Final Judgment. 9

1. An Appeal Will Provide Guidance On A Novel Question of First Impression: Whether The Securities Fraud Doctrine Of *Affiliated Ute* Applies To A Negligent Misrepresentation Claim Under ERISA. 9

2. Even If *Affiliated Ute* Were Available To A Plaintiff Alleging Negligent Misrepresentation Under ERISA, It Could Not Apply To Plaintiffs Here. 11

3. Sound Policy Reasons Preclude Extension Of The *Affiliated Ute* Doctrine Beyond The Securities Law Context. 14

B. Certification Of The Plaintiffs' Class Places Irresistible Pressure On Tyco To Settle. 16

CONCLUSION 18

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

TABLE OF AUTHORITIES

Page(s)

Cases

Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988) 12, 13

Abelson v. Strong, 644 F. Supp. 524 (D. Mass. 1986) 12

Affiliated Ute Citizens v. U.S., 406 U.S. 128 (1972) .... passim

Allison v. Bank-One Denver, 289 F.3d 1223 (10th Cir. 2002) 11

Ansin v. River Oaks Furniture, 105 F.3d 745 (1st Cir. 1997) 14, 15

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 7

Brandt v. Grounds, 687 F.2d 895 (7th Cir. 2002) 11

Buford v. H&R Block, 168 F.R.D. 340 (S.D. Ga. 1996) 15

Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. and Research Found., 334 F.3d 365 (3rd Cir. 2003) 1, 10

Cavalier Carpets, Inc. v. Caylor, 746 F.2d 749 (11th Cir. 1984) 12

Cox v. Collins, 7 F.3d 394 (4th Cir. 1993) 12

Edens v. Goodyear Tire & Rubber, 858 F.2d 198 (4th Cir. 1988) 15

Gunnells v. Healthplan Servs., Inc., 348 F.3d 417 (4th Cir. 2003) 1

Hudson v. Delta Air Lines, Inc., 90 F.3d 451 (11th Cir. 1996) 10

Hughes Aircraft Co. v. Jacobson, 525 U.S. 442 (1999) 16

In re Aep Erisa Litig., 327 F. Supp. 2d 812 (S.D. Ohio 2004) 9

In re Electronic Data Sys. Corp. ERISA Litig., 224 F.R.D. 613 (E.D. Tex. 2004) 2, 9, 16

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

Page(s)

In re Salomon Analyst Metromedia Litig., 236 F.R.D. 208 (S.D.N.Y. 2006) 12, 14

Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000) 12

Krogman v. Sterritt, 202 F.R.D. 467 (N.D. Tex. 2001) 12

Maldonado v. Dominguez, 137 F.3d 1 (1st Cir. 1998) 14

Peachin v. Aetna Life Ins. Co., No. 92 C 2739, 1996 WL 22968 (N.D. Ill. Jan. 19, 1996) 15

Perrone v. GM, 232 F.3d 433 (5th Cir. 2000) 15

Romero v. Allstate Corp., 404 F.3d 212 (3d Cir. 2005) 9

Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98 (2d Cir. 1998) 11

Tootle v. ARINC Inc., 222 F.R.D. 88 (D. Md. 2004) 10

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000) 2, 9

West v. Prudential Sec. Inc., 282 F.3d 935 (7th Cir. 2002) 3, 16

Wilson v. Comtech Telecomms. Corp., 648 F.2d 88 (2d Cir. 1981) 14

Wiseman v. First Citizens Bank & Trust Co., 215 F.R.D. 507 (W.D.N.C. 2003) 1

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

Page(s)

Statutes and Rules

29 U.S.C. § 1109(a).. 12

Fed. R. App. P. 5 1

Fed. R. Civ. P. 6(a).. 1

Fed. R. Civ. P. Rule 23(f).. 1

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure ("Rule 23(f)") and Rule 5 of the Federal Rules of Appellate Procedure, Tyco International Ltd. ("Tyco") respectfully petitions for leave to appeal from the district court's class certification order in *Overby v. Tyco International Ltd.*, Civil No. 02-CV-1357-B, MDL No. 02-MDL-1335-B (D.N.H.). Copies of the Order and the district court's opinion (the "Order") are attached hereto as Exhibit A. This petition is brought within ten days (as calculated pursuant to Fed. R. Civ. P. 6(a)) of the August 15, 2006, entry of the Order.

INTRODUCTION

The district court applied the presumption of reliance that is available in certain securities fraud cases under *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), to plaintiffs' negligent misrepresentation claim under ERISA. The court thereby excused plaintiffs from showing actual reliance, even though numerous courts have recognized that such a claim requires a showing that plaintiffs actually relied on the defendants' alleged misrepresentations.[1] In

---

[1] *See Burstein v. Ret. Account Plan for Emples. of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 384, 389 (3d Cir. 2003) ; *Wiseman v. First Citizens Bank & Trust Co.*, 215 F.R.D. 507, 510 (W.D.N.C. 2003); *see also Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 435-36 (4th Cir. 2003) (reversing grant of class certification involving similar state law claims, for failure to show that "plaintiffs actually relied on the [defendants's] alleged misrepresentations" about the Plan).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

searching for a basis to permit certification of a class, the Order abandons a crucial element of an ERISA claim for breach of fiduciary duty based on negligent misrepresentation.[2]

This Court has stated that a Rule 23(f) interlocutory appeal should "ordinarily" be allowed where it "will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293-94 (1st Cir. 2000). Rule 23(f) appeals also "should be permitted" when the court's class certification ruling is "questionable" and where, absent relief from the order, "the defendant will likely feel irresistible pressure to settle." *Id.* at 293. While meeting either of these tests is sufficient, the court's class certification Order satisfies both.

This petition raises an unsettled legal issue (erroneously resolved by the district court) that is fundamentally important not only to this case, but to the law

[2] A claim for negligent misrepresentation will often be unsuitable for class treatment. Although such claims are nominally brought on behalf of the plan itself, the claimed misrepresentations are made not to the plan, but, as here, to the individual members of the plan. (*See* Consolidated Amended Complaint (the "Complaint") at ¶ 3 (attached hereto as Exhibit B.)) Accordingly, plaintiffs must prove detrimental reliance on an individual basis. *In re Electronic Data Sys. Corp. ERISA Litigation*, 224 F.R.D. 613, 628-30 (E.D. Tex. 2004) (declining to certify a class in an ERISA misrepesentation case because such claims require individualized determinations of reliance).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

relating to ERISA claims in general—that is, whether the *Affiliated Ute* presumption of reliance may be applied in an ERISA case that alleges misrepresentations, so that individualized proof of reliance is unnecessary. Following enactment of the Private Securities Litigation Reform Act of 1995, and the Securities Litigation Uniform Standards Act of 1998, both intended to curb prior abuses of the nation's securities laws, litigation under ERISA has burgeoned; ERISA cases seeking recovery for alleged negligent misrepresentation are now a routine adjunct to securities fraud litigation. Granting Tyco's petition and clarifying the role of the reliance element in class litigation brought pursuant to ERISA will provide invaluable guidance to courts and litigants alike.

Moreover, there can be little question that, in a case in which plaintiffs have said they seek over a billion dollars in damages, class certification will create enormous pressure to settle and will likely deprive the defendant of an opportunity to obtain review after final judgment. *See West v. Prudential Sec. Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (noting that "because of the high risk of catastrophic loss . . . very few . . . class actions are litigated to conclusion"). As the Court is aware, Tyco has already filed a petition under Rule 23(f) directed at the district court's earlier certification of the securities class. As explained in that petition, that certification also was contrary to law and will place enormous pressure on Tyco to settle unless reviewed by this Court. (*See* Rule 23(f) petition in No. 06-8022.) The

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

cumulative effect of the district court's erroneous class certifications underscores that each petition should be granted by this Court.

BACKGROUND

From at least 1997 until June 3, 2002, Tyco's former chief executive officer, L. Dennis Kozlowski, and its former chief financial officer, Mark H. Swartz, looted Tyco's corporate treasury and concealed their illicit conduct from Tyco's Board of Directors and its relevant committees, enriching themselves at Tyco's expense. Tyco and its shareholders were victims of the Company's unfaithful officers. Kozlowski and Swartz have been sentenced to prison for their criminal wrongdoing.

Tyco has filed civil complaints against both Kozlowski and Swartz, alleging breach of fiduciary duty and other wrongful conduct.[3] Tyco learned of its officers' improper conduct through an internal review initiated by the Corporate Governance and Nominating Committee of the Tyco Board on April 30, 2002. While the internal investigation was proceeding, numerous securities, ERISA and derivative actions were filed against Tyco in various federal districts. The Judicial Panel on Multidistrict Litigation ordered all such actions centralized in the District of New Hampshire before the Honorable Paul J. Barbadoro.

---

[3] Tyco's action against Swartz was the subject of an appeal to this Court, No. 04-1848.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

On February 3, 2003, plaintiffs filed the Complaint, asserting causes of action under ERISA arising out of essentially the same facts upon which the contemporaneously filed securities fraud actions were based. The Complaint names as defendants Tyco, Tyco's principal operating subsidiary (Tyco International (US), Inc.), three of Tyco's former officers, the former Board of Directors, the Retirement Committee, and certain present and former employees. The Complaint asserts that defendants breached their fiduciary duties under ERISA by negligently misrepresenting and failing to disclose in Tyco's financial statements material information concerning, among other things, the following: related party transactions; executive compensation; mergers and acquisitions and the accounting therefor; and financial results (the "misrepresentation claim"). The Complaint also asserts that the defendants breached their fiduciary duties by allowing Tyco's ERISA plans to invest in Tyco's shares, which plaintiffs allege was not a prudent investment (the "imprudent investment claim").

On April 4, 2003, defendants moved to dismiss the Complaint. On December 2, 2004, the court granted the motion in part and denied it in part. The court dismissed all claims against two employee defendants, all former directors of Tyco International Ltd., and the former Tyco officers other than Kozlowski and Swartz. The court otherwise denied the motion.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

On January 20, 2005, plaintiffs filed a motion seeking certification of a class consisting of "all participants in the Plans for whose individual accounts the Plans purchased and/or held shares of the Tyco Stock Fund at any time from August 12, 1998 to July 25, 2002." Tyco filed its opposition on July 11, 2005. Tyco argued, *inter alia*, that, because ERISA claims for breach of fiduciary duty based on negligent misrepresentations and omissions require individualized proof of actual reliance, plaintiffs' misrepresentation claim was not amenable to class treatment. Specifically, Tyco argued that, in light of the individualized issues of reliance presented by plaintiffs' negligent misrepresentation claim, the proposed class did not meet Rule 23(a)'s typicality requirement, and was unsuitable for certification under Rule 23(b). Tyco further argued that, because the depositions of the six proposed class representatives demonstrated that all six either relied on different misrepresentations or did not rely on *any* misrepresentation described in the Complaint, they failed to meet the typicality requirement of Rule 23(a).[4]

In their moving papers, plaintiffs did not refer to the Supreme Court's decision in *Affiliated Ute*, which held that reliance may be presumed in a securities

[4] Indeed, four of the six proposed representatives admitted that they did not rely on any of the alleged misrepresentations alleged in the Complaint. The district court nonetheless found that they met the typicality requirement. (Ex. A at 14, 20.)

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

fraud case alleging a materially misleading omission.[5] In their reply papers, plaintiffs referred to *Affiliated Ute* only once, arguing that it should apply "to the non-disclosure aspect of the[ir] claim."[6] Plaintiffs primarily argued that they should be given the benefit of the "fraud on the market" doctrine enunciated in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which creates a rebuttable presumption that the inflationary effect of false and misleading statements is incorporated in the market price of publicly traded securities, so that a securities fraud plaintiff need not prove actual reliance on those statements. *See* Ex. C at 24-25. From plaintiffs' discussion of these issues, it is fairly apparent that they regarded their case as primarily asserting misstatements, not omissions. *See id.* at 23-25.

[5] In *Affiliated Ute*, a group of Indians alleged that bank employees violated Rule 10b-5 of the securities laws by persuading the plaintiffs to sell their shares in a trust to the bank employees and others, without revealing that the shares were being traded at higher prices on a secondary market that the employees had created. 406 U.S. at 146-48. The Supreme Court, noting that the bank employees' activities had "operated as a fraud upon the Indian sellers," *id.* at 153, held that "[u]nder the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery." *Id.*

[6] Plaintiffs' Reply Memorandum to Defendant's Opposition to the Motion for Class Certification, dated Aug. 12, 2005, at 23 ("Reply") (Ex. C).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

On July 12, 2006, the district court heard oral argument.[7] At that time, the court suggested to plaintiffs' counsel that the *Affiliated Ute* presumption of reliance could be used to satisfy the reliance element of plaintiffs' misrepresentation claim:

> "Under the *Affiliated Ute* doctrine, which I think still continues to be good law, it seems to be largely supplanted by fraud on the market in the securities context, but remains good law, is still cited by the First Circuit. The way I read those opinions, that body of case law, it suggests that reliance can be satisfied by demonstrating a duty to disclose and a failure to disclose material misstatement. . . . Why are you not arguing to me that Count 1 can be proved primarily on omissions?" (Ex. D at 11-12.)

On August 15, 2006, the district court granted plaintiffs' motion. Consistent with its own suggestions made at oral argument, the court held that *Affiliated Ute* was applicable to plaintiffs' ERISA claims for negligent misrepresentation, meaning that plaintiffs are excused from the requirement of showing actual reliance on defendants' alleged misstatements and omissions. *See* Ex. A at 18.

QUESTION PRESENTED

Did the district court correctly apply the *Affiliated Ute* securities-law presumption in this ERISA action?

[7] Relevant pages of the Class Certification Hearing Transcript, July 12, 2006, are attached as Exhibit D.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

REASONS FOR GRANTING THE PETITION

I. The Class Certification Order Satisfies This Court's Criteria For Immediate Interlocutory Review.

This Court has held that an interlocutory appeal of a class certification issue is appropriate where it will permit the Court to address an important and unsettled issue of law; or where the merits of the class certification order are questionable, and certification of the class raises the stakes of the litigation so substantially that the defendant will feel irresistible pressure to settle. *Mowbray*, 208 F.3d at 293-94. The district court's class certification Order satisfies both tests.

A. The Order Implicates Fundamental Questions Of Law That Are Unlikely To Be Litigated To Final Judgment.

1. An Appeal Will Provide Guidance On A Novel Question of First Impression: Whether The Securities Fraud Doctrine Of *Affiliated Ute* Applies To A Negligent Misrepresentation Claim Under ERISA.

The elements of an ERISA claim for breach of fiduciary duty based on misrepresentations and omissions are: "(1) defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation."[8]

[8] *Romero v. Allstate Corp.*, 404 F.3d 212, 226 (3d Cir. 2005); *In re AEP ERISA Litig.*, 327 F. Supp. 2d 812, 831 (S.D. Ohio 2004). It is axiomatic that a showing of detrimental reliance is required. *In re Electronic Data,* 224 F.R.D. at 628-30 (declining to certify a class in an ERISA misrepresentation case because such

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

In holding that plaintiffs can establish an ERISA claim for breach of fiduciary duty based on misrepresentations and omissions without offering affirmative proof of reliance—through application of the *Affiliated Ute* presumption—the district court adopted an interpretation of the elements of an ERISA misrepresentation claim that no other court of which we are aware has endorsed. The court's decision allows plaintiffs in an ERISA action to succeed on a breach of fiduciary duty claim based on alleged misrepresentations and omissions by offering proof of only three of the four elements of the claim—a fiduciary relationship; a misrepresentation, and materiality of the misrepresentation. The district court's opinion essentially abandons the element of reliance, improperly altering the showing necessary to state an ERISA misrepresentation claim.

Such an approach contravenes the express language of ERISA, which requires proof of causation. The liability provision of ERISA, 29 U.S.C. § 1109(a), makes a fiduciary liable for "losses . . . *resulting from* each such breach" of its fiduciary duty. The phrase "resulting from" establishes that there must be a showing of "some causal link between the alleged breach . . . and the loss plaintiff

---

claims require individualized determinations of reliance); *Burstein*, 334 at 384, 389, 386 (plaintiff must show detrimental reliance to establish a claim for breach of fiduciary duty under ERISA); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996); *see also Tootle v. ARINC Inc.*, 222 F.R.D. 88, 96 (D. Md. 2004) (same).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

seeks to recover."[9] In an ERISA misrepresentation case, causation is proved by showing reliance. The district court acknowledged this point: "You have to show causation, and causation is satisfied here by reliance." (Ex. D at 28.).

Having recognized that causation and reliance are required elements of plaintiffs' ERISA claims, the Court, nonetheless, permitted the element of reliance to be presumed based on inapplicable case law, and by permitting this, wrote reliance out of the statute. By holding that proof of reliance is unnecessary so long as materiality is established, the district court improperly relieved plaintiffs of the obligation to prove that they satisfy the causation element of ERISA § 1109(a). That the district court did alter the elements of the claim is highlighted by its finding that the named plaintiffs were all adequate class representatives, even though most of them testified that they had *not* in fact relied on any of the allegedly false and misleading statements.

2. Even If *Affiliated Ute* Were Available To A Plaintiff Alleging Negligent Misrepresentation Under ERISA, It Could Not Apply To Plaintiffs Here.

Cases applying *Affiliated Ute* in the securities fraud context make clear that, for *Affiliated Ute* to apply, omission of material facts (as opposed to a false or

---

[9] *Allison v. Bank-One Denver*, 289 F.3d 1223, 1239 (10th Cir. 2002) (emphasis in original) (citing *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998)). *See also Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 2002) (noting that the language of § 1109(a) "clearly indicates that a causal connection is required between the breach of fiduciary duty and the losses incurred").

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

misleading statement of material facts) must be either the sole,[10] or the central,[11] element of the plaintiff's claim. The reason why *Affiliated Ute* is applied in this strict fashion is readily apparent: any case that involves a false or misleading statement necessarily also involves a misleading omission of the true or accurate facts.[12] To allow artful pleading to turn a misrepresentation case into an omissions case would allow the exception to swallow the rule.

[10] Cases in this line hold that the *Affiliated Ute* presumption applies only where the defendant has allegedly "failed to disclose ***any information whatsoever*** relating to material facts about which the defendant has a duty to disclose." *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1119 (5th Cir. 1988) (emphasis added) (vacated and remanded on other grounds); *accord Cox v. Collins*, 7 F.3d 394, 395-96 (4th Cir. 1993) ("The *Affiliated Ute* presumption of reliance is not warranted in a Rule 10b-5 case when the plaintiff alleges both non-disclosure and positive misrepresentations instead of only nondisclosure as in *Affiliated Ute*.").

[11] Cases in this line hold that the *Affiliated Ute* presumption does not apply where affirmative misstatements form a ***central part*** of the alleged fraud. *Cavalier Carpets, Inc. v. Caylor*, 746 F.2d 749, 756-57 (11th Cir. 1984); *In re Salomon Analyst Metromedia Litig.*, 236 F.R.D. 208, 219 (S.D.N.Y. 2006); *Abelson v. Strong*, 644 F. Supp. 524, 528 (D. Mass. 1986) (holding that when the "gravamen" of the complaint is misstatements, the *Affiliated Ute* presumption does not apply) .

[12] *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1162 (10th Cir. 2000) (because "every misstatement both advances false information and omits truthful information," any "artfully-pleaded complaint can recharacterize as an omission conduct which more closely resembles a misrepresentation"); *Krogman v. Sterritt*, 202 F.R.D. 467, 479 (N.D. Tex. 2001) (recognizing that every case involving misrepresentations has corresponding omissions, and that does not turn the misrepresentations into omissions).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

On the face of the Amended Complaint, this case concerns false and misleading *statements*, not omissions, so that *Affiliated Ute* would not be available to plaintiffs even if application in the ERISA context were proper. *First*, plaintiffs themselves plead that Tyco's public filings made affirmatively false and misleading statements about Tyco's financial results, acquisitions and executive compensation. Because plaintiffs have alleged that those disclosures were false and misleading statements, they cannot characterize their case as one in which there was a "failure to disclose any information whatsoever." *Abell*, 858 F.2d at 1119. *Second*, the gravamen of plaintiffs' Complaint is affirmative misstatements.[13]

Those allegations of false statements make clear that the court's reliance on the rationale of *Affiliated Ute* and its progeny was erroneous. The rationale in cases applying *Affiliated Ute* is that, where "no positive statements exist: reliance

[13] *See, e.g.* Ex. B ¶ 77 ("Tyco made statements to Participants which purported to disclose the complete compensation.... Each of the proxy statements contained a detailed account of the compensation ..."); Ex. B ¶ 88 ("Throughout the Class Period, Defendants continued to represent that acquisitions will be immediately accretive to Tyco earnings"); Ex. B ¶ 90 ("... Defendants negligently misrepresented to Participants that Tyco only purchased other companies with significant revenue streams . . ."); Ex. B ¶ 91 ("Tyco's Annual Reports on Form 10-K for the fiscal years ended September 30, 1998, 1999 and 2000 respectively, negligently purported to describe Tyco's material acquisitions during those financial periods ..." Ex. B ¶ 95 ("Tyco also overstated income following acquisitions..."); Ex. B ¶ 99 ("In particular, these financial statements overstated income and understated expenses for the reasons alleged above, among others.").

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

as a practical matter is impossible to prove." *In re Salomon Analyst Metromedia Litig.*, 236 F.R.D. at 218 (*quoting Wilson v. Comtech Telecomms. Corp.*, 648 F.2d 88, 93 (2d Cir. 1981)); *see also* Ex. A at 18, citing *Ansin v. River Oaks Furniture*, 105 F.3d 745 (1st Cir. 1997). Here, "the complaint is rife with allegations of affirmative misstatements that do not on their face suggest any of the evidentiary problems with which the Supreme Court was concerned in *Affiliated Ute*." *In re Salomon*, 236 F.R.D. at 218. The alleged omissions are merely the inverse of the alleged affirmative misrepresentations.[14]

3. Sound Policy Reasons Preclude Extension Of The *Affiliated Ute* Doctrine Beyond The Securities Law Context.

The *Affiliated Ute* presumption of reliance on a material omission is a securities fraud doctrine that was developed to support the remedial purposes of the securities laws. 406 U.S. 151. Claims that sound in fraud must meet requirements far more rigorous than those that sound in negligence. In particular, under Rule 9(b), all the elements of fraud, including scienter, must be pleaded with particularity. *See Maldonado v. Dominguez*, 137 F.3d 1, 9 (1st Cir. 1998). Where the standards applicable to a claim for securities fraud have otherwise been met, it

[14] Examples of this can be seen in Paragraphs 77 and 78 of the Complaint (Ex. B). Paragraph 77 alleges that the executive compensation disclosed in Tyco SEC filings was incorrect, while Paragraph 78 of the Complaint alleges that defendants failed to disclose unauthorized payments to executives.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

makes sense to provide a more lenient construction to the element of reliance. *See Affiliated Ute*, 406 U.S. at 151. Courts generally have been reluctant to apply the *Affiliated Ute* doctrine outside the securities fraud context.[15]

The district court read this Court's opinion in *Ansin*, which held that "[p]ositive proof of reliance on omissions is not necessary where materiality has been established," 105 F.3d at 754, as supporting an extension of *Affiliated Ute* to ERISA cases. *Ansin* does not appear to reach so far, however.[16] Like *Affiliated Ute*, *Ansin* was a nondisclosure case, and it addressed claims for fraud under Rule 10b-5 as well as a pendent state law claim for common law fraud. Nothing in *Ansin* suggests that *Affiliated Ute* should be applied broadly outside the securities law context or to a claim which does not sound in fraud.

---

[15] *See Buford v. H&R Block*, 168 F.R.D. 340, 359 n.8 (S.D. Ga. 1996) (noting that "this court is convinced that the *Affiliated Ute* presumption does not reach beyond § 10b-5 actions"); *Peachin v. Aetna Life Ins. Co.*, No. 92 C 2739, 1996 WL 22968, *5 (N.D. Ill. Jan. 19, 1996) (rejecting the application of *Affiliated Ute* in the context of an ERISA estoppel action); *Perrone v. GM*, 232 F.3d 433, 339-40 (5th Cir. 2000) (declining to extend *Affiliated Ute* to truth-in-lending laws); *but see Edens v. Goodyear Tire & Rubber*, 858 F.2d 198, 207 (4th Cir. 1988) (extending *Affiliated Ute* to an action for fraudulent breach of contracts).

[16] In *Ansin*, the plaintiff, a shareholder in a close corporation, sold his shares to other shareholders who did not disclose to him their plan to conduct an initial public offering of shares in the corporation in the near future. The case is nearly on all fours with *Affiliated Ute*. Moreover in *Ansin* the plaintiff testified that "he did rely on information from [the defendant]". Here, four of the six plaintiffs admit that they did not rely on any misstatement contained in the Complaint.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

Plaintiffs' claims sound in negligence, not fraud. Plaintiffs have not been required to plead scienter, nor have they been subject to the strictures of Rule 9(b). There is no justification for providing the same leniency to plaintiffs alleging negligence as to those meeting the rigorous standard of Rule 9(b). Indeed, the opposite holds true: Because ERISA plaintiffs enjoy the benefits of a relaxed pleading standard, granting them a presumption of reliance on material omission will encourage the bringing of lawsuits in which plaintiffs' losses do not "resul[t] from" the claimed breaches of duty, while simultaneously making such cases much harder to defend. Such a result would not be consistent with the Supreme Court's admonition that, because "ERISA is a comprehensive and reticulated statute, and is enormously complex and detailed . . . it should not be supplemented by extratextual remedies." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 442, 447 (1999) (internal citation omitted).

B. Certification Of The Plaintiffs' Class Places Irresistible Pressure On Tyco To Settle.

The district court's Order is questionable under Rule 23. *See In re Electronic Data,* 224 F.R.D. at 628-30, (individual issues of reliance preclude certification under either Rule 23(b)(1) or Rule 23(b)(3)). Moreover, the Order certified a class consisting of thousands of plaintiffs, claiming damages that could total a billion dollars. Such potential liability, however weak its basis, creates enormous pressure to settle. *See West v. Prudential Sec. Inc.*, 282 F.3d at 937.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

The *in terrorem* effect of class actions is maximized here, where the district court's certification decision substantively strengthens plaintiffs' otherwise weak claim by eliminating an essential element of plaintiffs' misrepresentation claim—detrimental reliance. Although Tyco vigorously disputes plaintiffs' factual and legal claims, and prefers to litigate rather than settle this case, the certification of this class under this ***new*** legal standard creates enormous pressure to settle.

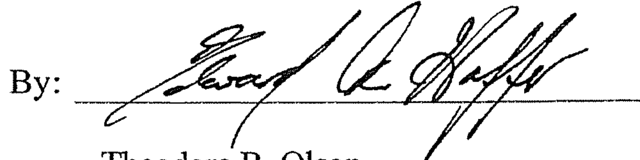
The *in terrorem effect* is further exacerbated because Tyco is faced, in the MDL proceedings, not only with this ERISA claim, but also with the securities claim for tens of billions in which a class has also erroneously been certified. The pressure to settle both actions together is overwhelming—meaning that it is very unlikely that this court will ever have the opportunity to consider the issue presented except through a Rule 23(f) appeal.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

CONCLUSION

For the foregoing reasons, Tyco respectfully requests that this Court grant leave to appeal from the district court's class certification Order.

Respectfully submitted,

By: 

Theodore B. Olson
Douglas R. Cox
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Edward A. Haffer
SHEEHAN PHINNEY BASS & GREEN
Hampshire Plaza
1000 Elm Street
P.O. Box 3701
Manchester, NH 3105-3701
(603) 627-8115

Attorneys for Defendant Tyco International Ltd.

Francis P. Barron
Stephen S. Madsen
CRAVATH, SWAINE & MOORE LLP,
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

David Boies
Ann Galvani
David Shapiro
BOIES SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

Elizabeth F. Edwards
Bryan A. Fratkin
McGUIREWOODS LLP
901 East Cary Street
Richmond, VA 23219
(804) 775-1000

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

CERTIFICATE OF SERVICE

I certify that on August 29, 2006 I caused copies of the attached Reply of Tyco International Ltd. in Support of Petition Pursuant to Rule 23(f) for Leave to Appeal from the District Court's Class Certification Order to be served by First Class Mail on the following counsel of record:

Kenneth G. Bouchard, Esq.
Bouchard Kleinman & Wright, P.A.
1 Merrill Drive, Suite 6
Hampton, NH 03842
(603) 926-9333

Robert A. Izard, Esq.
Schatz & Nobel, PC
Corporate Center
20 Church Street, Suite 1700
Hartford, CT 06103-3290
(860) 493-6295

Edwin J. Mills, Esq.
Stull, Stull & Brody
6 East 45th Street
New York, NY 10017
(212) 687-7230

Gregory A. Markel, Esq.
Cadwalader, Wickersham & Taft LLP
One World Financial Center
New York, NY 10281
(212) 504-6000

David A. Vicinanzo, Esq.
Gordon P. MacDonald, Esq.
Nixon Peabody LLP
889 Elm Street
Manchester, NH 03101
(603) 628-4083

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

William Hassler, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, DC 20036
(202) 429-6469

Laurence Greenwald, Esq.
Michele L. Pahmer, Esq.
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038-4982
(212) 806-5652

Paul McEachern, Esq.
Shaines & McEachern
25 Maplewood Avenue
PO Box 360
Portsmouth, NH 03802-0360
(603) 436-3110

James A. Mitchell, Esq.
Michael J. Grudberg, Esq.
Stillman & Friedman, PC
425 Park Avenue
New York, NY 10022
(212) 223-0200

Richard McNamara, Esq.
Wiggin & Nourie, P.A.
670 No. Commercial Street, Suite 305
PO Box 808
Manchester, NH 03105-0808
(603) 669-2211

Robert N. Shwartz, Esq.
Debevoise & Plimpton
919 Third Avenue
New York, NY 10022-3904
(212) 909-6850

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

Michael P. Carroll, Esq.
Michael S. Flynn, Esq.
Dana M. Seshens, Esq.
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
(212) 450-4978

Arnold Rosenblatt, Esq.
Cook, Little, Rosenblatt & Mason, PLLC
650 Elm Street
Manchester, NH 03101
(603) 621-7100

William R. Maguire, Esq.
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004-1482
(212) 837-6879

James E. Townsend, Esq.
Townsend Law Office
Londonderry Professional Park
PO Box 1067
Londonderry, NH 03053
(603) 434-5059

Irwin H. Warren, Esq.
Miranda S. Schiller, Esq.
Ashley R. Altschuler, Esq.
Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Paul H. Dawes, Esq.
Latham & Watkins LLP
135 Commonwealth Drive
Menlo Park, CA 94025
(650) 463-2626

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

Alan R. Friedman, Esq.
Gary P. Naftalis, Esq.
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Martin Glenn, Esq.
O'Melveny & Myers LLP
Times Square Tower
7 times Square
New York, NY 10036
(212) 326-2000

Christian M. Hoffman, Esq.
Foley Hoag LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1131

Wilbur A. Glahn, III, Esq.
McLane, Graf, Raulerson & Middleton
City Hall Plaza
900 Elm Street
Manchester, NH 03105-0326
(603) 628-1469

Lawrence Iason, Esq.
Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600

Paul J. Fishman, Esq.
Lisa Swedenborg Getson, Esq.
Friedman Kaplan Seiler & Adelman LLP
633 Broadway
New York, NY 10019-6708
(212) 833-1130

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a09d2918-41ab-4101-b6ba-f83ae20cd7cd

David Spears, Esq.
Patricia T. Northrop, Esq.
James Q. Walker, Esq.
Richards Spears Kibbe & Orbe LLP
One World Financial Center
29th Floor
New York, NY 10281
(212) 530-1830

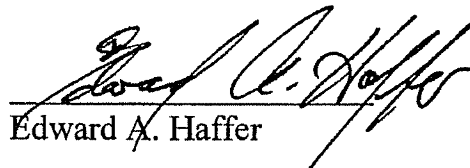
Carl H. Loewenson, Jr., Esq.
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0050
(212) 468-8128

Barry Wm. Levine, Esq.
Deborah Ringel, Esq.
Dickstein Shapiro LLP
1825 Eye Street NW
Washington, DC 20006
(202) 420-2200

Paul E. Wagner, Esq.
Shea Stokes & Carter, A.L.C.
1405 Hanshaw Road
Ithaca, NY 14850
(607) 257-5165

Stanley Keller, Esq.
Edwards Angell Palmer & Dodge LLP
111 Huntington Avenue at Prudential Center
Boston, MA 02199-7613
(617) 239-0217

Date: August 29, 2006



Edward A. Haffer