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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RICHARD R. FURSTENAU and DAVID G. INGBER, on behalf on 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 CORPORATION, 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.	HON. GARRETT E. BROWN, JR. Civil Action No.: 02-CV-5409 (GEB) Return Date: June 7, 2004 **MEMORANDUM OF DEFENDANTS AT&T CORP., AT&T SAVINGS PLAN COMMITTEE, AT&T INVESTMENT MANAGEMENT CORPORATION, MICHAEL ARMSTRONG, KENNETH T. DERR, M. KATHRYN EICKHOFF, WALTER Y. ELISHA, GEORGE M.C. FISHER, DONALD V. FITES, RALPH S. LARSEN, DONALD F. McHENRY, MICHAEL I. SOVERN, JOHN D. ZEGLIS, HAROLD W. BURLINGAME, MIRIAN GRADDICK, HOSSEIN ESLAMBOLCHI, AND BARBARA PEDA IN OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION**

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Defendants AT&T Corp. ("AT&T"), AT&T Savings Plan Committee, AT&T Investment Management Corporation, C. Michael Armstrong, Kenneth T. Derr, M. Kathryn Eickhoff, Walter Y. Elisha, George M.C. Fisher, Donald V. Fites, Ralph S. Larsen, Donald F. McHenry, Michael I. Sovern, John D. Zeglis, Harold W. Burlingame, Mirian Graddick, Hossein Eslambolchi, and Barbara Peda (collectively with AT&T, "defendants"), respectfully submit this memorandum in opposition to the motion for class certification filed by plaintiff Richard Furstenau ("Furstenau").[1]

INTRODUCTION

Furstenau's boilerplate memorandum fails to satisfy the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure. A fundamental prerequisite of Rule 23 is that in order to certify a class, common evidence must predominate over individualized issues. If a court were required to hear individualized evidence concerning each plaintiff, the proceeding would degenerate into an endless and unmanageable succession of mini-trials.

Although Furstenau boldly states that his particular claim is "precisely aligned with those of the class," (Pl. Br. p. 13), he avoids discussing the evidence that this Court will need to consider and how that evidence will vary from plaintiff-to-plaintiff. The class Furstenau seeks to certify would include all participants in the AT&T Long Term Savings Plan for Management Employees (the "Plan") whose individual accounts purchased and/or held shares of the AT&T Stock Fund and/or the AT&T Wireless Group Stock Fund (collectively referred to as

[1] Plaintiffs have agreed to dismiss the claims of plaintiff David Ingber, who was named in the Complaint and identified as a proposed class representative in the motion for class certification. The parties will be submitting a stipulation to dismiss Ingber's claims shortly, and once entered, Furstenau will be the sole remaining plaintiff.

the "AT&T Funds") between September 15, 1999 and December 28, 2000. (See Second Amended Complaint (referred to herein as "Complaint" or "Cmplt.") ¶ 16). In order to adjudicate this putative class action, this Court will need to determine, on an individual basis: (1) the issue of reliance, (2) whether and to what extent each individual plaintiff exercised control over his/her investment selections pursuant to Section 404(c) of ERISA, (3) defenses that are unique to each plaintiff's claim, and (4) any purported damages, including whether and to what extent each plaintiff is entitled to a "lost opportunity" recovery (which Furstenau attempts to define as the profits a participant would have gained in a different investment option had AT&T removed the AT&T Funds from the Plan). When a court is required to make factual or legal determinations on a plaintiff-by-plaintiff basis, class certification should be denied.

Moreover, courts will not certify a class when there is any potential for inter-class conflict. See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001) ("The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees . . . ."). Furstenau has failed to demonstrate the absence of potential conflict in his large, amorphous class. To the contrary, the proposed class is rife with conflict. For example, there would be "retention" conflict that pits the interests of the class members who held their shares in the Funds against those who sold their shares. In addition, Furstenau's request for relief – a determination binding upon every single participant that the AT&T Funds were not prudent investment options – is at odds with the interests of those who enjoyed investment gains and the long-term investors who would not have wanted to liquidate the Funds.

Finally, the scope and duration of the proposed class is inappropriate. Furstenau seeks to certify a class of all participants who held or purchased shares in the AT&T Funds over

the fifteen-month period from September 15, 1999 to December 28, 2000. However, the Complaint pleads no factual basis for certifying such a broad class period. Indeed, Furstenau himself testified that he has absolutely no idea why this particular time frame was selected. (Furstenau Dep. at 192) (stating "[y]ou'll have to ask my attorneys about that") (copies of the cited pages of Furstenau's deposition are attached hereto at Group Ex. 1). Furstenau's proposed class period is much longer than the class periods certified in the securities litigation titled In re AT&T Corp. Securities Litigation, No. 3:00-cv-5364(GEB), 3:01-cv-1883(GEB) (D.N.J.). In that action, which arises out of the same allegations, this Court certified a class period of October 25, 1999 to May 1, 2000 with respect to the AT&T common stock purchasers, and a class period of April 26, 2000 to May 1, 2000 with respect to the AT&T Wireless Group tracking stock purchasers. Furstenau gives no justification for why his proposed class period should be so vastly different.

In addition, Furstenau cannot certify a class of AT&T Wireless Fund participants as a matter of law. That particular fund did not become an investment option within the Plan until August 14, 2000 – months after the Complaint alleges that the "truth began to emerge" about AT&T's business performance. (Oct. 1, 1999 Plan Prospectus (Exh. 2), at August 2000 Sticker (ATF09338); Cmplt. ¶ 65). In addition, Furstenau himself did not hold shares in the AT&T Wireless Fund until months after the end of the proposed class period of his complaint – a fact which alone requires a denial of class certification.

For each of these reasons, as well as the additional reasons set forth below, Furstenau's motion for class certification should be denied.

STATEMENT OF FACTS

This action concerns a 401(k) retirement plan sponsored by AT&T. The Plan is a defined contribution plan that maintains individual accounts for each Plan participant. (Cmplt. ¶ 32; 29 U.S.C. § 1002(34)). Plan contributions come from, (a) elective contributions made by the participants themselves, and (b) matching contributions made by AT&T. (Cmplt. ¶¶ 32, 34-35). Plan participants direct how contributions should be invested. (Cmplt. ¶¶ 33, 35; Furstenau Dep. at 32-33, 75-76).

During the proposed class period, there were up to twenty-eight separate and distinct investment options within the Plan. (Ex. 2, p. 16 (ATF09317), & August 2000 Sticker (ATF09338)). The AT&T Stock Fund was one such option, and fund documents specifically disclosed the well-known fact that it invested "primarily in shares of AT&T Common Stock, with a small portion in cash or other liquid investments." (See, e.g., Ex. 2, p. 28 (ATF09329)). The AT&T Wireless Fund first became an investment option under the Plan on August 14, 2000. (Ex. 2, at August 2000 Sticker (ATF09338)). The AT&T Wireless Fund invested "primarily in shares of AT&T Wireless Group Common Stock, with a portion in cash or other liquid investments." (Id.).

Participants were expressly told that each of the AT&T Funds "lacks the diversification provided by, and may involve a greater degree of risk than," other investment options under the Plan. (Ex. 2, p. 28 (ATF09329), & August 2000 Sticker (ATF09338)). As named plaintiff Richard Furstenau acknowledged, "any stock individually is more risky than a diversified portfolio of stocks." (Furstenau Dep. at 41-42.)

Furstenau worked for AT&T from 1967 until leaving to work for NCR (an AT&T spin-off) in 1995. (Id. at 11-16, 18-19). Furstenau has been a participant in the Plan since the late 1960s. (Id. at 8, 29). He has invested some or all of his Plan monies in the AT&T Stock

Fund for the bulk of the thirty-plus years he has been a participant, and still holds shares in that Fund today. (See, e.g., id. at 8, 53-54, 92-93, 229-30). Indeed, but for a brief window in part of 1997 and 1998, Furstenau allocated one hundred percent of his investments within the Plan to the AT&T Stock Fund between 1989 and mid-2001. (Id. at 54-55, 57-58, 64, 72-74, 76, 80-82, 90-92, 230). As Furstenau summarized, "I'm a long-term guy." (Id. at 92) (further acknowledging that, given such strategy, "there's always ups and there's always downs").

Although the AT&T Wireless Fund became an investment option for Plan participants in August 2000, see supra, Furstenau chose not to invest any of his own contributions in that Fund at that time, or any time thereafter. (Id. at 91) ("I didn't go out and buy any AT&T wireless stock on my own."). Furstenau did eventually become the owner of units in the AT&T Wireless Fund on or about July 9, 2001 – long after the proposed class period – when AT&T spun off its Wireless Group. (See id. at 91, 99; Ex. 2, at August 2001 Sticker (ATF094343)). At that time, investors in the AT&T Stock Fund, such as Furstenau, received a "special stock dividend" of Wireless shares, which were deposited in the AT&T Wireless Fund within the Plan. (Ex. 2, at August 2001 Sticker (ATF094343)).

Furstenau filed a two-count Complaint against each of the defendants.[2] (Cmplt. ¶¶ 2-3). Count One claims that the defendants violated ERISA by "negligently making misrepresentations and negligently failing to disclose material information" regarding AT&T's business performance. (Id. ¶¶ 2, 3(a)). Count Two alleges that the defendants improperly "permitt[ed] the Plan to invest Plan assets in the [AT&T Stock Fund and the AT&T Wireless Fund] when those funds were not prudent investments." (Id. ¶¶ 2, 3(b)). The complaint mainly alleges that AT&T made false statements about the company, but that the "truth began to emerge

[2] On February 18, 2004, this Court entered an agreed stipulation to dismiss Count III.

on May 2, 2000," when AT&T revised its year 2000 profit estimates. (Cmplt. ¶ 65).

The Complaint contends that AT&T made false statements about the company in three Securities & Exchange Commission ("SEC") filings. Those filings are (1) a Form 8-K filed on December 6, 1999, (2) a Form 8-K filed on January 14, 2000, and (3) a Form 10-K filed on March 27, 2000. (Cmplt. ¶ 63(a)-(d)). The complaint does not allege that any false statement was made prior to December 6, 1999. Furstenau's complaint, boiled down, is that these SEC filings did not adequately disclose poor business performance.

Furstenau does not recall reading any of the three SEC filings at issue and thus did not rely upon them when making any investment decisions. (Furstenau Dep. at 194, 196). And contrary to the Complaint's contention that the defendants should have removed the AT&T Funds from the Plan because they were not "prudent" investments, Furstenau believes that AT&T is still today a prudent long-term investment and he still holds shares in the AT&T Stock Fund today. (Id. at 229-30).

ARGUMENT

This Court cannot certify a class unless the requirements of Federal Rule 23(a) and Rule 23(b) have been satisfied. In re LifeUSA Holding Inc., 242 F.3d 136, 143 (3d Cir. 2001). Pursuant to Rule 23(a), Furstenau bears the burden of proving:

(1) numerosity: that the class is so numerous that joinder of all members is impracticable;

(2) commonality: that there are questions of law or fact common to the class;

(3) typicality: that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) adequacy: that the representative party will fairly and adequately protect the interests of the class.

Id.; Fed. R. Civ. P. 23(a); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

If a plaintiff satisfies each of the requirements of Rule 23(a), this court must next determine whether the plaintiff has satisfied at least one requirement of Rule 23(b). In this case, Furstenau seeks certification under Rule 23(b)(1) and (b)(3). (Pl. Br. p. 6). Rule 23(b)(1) requires Furstenau to demonstrate that the prosecution of individual actions would create a risk of (1) inconsistent or varying adjudications with respect to members of the class, or (2) that adjudications of the claims of individual members "would as a practical matter be dispositive of the interests of the other members." Fed. R. Civ. P. 23(b)(1); Amchem, 521 U.S. at 614-15. Under Rule 23(b)(3), Furstenau must show that questions of law of fact common to the class "predominate" over any questions affecting individual members and that class resolution is "superior" to other available methods of adjudication. Fed. R. Civ. P. 23(b)(3); Amchem, 521 U.S. at 614-15.

Furstenau cannot satisfy his burden under Rule 23 simply by parroting self-selected portions of the Rule. To the contrary, this Court may only certify a class if "after a rigorous analysis," it is satisfied each prerequisite of Rule 23(a) is satisfied. General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (internal quotes omitted); accord Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 72-73 (D.N.J. 1993). The "failure to meet any of the requirements of Rules 23(a) and (b) precludes certification of a class." In re LifeUSA, 242 F.3d at 147.

In an effort to avoid making the factual showing required by Rule 23, Furstenau asserts that the Third Circuit takes a "liberal approach" to class certification and that it is "inappropriate for a court to evaluate the merits of Plaintiff's legal claims." (Pl. Br. pp. 7-8). Contrary to Furstenau's suggestion, however, "[c]lass actions may not be approved lightly." Seiler v. E.F. Hutton & Co., 102 F.R.D. 880, 887 (D.N.J. 1984). In addition, both the U.S.

Supreme Court and Third Circuit have recognized that class certification motions are not immune from a review of the underlying merits of the case. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n.12 (1978) (citation omitted); Newton, 259 F.3d at 167-68 & n.8. As the Third Circuit has observed, "[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." Newton, 259 F.3d at 168 (internal quotations omitted); see also Livesay, 437 U.S. at 469 n.12 (courts may be required to answer questions that are "enmeshed" with the merits). For the many reasons set forth below, Furstenau cannot meet Rule 23's stringent requirements.

I. FURSTENAU CANNOT SATISFY THE REQUIREMENTS OF RULE 23(a).

Rule 23(a) demands proof of numerosity, commonality, typicality, and adequacy. Furstenau did not and cannot satisfy all of these requirements.

A. Numerosity.

The first Rule 23(a) requirement is numerosity – specifically, that the class is so numerous that joinder of all members individually in one action is impracticable. Fed. R. Civ. P. 23(a)(1). The defendants do not contest that Furstenau has fulfilled this particular requirement of Rule 23(a).

B. Commonality.

Rule 23(a)(2) requires Furstenau to demonstrate that "there are questions of law or fact common to the class." "When the resolution of a common legal issue is dependent upon factual determinations that will be different for each purported class plaintiff . . . courts have consistently refused to find commonality and have declined to certify a class action." Liberty Lincoln, 149 F.R.D. at 76. Furstenau's proposed class action – which asks this Court to certify a

class of thousands of uniquely-situated individuals and examine tens of thousands of individual transactions within the Plan – falls well short of meeting the commonality requirement.

First, there can be no commonality because resolution of the misrepresentation claim is dependent upon factual determinations of reliance and materiality that will differ for each and every class member. While Furstenau did not address the required elements of an ERISA misrepresentation claim in his brief, the Third Circuit requires Furstenau to demonstrate (1) the existence of a misrepresentation; (2) that the misrepresentation was "material" (specifically, that it would have influenced each plaintiff's investment decision), and (3) detrimental reliance. Burstein v. Retirement Account Plan for Employees of Allegheny Health Educ. & Research Found., 334 F.3d 365, 384 (3d Cir. 2003) (emphasis added); accord Daniels v. Thomas & Betts Corp., 263 F.3d 66, 73 (3d Cir. 2001) (same); Adams v. Freedom Forge Corp., 204 F.3d 475, 492 (3d Cir. 2000) (a fiduciary duty claim is stated when a fiduciary makes "a material misrepresentation" and an employee "[acts] thereupon to his or her detriment"); Peterson v. American Tel. & Tel. Co., No. Civ. A 99-4982, 2004 WL 190295, at *5 (D.N.J. Jan. 9, 2004). As the Third Circuit has emphasized, "[o]ur jurisprudence . . . requires 'detrimental reliance' as an element of a breach of fiduciary duty claim." Burstein, 334 F.3d at 387.

Furstenau's need to demonstrate the existence of materiality and detrimental reliance debunks his unsupported claim of "commonality." In order to adjudicate the putative class claims, this Court will need to assess, on a plaintiff-by-plaintiff basis, whether each communication at issue was material to each plaintiff's investment decision and if so, the nature and degree of each plaintiff's reliance. See, e.g., Burstein, Daniels, Adams, and Peterson, supra. The tantamount need to examine each individual participant's account history, investment

history[3] and practices, and purchases and sales of the AT&T Funds will require literally hundreds of thousands of separate adjudications and this case is therefore wholly inappropriate for class treatment.

Such wide-ranging and endless "mini-trials" are precisely what Rule 23(a) is designed to avoid. Indeed, for that reason, courts have declined to certify putative ERISA class actions when individual proof of reliance would be necessary. For example, in Hudson v. Delta Air Lines, Inc., the Eleventh Circuit declined to certify a putative ERISA class action based upon an alleged misrepresentation, noting that:

> [e]ven if the plaintiffs are able to prove that Delta disseminated a false and uniform message to all retirees . . . . they would also have to show that all members of the class would have deferred their retirement in the hope that they would be eligible for the Special Retirement Plan to be offered in the future. *This sort of decision would necessarily have been highly individualized for each potential retiree.*

90 F.3d 451, 457 (11th Cir. 1996) (emphasis added). Using similar logic, another court recently refused to certify an ERISA breach of fiduciary duty class action because the individual proof needed of reliance meant that there was a lack of commonality:

> In order to prove detrimental reliance, the Plaintiffs would have to establish that each member of the proposed class relied on the Defendants' alleged misrepresentations in making his investment decisions. Such proof requires an individualized analysis and cannot be presumed from the behavior of the named Plaintiffs. Each member of the proposed class would have to establish that he relied on the misrepresentation in deciding to maintain his investment in the LTGF after the freeze had been lifted. *This burden is too individualized to meet the commonality requirement of a class action.*

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[3] A person's investment history is indicative of his or her level of sophistication as an investor; a high level of sophistication may preclude a finding that a person relied on alleged misrepresentations. See, e.g., Degulis v. LXR Biotechnology, Inc., 176 F.R.D. 123, 126 (S.D.N.Y. 1997); In re AES Corp. Sec. Litig., 849 F. Supp. 907, 910 (S.D.N.Y. 1994); In re ML-Lee Acquisition Fund II, L.P. Sec. Litig., 149 F.R.D. 506, 508 (D. Del. 1993). Accordingly, any reliance analysis must include an examination of each plaintiff's investment history.

Wiseman v. First Citizens Bank & Trust Co., 215 F.R.D. 507, 510 (W.D.N.C. 2003) ("Wiseman II") (internal citations omitted, emphasis added); see also Peterson, No. Civ. A 99-4982, 2004 WL 190295, at *13 (declining to certify an ERISA breach of fiduciary duty claim as a class action because of, inter alia, "highly individualized issues of reliance"); cf. United Steelworkers of America, AFL-CIO-CLC v. Ivaco, Inc., 216 F.R.D. 693, 697-98 (N.D. Ga. 2002) (finding that the commonality and typicality prongs of Rule 23(a) were not satisfied for an ERISA equitable estoppel claim because, inter alia, evidence of detrimental reliance could not "possibly be made on a class-wide basis").

The cases cited by Furstenau are easily distinguishable and do not support class certification. (See Pl. Br. p. 12).[4] In Kolar v. Rite Aid Corp., the court adjudicated a motion to approve a settlement of the class claims. Although the Court briefly addressed the Rule 23(a) class certification requirements, the motion to approve the settlement was not contested and the need to demonstrate individual reliance were not even addressed by the Court. See Kolar, No. Civ. A 01-1229, No. 2003 WL 1257272 (E.D. Pa. Mar. 11, 2003). Moreover, the plaintiffs in Babcock v. Computer Associates International Inc., 212 F.R.D. 126, 128 (E.D.N.Y. 2003), did not allege that they had relied upon any misrepresentation made by the company when selecting

[4] Although in Eisenberg v. Gangnon, 766 F.2d 770, 786 (3d Cir. 1985), the court noted that individual questions of reliance do not, ipso facto, preclude class certification, it observed that there may be a need to have separate trials on the issue of reliance. While in Eisenberg such a task was not overwhelming because there were only around 90 class members, in this case, the need to conduct thousands of separate mini-trials would undermine Rule 23. Moreover, Eisenberg involved a securities fraud class action, as opposed to an ERISA class action. Although securities fraud plaintiffs have been permitted in certain circumstances to plead "fraud on the market," which creates a rebuttable presumption of reliance, that doctrine should not apply under ERISA. See Hull v. Policy Mgmt. Sys. Corp., No. Civ-A-3:00-778-17, 2001 WL 1836286, at *8 (D.S.C. Feb. 9, 2001) (comparing securities law actions with those arising under ERISA, and concluding, inter alia, that the appropriate remedy for plaintiffs who suffered a wrong pursuant to public disclosures is to pursue an action under the securities laws).

among various investment options. To the contrary, company stock was the only investment option available to those plaintiffs. The issue presented in Babcock was whether the defendants had breached their fiduciary duty by not diversifying the plan's investment options.

Second, Section 404(c) of ERISA provides a complete defense to claims, such as those here, that arise out of self-directed, voluntary purchases of the AT&T Funds. 29 U.S.C. § 1104(c)(1)(B). Section 404(c) provides, in relevant part, that "[i]n the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account . . . no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." Id; see also Unisys Sav. Plan Litig., 74 F.3d 420, 446 (3d Cir. 1996). The Wiseman court analyzed the interplay of Section 404(c) and Rule 23, and concluded that, "[e]xamining the issue of independent control for each of hundreds or thousands of Plaintiffs will make a class action unwieldy and impracticable." Wiseman v. First Citizens Bank & Trust Co., 212 F.R.D. 482, 487 (W.D.N.C. 2003) ("Wiseman I"). An adjudication of this issue will obviously require this Court to examine the conduct and state of mind of each individual plaintiff to ascertain (a) what information that plaintiff had at his or her disposal at the time of each investment decision, and (b) whether each participant exercised sufficient control over those investment decisions. For example, Furstenau chose to leave his contributions in the AT&T Stock Fund even after, as he alleges, the "truth began to emerge" (Cmplt. ¶ 65) about AT&T's alleged poor performance. (Furstenau Dep. at 229-30). Since even a participant's decision to hold an investment may constitute control under Section 404(c), due process entitles the defendants to an examination of the merits of each individual plaintiff's claim. See Unisys, 74 F.3d at 448 (noting that exercising control under Section 404(c) can include deciding to

maintain assets in a certain investment); Wiseman I, 212 F.R.D. at 487 (observing that the plaintiff's "conscious and voluntary decision" to remain invested in a particular fund within her 401(k) plan after negative information was revealed "could be considered an exercise of control."). Compare Carroll v. Cellco P'ship, 713 A.2d 509, 515 (N.J. Super. Ct. App. 1998) (where individual testimony bears on liability, "the defendant's right to cross examine each plaintiff could not be protected" in a class action).

Finally, although it is not pled within the four corners of the Complaint, Furstenau, through his counsel, has asserted that he is not only entitled to recover the alleged loss on his AT&T stock investment, but that he is also entitled to recover "lost opportunity" damages. According to Furstenau, "lost opportunity" damages represent the additional amount of money that each individual class member could hypothetically have earned in an alternative Plan investment of their choosing if the Funds had not been offered.

Assuming arguendo that any plaintiff would be entitled to this type of recovery (a conclusion the defendants dispute), this Court would be required to (1) evaluate each individual plaintiff's investment practices over the course of the entire class period, (2) determine which Plan investment(s) the putative class members would have selected, based upon those unique and individual investment practices, and (3) calculate each individual's recovery based upon the rates of return of those investments. As a result, any calculation of damages will require thousands and thousands of individualized determinations. The vast number of individualized inquiries would far outweigh any efficiencies obtained through class certification.

C. Typicality.

Furstenau must also demonstrate that his "claims or defenses are typical of the claims and defenses of the class." Although commonality and typicality "are broadly defined and tend to merge," they are distinct requirements and Furstenau must independently satisfy both

of them. Stewart v. Abraham, 275 F.3d 220, 227 (3d Cir. 2001). For each of the reasons set forth in Section I(B) above, Furstenau cannot demonstrate that his claim is "typical."

Furstenau's claim is not "typical" for the additional reason that he is subject to unique defenses. Although Rule 23(a)(3) does not require that all putative class members share identical characteristics, it nonetheless serves to "screen out class actions involving legal or factual positions of the representative class which are 'markedly different' from those of other class members." Liberty Lincoln, 149 F.R.D. at 77 (citation omitted). As the Third Circuit recognized in Zenith Laboratories, Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3d Cir. 1976), when "unique defenses could conceivably become the focus of the entire litigation and divert much of [the plaintiff's] attention from the suit as a whole, the remaining members of the class could be severely disadvantaged by [the plaintiff's] representation." See also Spann v. AOL Time Warner, Inc., 219 F.R.D. 307, 316 (S.D.N.Y. 2003) ("In assessing the typicality of the plaintiff's claims, the court must pay special attention to unique defenses that are not shared by the class representatives and members of the class."); Wiseman I, 212 F.R.D. at 488. Although Furstenau makes a conclusory assertion that his claims are "precisely aligned with those of the class," (Pl. Br. p. 13), that is manifestly not the case.

First, Furstenau does not recall reading any of the three SEC filings at issue in this case. *Not a single one.* (Furstenau Dep. at 194, 196).[5] Therefore, a fortiori, he did not "rely"

[5] Of course, even if he had read the articles, it is hard to see what Furstenau possibly would have done in reliance given that he had already invested 100 percent of his Plan monies in the AT&T Stock Fund *before* the proposed class period began (and before the articles were published). (See, e.g., Furstenau Dep. at 54-55, 57-58, 64, 72-74, 76, 80-82, 90-92, 230). Moreover, at his deposition he repeatedly expressed a disinterest in investing in the Plan's mutual fund offerings because of their relatively higher costs compared to the AT&T Stock Fund. (E.g., id. at 53-56, 58-60). Finally, he admittedly took a "long-term" approach to investing, which includes his choice to be invested in the AT&T Stock Fund presently and for the greater part of the last thirty-six years. (Id. at 8, 53-54, 92-93, 229-30).

upon those SEC filings and his ERISA claims fail as a matter of law. See discussion Section I(B), supra (discussing the need to demonstrate individual reliance on the purported false statements). Indeed, with respect to his holdings in the AT&T Wireless Fund, Furstenau did not rely upon any representation whatsoever. Furstenau never purchased any shares of that Fund during the class period, or ever, for that matter. It was only after the close of the proposed class period – and after the spin-off of the AT&T Wireless Group – that AT&T contributed shares of the AT&T Wireless Fund to Furstenau's account as part of a "special stock dividend" for investors in the AT&T Stock Fund. (See Furstenau Dep. at 91; Ex. 2, at August 2001 Sticker (ATF094343)).

Second, Furstenau exercised independent control over his investment options pursuant to Section 404(c) of ERISA. Although Furstenau attempts to circumvent Section 404(c) by merely alleging that AT&T made false statements (Cmplt. ¶ 56), that exception to 404(c) has no bearing on Furstenau's claims because he did not rely upon the SEC filings at issue in the Complaint. Because any finding that Furstenau exercised independent control over his investment decisions would provide the defendants with a complete defense to liability, Furstenau's claim is atypical of the class that he purports to represent.

Third, Furstenau made apparent at his deposition that his own view of this case actually contravenes the express allegations of the Complaint. Count II of the Complaint alleges that the facts contained in certain news articles published in Bloomberg News "would have led a prudent fiduciary to conclude that the [AT&T Funds] were imprudent investments for the Plan." (Cmplt. ¶ 81). Although the Complaint alleges that the revelation of this information dictates a conclusion that the AT&T Funds were an imprudent investment option, Furstenau himself disagreed. Furstenau testified that although he was aware of the so-called "bad news" revealed

in the news articles (i.e., the fact that AT&T had frozen hiring and laid off employees), Furstenau did not harbor the belief that AT&T was an imprudent investment. Instead, Furstenau viewed the AT&T lay-offs as a positive development because it demonstrated that AT&T was cutting costs. (Furstenau Dep. at 203) (stating "[a]ctually, that's usually pretty good for a stock. It shows you that somebody is at least watching what's going on on the expense side of the business. That didn't bother me."). Moreover, Furstenau believed at the time – and continues to believe today – that AT&T is a good long-term investment for the Plan. (Id. at 230) ("I still own the companies that were all a part of that plan, *and I think all of them over time will be valuable*.") (emphasis supplied).

D. Adequacy of the Named Plaintiff.[6]

Finally, Rule 23(a)(4) requires Furstenau to demonstrate that he will "adequately protect the interests of the class." The adequacy of representation requirement ensures, inter alia, that the "relationship of the representative parties' interests to those of the class are such that there is not likely to be a divergence in viewpoint or goals in conduct of the suit." Liberty Lincoln, 149 F.R.D. at 78 (citation omitted). Because proposed class representatives owe fiduciary duties to the class, courts should not permit any representative who has a conflict of interest to serve as Lead Plaintiff. See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig., 55 F.3d 768, 801 (3d Cir. 1995); In re Party City Sec. Litig., 189 F.R.D. 91, 107-08 (D.N.J. 1999); Charal v. Andes, 81 F.R.D. 99, 101 (E.D. Pa. 1979).

Instead of making any factual showing that he is an adequate named plaintiff, Furstenau makes nothing more than a cursory, boilerplate argument that "the legal claims of Plaintiff are identical to all class members." (Pl. Br. p. 15). As discussed above, however,

[6] The defendants do not contest the adequacy of Furstenau's counsel.

Furstenau is subject to a number of unique defenses that make him wholly inadequate to serve. See discussion Section I(C), supra. In addition, as explained in Section IV below, to the extent this Court may certify a class that includes participants from the Wireless Fund (which, as also explained below, the defendants submit would be inappropriate), Furstenau is not an adequate representative for such participants because he never purchase or sold shares in the Wireless Fund during the proposed class period and only held shares in the Wireless Fund after the class period. For all of these reasons, Furstenau is not an adequate class representative, and for this additional reason, his motion for class certification should be denied.

II. FURSTENAU CANNOT SATISFY THE REQUIREMENTS OF RULE 23(B).

Even if Furstenau could satisfy all of the requirements of Rule 23(a), Furstenau must also demonstrate that the proposed class fits under at least one subsection of Rule 23(b). Furstenau has attempted to certify a class under either Rule 23(b)(1) or Rule 23(b)(3). Once again, however, Furstenau's motion falls far short of fulfilling Rule 23's requirements.

A. The Proposed Class Cannot be Certified Under Rule 23(b)(1).

Furstenau's proposed class action does not satisfy the requirements of Rule 23(b)(1). Rule 23(b)(1) only supports certification of a class when separate actions by individual class members would risk establishing "incompatible standards of conduct for the party opposing the class, or would "as a practical matter be dispositive of the interests of the other members." Fed. R. Civ. P. 23(b)(1). Furstenau, however, has not alleged the existence of any facts that support certification under Rule 23(b)(1). Furstenau has not made any showing that incompatible standards of conduct might be established if this case was not certified as a class action, nor has he demonstrated that any adjudications of individual members would be dispositive of other cases. To the contrary, Furstenau concedes that an adverse decision in his

case would not "technically preclude" any other individual plaintiff from bringing suit. (Pl. Br. p. 16).

This is not a case like In re IKON Office Solutions, 191 F.R.D. 457 (E.D. Pa. 2000), because Furstenau has not identified the specific facts of this case that warrant Rule 23(b)(1) class certification. Moreover, a more recent opinion, Nelson v. IPALCO Enterprises, Inc., No. IP02-477CHK, 2003 WL 23101792 (S.D. Ind. Sept. 30, 2003), declined to certify a (b)(1) class under circumstances similar to those here. In rejecting the same argument made by Furstenau, the IPALCO court noted that:

> The existence of the individual accounts and individual investment decisions, however, means that the correct decisions for different class members may be different. There are individual issues of reliance and causation as well as individual issues presented by affirmative defenses . . . . *The presence of those individual issues and the prospect of different results for different class members means that Rule 23(b)(1) does not fit this case.*

Id. at *10 (emphasis added).

The IPALCO court appropriately declined to adopt the rationale of IKON because the advisory notes to Rule 23 do not support certifying a class under Rule 23(b)(1) whenever there is a claim for breach of fiduciary duty brought on behalf of a group of beneficiaries. Id. Rather, the IPALCO court found that the 1966 advisory committee notes state that Rule 23(b)(1)(B) applies when an accounting or like measures are needed to restore the subject of the trust. Furstenau, however, does not seek the return of funds purportedly converted out of the Plan. Instead, he is seeking money damages from the defendants for the decline in value of the AT&T Funds held within the Plan.[7]

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[7] Furstenau's reliance upon Specialty Cabinets & Fixtures Inc. v. American Equitable Life Insurance Company, 140 F.R.D. 474, 475 (S.D. Ga. 1991), is also misplaced. That case involved inapposite facts and as part of a conditional settlement, the parties had agreed to waive any objections to class certification.

In an effort to distract this Court from the need to examine individual issues, Furstenau asserts that any damages received pursuant to the derivative claims brought under Section 502(a)(2) "would inure to the Plan as a whole rather than the individual plaintiffs." (Pl. Br. pp. 16-17). Of course, this allegation does not help Furstenau overcome the deficiencies in the claims brought on behalf of individual participants under Section 502(a)(3) of ERISA. It is also a mischaracterization. The need to make individualized determinations does not simply disappear merely because a plaintiff tacks on a derivative claim that seeks duplicative relief under Section 502(a)(2). To the contrary, as the IPALCO court recognized, any monetary award to the Plan would ultimately flow to the individual retirement accounts within the Plan. That is precisely why Furstenau's prayer for relief requests "an Order awarding actual damages in the amount of any losses the Plan suffered *to be allocated among the Participants' individual accounts in proportion to the accounts' losses.*" (Cmplt., prayer for relief, ¶ F) (emphasis supplied).

B. The Proposed Class Cannot be Certified Under Rule 23(b)(3).

Likewise, Furstenau cannot satisfy the requirements of Rule 23(b)(3). In order to certify a class under Rule 23(b)(3), this Court must find that common questions "predominate over any questions affecting only individual members," and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); In re LifeUSA, 242 F.3d at 143-44 (emphasis supplied). The requirement that common questions "predominate" over individual issues "is far more demanding than the Rule 23(a)(2) commonality requirement." Id. (citing Amchem, 521 U.S. at 623-24).

In applying Rule 23's predominance requirement, this Court must determine the extent to which the relevant legal and factual questions could be litigated on a common basis. See, e.g., Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir. 1974). When common factual

and legal questions do not predominate over individual issues, a case "disintegrate[s] into a myriad of individualized claims, destroying the cohesiveness of the litigation and rendering it entirely unmanageable." Gelman v. Westinghouse Elec. Corp., 73 F.R.D. 60, 69 (W.D. Pa. 1976); see also In re LifeUSA, 242 F.3d at 146 (class certification not appropriate under Rule 23(b)(3) when the court was required to, among other things, make individual determinations concerning causation and reliance); Angelastro v. Prudential-Bache Sec., Inc., 113 F.R.D. 579, 585 (D.N.J. 1986) (denying motion for class certification where trial of an individual issue for thousands of putative class members would render the case unmanageable as a class action).

Furstenau cannot demonstrate that common issues predominate in this case as required by Rule 23(b)(3). See discussion Sections I(B),(C), supra; In re LifeUSA, 242 F.3d at 145. The lack of predominance is illustrated by, among other things, this Court's need to: (1) examine questions of individual reliance, (2) determine whether and to what extent each individual plaintiff exercised control over his/her investment selections pursuant to Section 404(c) of ERISA, (3) adjudicate defenses that will be unique to each plaintiff, and (4) make individualized calculations of damages and any permissible "lost opportunity" costs. Therefore, this Court should not certify Furstenau's claim as a class action.

III. IRRECONCILABLE CONFLICTS AMONG MEMBERS OF THE PUTATIVE CLASS PRECLUDE CLASS CERTIFICATION.

Furstenau's motion for class certification should be denied for the additional reason that there are irreconcilable conflicts among the class members. The Third Circuit has expressly instructed district courts to address retention conflicts at the class certification stage. In re Cendant Corp. Litig., 264 F.3d 201, 244 n. 25 (3d Cir. 2001). As a consequence, requests for class certification should be viewed with skepticism where the likelihood of intra-class

conflicts loom large. See, e.g., Griffin v. GK Intelligent Sys., Inc., 196 F.R.D. 298, 301 (S.D. Tex. 2000); O'Neil v. Appel, 165 F.R.D. 479, 494-95 (W.D. Mich. 1996); Ziemack v. Centel Corp., 163 F.R.D. 530, 539-42 (N.D. Ill. 1995); In re Clearly Canadian Sec. Litig., 875 F. Supp. 1410, 1422 (N.D. Cal. 1995); Ballan v. Upjohn Co., 159 F.R.D. 473, 482-85 (W.D. Mich. 1994); David J. Ross, Do Conflicts Between Class Members Vitiate Class Action Securities Fraud Suits?, 70 St. John's L. Rev. 209, 209-27, 234 (1996); Michael Y. Scudder, Comment, The Implications of Market-Based Damages Caps in Securities Class Actions, 92 Nw. U. L. Rev. 435, 444-46, 459, 451-54, 468-70, 472 (1997). Furstenau has failed to carry his burden to "provide evidence establishing that to the extent [such] conflicts exist in the plaintiff class, they are not so serious as to preclude a finding of adequacy of representation." In re Seagate Technology II Sec. Litig., 843 F. Supp. 1341, 1366 (N.D. Cal. 1994); see also O'Neil, 165 F.R.D. at 495 (refusing to find adequate representation where the plaintiffs merely "glossed over" potential purchaser-seller and retention conflicts).

The "retention" conflict pits class members in an action who "still hold some of the relevant securities on the date of suit" against "those who have divested themselves of such holdings." Seagate, 843 F. Supp. at 1359. Put plainly, a plaintiff who still holds some of the defendant corporation's securities is concerned with both the corporation's commercial viability and with obtaining a favorable settlement, while someone who has divested himself of the corporation's stock cares only about maximizing his damages. These two groups will have diverging views towards settlement and cannot represent one another's interests. See, e.g, Party City, 189 F.R.D. at 108-12 & nn.15-16 ("retention conflicts" may lead to "antithetical" and "divergent" interests among class members and "create a conflict of interest for counsel to the class"); see also In re Lucent Technologies, Inc. Sec. Litig., 194 F.R.D. 137, 152-53 & n.20

(D.N.J. 2000) (reiterating that the retention conflict can "lead to conflicting litigation strategies"), overruled on other grounds, Cendant, 264 F.3d at 258 n. 35.

A retention conflict looms large in the putative class proposed by Furstenau. This conflict was identified in the brief AT&T filed in opposition to class certification in the common stock securities case, and rather than repeating the arguments, the defendants incorporate them by reference herein. (See Memorandum of Defendants AT&T Corp. and C. Michael Armstrong in Opposition to Plaintiffs' Motion for Class Certification at 16-23, In re AT&T Corp. Sec. Litig, No. 3:00cv5364(GEB) (filed on May 23, 2002) (Ex. 3)). Although this Court determined that these conflicts were not sufficiently severe to warrant denial of class certification in the common stock securities case (In re AT&T Corp. Sec. Litig, No. 3:00cv5364(GEB) (D.N.J. Sept. 17, 2002), slip op. at 16-20 (Ex. 4)), the same reasoning does not apply to this ERISA case.

Not only is there a retention conflict in this case in the classic sense, but with respect to Count II, the conflict runs even deeper. Count II seeks to have the AT&T and AT&T wireless stocks declared to be imprudent investments. Furstenau's requested relief creates an obvious retention conflict that cannot be cured through subclasses: it pits long-term AT&T investors who did not (and still do not) want to liquidate their investments in the AT&T Funds against those investors – if there even are any – that wished to be divested of their AT&T stock. Plaintiff cites no cases in which a class was certified with the goal of having a stock fund be declared permanently imprudent. Indeed, Furstenau himself is a prime example of this conflict, having testified that he is a long-term investor of AT&T and that he believes that the AT&T Funds are prudent investments over the long-term. (Furstenau Dep. at 229-30). Even after hearing what the Complaint calls "bad news," Furstenau never considered selling his AT&T Fund shares. (See, e.g., id. at 203). If a participant believes that he was wronged by some action

taken by the defendants, he is free to bring an individual action under ERISA. But there is no reason – and Furstenau has not articulated one – for depriving all retirees of the benefits of an investment in the AT&T Funds that Furstenau admits "over time will be valuable." (Id. at 230).[8] For purposes of the present motion, though, the real problem is that the requested relief creates a severe intra-class conflict that cannot be addressed through sub-classes and therefore class certification is inappropriate.

IV. THERE IS NO BASIS FOR CERTIFYING A CLASS OF PARTICIPANTS IN THE AT&T WIRELESS FUND.

Even if Furstenau could overcome each of Rule 23's hurdles to class certification, this Court should, at a minimum, deny Furstenau's request to certify a class insofar as it seeks to include participants who invested contributions in the AT&T Wireless Fund. Participants in the AT&T Wireless Fund should be excluded from any certified class for at least two separate reasons.

First, as a threshold matter, the AT&T Wireless Fund was not an investment option in the Plan during the period in which the Complaint alleges that misrepresentations were made. Although the initial public offering for the AT&T Wireless Tracking Stock was held in April 2000, the AT&T Wireless Fund was not a Plan option until August 2000 – a date up to eight months after AT&T made the statements at issue and three months after plaintiff alleges that "the truth began to emerge." (Cmplt. ¶ 63 (alleging that AT&T Corp. made false statements in Forms 8-K filed on December 6, 1999 and January 14, 2000, and in a Form 10-K filed on March 27, 2000); Cmplt. ¶ 65; Ex. 2, at August 2000 Sticker (ATF09338)). Thus, there were no

[8] Even if this Court chooses to certify a class, however, it should remain open to the possibility of the need to create subclasses at some point in the future. (See Ex. 4, p. 18 at n.4).

"Wireless Fund participants" at the time the statements were made, and Furstenau therefore cannot demonstrate that any participant in the Wireless Fund relied upon the December 6, 1999, January 14, 2000 or March 27, 2000 SEC filings when making their AT&T Wireless investments many months later. To the contrary, Furstenau admits that "[t]he truth began to emerge" about AT&T's purported business difficulties on May 2, 2000, over three months before the AT&T Wireless Fund became available. (Cmplt. ¶ 65). That is why, with respect to AT&T Wireless Group tracking stock investors, this Court only certified a stipulated class period of April 26, 2000 to May 1, 2000. See In re AT&T Corp. Sec. Litig., No. 3:01-cv-1883(GEB) (D.N.J. Sept. 25, 2002), slip op. at 2 (stipulation and order certifying class of AT&T Wireless tracking stock purchasers) (Ex. 5)).

Second, even if it were proper to include AT&T Wireless Fund participants in any certified class, Furstenau cannot serve as the class representative for such a class. Furstenau has never purchased or sold any shares in the AT&T Wireless Fund, but instead, was *given* shares in the AT&T Wireless Fund as part of a "special stock dividend" for investors in the AT&T Stock Fund and "still own[s] them today." (See Furstenau Dep. at 91, 99; Ex. 2, at August 2001 Sticker (ATF094343)). Moreover, Furstenau did not attain even "holder" status for the AT&T Wireless Fund until July 2001, when the "special stock dividend" occurred. (See Ex. 2, at August 2001 Sticker (ATF094343)). Quite simply, Furstenau invested 100 percent of his Plan monies in the AT&T Stock Fund – and zero percent in the AT&T Wireless Fund – during the six quarters covered by the putative class period. (See Furstenau Dep. at 76, 80-81, 90-91). It is well-established that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Falcon, 457 U.S. at 156 (internal quotes removed). "The premise of the typicality requirement is simply stated: so goes the claim

of the named plaintiff, so go the claims of the class." Sprague v. General Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998). Because Furstenau did not hold any AT&T Wireless Fund shares during his proposed class period, he cannot bring a class action lawsuit on behalf of AT&T Wireless Fund participants.

V. IN THE EVENT THAT THIS COURT CERTIFIES ANY CLASS, THE TIME PERIOD AND SCOPE OF THE CLASS SHOULD BE LIMITED.

As discussed above, this Court should not certify this case as a class action in the first instance. However, in the event that this Court certifies a class, the time period and scope of the class should be limited to reflect the actual facts underlying the claims asserted. Furstenau has requested this Court to certify a class of participants who purchased and/or "held" shares in the two AT&T Funds between September 15, 1999 to December 28, 2000. (Cmplt. ¶ 1). Even the Complaint fails to support the creation of this amorphous class for this entire time period.[9]

A. The Class Period for Any Class of Participants Who Invested in the AT&T Stock Fund Should be Adjusted to December 6, 1999 to May 1, 2000.

There are no facts that would support certification of a class that commences any time prior to December 6, 1999. It is on that date that Furstenau alleges AT&T issued its first false statement, in the form of an 8-K filed with the SEC. (Id. ¶ 63(a)). Indeed, at his deposition, Furstenau could not articulate why the start date of September 15, 1999 was chosen. (Furstenau Dep. at 192) ("You'll have to ask my attorneys about that, why they picked that particular day."). The commencement date for the class period should accordingly be December 6, 1999.

Nor has Furstenau alleged any facts that could support an end date for the class period any time later than May 1, 2000. The Complaint concedes that, at the very latest, "[t]he

[9] As discussed above, there is no basis for certifying any class with respect to the AT&T Wireless Fund.

truth began to emerge" about AT&T's financial condition on May 2, 2000, shortly after the initial public offering of AT&T Wireless Group tracking stock. (Id. ¶ 65). On that day, AT&T revised its fiscal year 2000 profit estimates downward and "the price of AT&T stock fell 14 percent in one day, its biggest drop in 13 years." (Id.). Furstenau provides absolutely no explanation as to why his class period should extend an additional nine months after the date of that disclosure.[10] Indeed, in the securities case, this Court certified a class for a period that ended on May 1, 2000. (Ex. 4, p. 25). Accordingly, any class period for participants in the AT&T Stock Fund should be narrowed to December 6, 1999 to May 1, 2000.

B. The Scope of the Class Should Only Include Stock Purchasers.

Without explanation, Furstenau also asserts that this Court should certify a class of those who "purchased and/or held shares" of the AT&T Stock Fund. (Cmplt. ¶ 1). Furstenau's motion does not explain why "holders" of the Funds should be included the class – for good reason. The Supreme Court rejected the idea of "holder" liability in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975), when it held that a plaintiff asserting a claim based on the violation of Rule 10b-5 must be either a purchaser or seller of securities. Accord Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 485 (3d Cir. 1998). Because the claim in Count I is essentially a securities fraud claim in ERISA clothing – he alleges that the defendants breached their fiduciary duties by making various misrepresentations and omissions regarding AT&T's business performance in SEC filings – the ban on holder liability should apply here as well.

[10] Although the Complaint makes allegations about two additional statements made by AT&T (see id. ¶¶ 66 and 67), the Complaint contains obvious typographical errors with respect to the dates. Those particular earnings releases were issued in Year 2001, not Year 2000, and thus post-date the time period of Furstenau's proposed class.

Moreover, and as explained above, in order to recover under the ERISA claim alleged in Count I, Furstenau must demonstrate that he relied upon the purported misstatement to his detriment. See, e.g., Burstein, 334 F.3d at 384; see also discussion Section I(B), supra. Including a class of Fund "holders" would require a host of additional, complex, plaintiff-specific inquiries that would defeat commonality and typicality. This Court would be required to examine each putative class member's decision to "hold" the Funds in order to determine: (1) whether each class member actually relied upon the statements, or, like Furstenau, believed that AT&T was a good long-term investment notwithstanding any dips in price during the interim, and (2) whether the alleged misstatements were the proximate cause of the class member's decision to "hold" his or her shares.[11] Doing so will require this Court to analyze claims for each holder plaintiff that are "largely conjectural and speculative." Blue Chip Stamps, 421 U.S. at 735. Consequently, any class that is certified should only include those who purchased or sold the AT&T Stock Fund within the class period, and not those who merely chose to hold Fund shares.

VI. FURSTENAU'S PROPOSED DERIVATIVE ACTION IS SUBJECT TO EXAMINATION UNDER RULE 23.

Finally, Furstenau's suggestion that the derivative claims brought on behalf of the Plan pursuant to Section 502(a)(2) of ERISA are not subject to any scrutiny under Rule 23 (Pl. Br. pp. 4-5) should be quickly rejected for three reasons. First, Furstenau does not cite to *any*

[11] Furstenau himself is only a "holder" due to the fact that his Plan monies were already 100 percent invested in the AT&T Stock Fund prior to the start of the putative class period and he had left AT&T in 1995 and was therefore no longer making contributions to the Plan. (Furstenau Dep. at 18-19, 64, 72-74, 76, 80-82, 90-91). For this additional reason, he is an inadequate class representative because he cannot represent a class of "purchasers." See Falcon, 457 U.S. at 156 (class representative must be a member of the class he seeks to represent).

case where a court did what he asks this Court to do; namely, adjudicate Section 502(a)(2) claims on behalf of absent plan participants (in the name of the Plan) without engaging in the class certification analysis under Rule 23. All that Furstenau can muster is dicta from an unpublished opinion, Montgomery v. Aetna Plywood, No. 95 C 3193, 1996 WL 189347 (N.D. Ill. April 16, 1996) (cited in Pl. Br. p. 5), yet even the Montgomery court went through the Rule 23 analysis before adjudicating the Section 502(a)(2) claim before it. See id. at *3-4. The same is true for the other cases cited by Furstenau: in each one, the court engaged in the very Rule 23 class certification analysis that Furstenau asks this Court to forego. See, e.g., Piazza v. EBSCO Indus., Inc., 273 F.3d 1341, 1349-53 (11th Cir. 2001); Keyes v. Pacific Lumber Co., 51 F.3d 1449, 1463 (9th Cir. 1995).

Second, because the Complaint seeks a monetary payment to the individual accounts that traded in the Funds (Cmplt. ¶ 1), this Court is required to determine the appropriate group of individuals for whom relief may be sought. Without any direction from this Court as to which particular accounts would be entitled to any damage award, this action would become wholly unmanageable and rightful members of the proposed class may be prejudiced.

Third, regardless of whether this action is treated as a "derivative" action or a class action, applying the "rigorous analysis" of Rule 23 is warranted. Under either procedural framework, identical concerns exist regarding Furstenau's adequacy to represent a group of absent individuals and this Court's ability to adjudicate the claims of thousands of persons in one proceeding. For all of these reasons, plaintiff should not be permitted to make an end-run around Rule 23.

CONCLUSION

For the foregoing reasons, the defendants respectfully request this Court to deny the plaintiff's motion for class certification. In the alternative, the defendants request this Court to limit the scope of the proposed class.

Respectfully submitted,

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