UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Richard R. Furstenau and David G. Ingber, on behalf of all other persons similarly situated and on behalf of the AT&T Long Term Savings Plan for Management Employees, Plaintiffs, v. AT&T Corporation, and C. 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, and John D. Zeglis, Defendants.	Civil Action No.: 02-CV-5409 **CLASS ACTION**

BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

TRUJILLO RODRIGUEZ & RICHARDS, LLC
Lisa J. Rodriguez (LR6767)
Donna Siegel Moffa (DSM4634)
3 Kings Highway, East
Haddonfield, NJ 08033
(856) 795-9002

SCHATZ & NOBEL, PC
Wayne Boulton
330 Main Street, 2nd Floor
Hartford, Connecticut 06106-1851
(860) 493-6292

Dated: April 4, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

Page

FEDERAL STATUTES

MISCELLANEOUS

Plaintiffs Richard R. Furstenau and David G. Ingber ("Plaintiffs") submit this Brief and the accompanying Affidavit of Lisa Rodriguez ("Rodriguez Affid.") in support of their motion for an Order certifying this case as a class action. As demonstrated below, this case is well suited for class action treatment, and all of the requirements for class certification under Fed. R. Civ. P. ("Rule") 23(a) and 23(b)(1).

I. PRELIMINARY STATEMENT

This litigation is brought on behalf of participants and beneficiaries of the AT&T Long Term Investment Plan for Management Employees (the "Plan"). Defendants are AT&T - the named fiduciary and Administrator of the Plan - and the members of its Board of Directors. The action is brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA §§ 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3) (ERISA's civil enforcement provisions), alleging violations of ERISA § 404, 29 U.S.C. § 1104 (ERISA's fiduciary standards provision). The proposed class ("Class") includes:

> all Participants in the AT&T Long Term Investment Plan for Management Employees for whose individual accounts the Plan purchased and/or held shares of the AT&T Stock Fund and/or the AT&T Wireless Stock Fund between September 15, 1999 and December 28, 2000.

This ERISA breach of fiduciary duty action is particularly appropriate for class action treatment because only Plan-wide relief is available. The wrongdoing alleged in the Amended Complaint ("Complaint") was directed against the Plan as a whole and the outcome of the litigation will affect tens of thousands of AT&T employees. Indeed, this particular type of action was specifically cited as an example of an appropriate Rule 23(b)(1) class by the drafters of Rule 23.[1]

---

[1] The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust

ERISA is remedial legislation designed to protect employees' retirement savings by setting high standards for fiduciary conduct, requiring honest communication to Plan participants, and offering an effective means to redress violations. 29 U.S.C. § 1001(b).[2] ERISA class actions brought to redress breaches of fiduciary duty concerning the offering of employer stock in 401(k) plans are well established in the Third Circuit. *See, e.g.*, In re Unisys Sav. Plan Litigation, 74 F.3d 420 (3d Cir. 1996); In re Ikon Office Solutions, Inc., 191 F.R.D. 457 (E.D. Pa. 2000).

II. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of the Plan's loss of over $4 billion between September 15, 1999 and December 28, 2000. This tremendous loss occurred because defendants imprudently offered as a Plan investment funds primarily composed of AT&T common stock and AT&T Wireless "tracking stock" (the "Funds"), imprudently caused the Plans to invest in the Funds, and made negligent misrepresentations (and omissions) concerning the investment value and risks associated with those Funds.

As set forth in Plaintiffs' Complaint, which was originally filed on November 11, 2002, and amended on January 13, 2003, during the proposed Class Period, AT&T attempted to downsize its conservative "Ma Bell" long distance telephone business and stake its future on becoming a cable television and internet provider. (Complaint, ¶¶ 59(a)-(p), 60). To accomplish this transformation, AT&T laid-off tens of thousands of telephone workers and spent over $140

Fed. R. Civ. P. 23 advisory committee notes.

[2] The policy of ERISA is " to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b).

billion on rapidly evolving cable and internet technologies with no history of profitability. (Complaint, ¶¶ 59, 60, 62). This transformation effort was a failure. (Complaint, ¶¶ 60(n)-(p), 61-65). At no point during this transformation did the Plan fiduciaries take any steps to protect the Plan from imprudent investments in the Funds nor did they make any effort to disclose the increased risk associated with the Funds.

Rather than discontinue the Funds as a Plan investment option and terminate all Plan investments in the Funds, defendants made a series of negligent misrepresentations (and omissions), (Complaint, §¶ 39(a)-(d)), which had the effect of promoting the Funds to the Plan and its participants, (Complaint, ¶ 44), while raising the cost of those Plan investments above their true value. (Complaint, ¶ 66) These actions constituted a breach of fiduciary duty.

As the Plan fiduciaries, defendants are liable for losses resulting from these breaches of fiduciary duty. (Complaint, ¶¶ 31, 32) The fact that the Plan is a 401(k) plan in which employees directed the Plan to select investment options does not change this fact in that only by complying with the strict requirements of ERISA § 404(c), 29 U.S.C. § 1104(c), could defendants shift responsibility for imprudent investments to Plan participants. Defendants failed to transfer this responsibility in this case because they failed to provide information to Plan participants sufficient for them to make informed investment decisions pursuant to regulations promulgated by the Department of Labor. 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(i) and (ii) and (c)(2)(i) and (ii); Complaint, ¶¶ 33-34.

On February 14, 2003, Defendants filed an answer.

III. ARGUMENT

THE COURT SHOULD CERTIFY THE REQUESTED CLASS

An ERISA breach of fiduciary duty action is particularly well suited for class action treatment. In fact, an ERISA action to enforce fiduciary duties must be "brought in a representative capacity on behalf of the plan as a whole." Kane v. United Independent Union Welfare Fund, 1998 WL 78985 (E.D. Pa.), *quoting* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 n. 9 (1985). Furthermore, certifying a class in this case satisfies all elements of Fed. R. Civ. P. ("Rule"), 23(a). While the proposed class may be certified under either Rule 23(b)(1) or 23(b)(3), the Court should certify the Class under Rule 23(b)(1). *See* Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Insurance Company, 140 F.R.D. 474, 477 (S.D. Ga. 1991); *citing* 1 Herbert B. Newberg, Newberg on Class Actions § 4.20, at 310 (2d ed. 1985) ("actions that qualify for class certification under subdivision (b)(1) or (b)(2) should not normally be certified under subdivision (b)(3)").

The Court should employ a liberal standard in determining whether this action is appropriate for class action treatment. Plaintiffs must show that they satisfy the four requirements of Rule 23(a) as well as the requirements of Rule 23(b)(1). However, doubts should be resolved in favor of approving class certification. Ikon, 191 F.R.D. at 462; *citing* Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985). Plaintiffs have no obligation to prove their case at this point, and the Court's resolution of the class motion is limited to ascertaining whether the requirements of Rule 23(a) and (b) are met. Ikon, 191 F.R.D. at 462; *citing* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or the history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.")

A. THE PREREQUISITES OF RULE 23(a) ARE SATISFIED

To proceed as a class action, the litigation must satisfy the four prerequisites of Rule 23(a), which provides in pertinent part:

> One or more members of a class may sue. . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These prerequisites, often referred to in shorthand fashion as numerosity, commonality, typicality and adequacy, *see* In re Baby Neal, 43 F.3d 48, 54 (3d Cir. 1994), are easily satisfied here.

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable

Rule 23(a)(1) requires that the class be so large that joinder of all members is "impracticable," which "does not mean impossibility, but only the difficulty or inconvenience of joining all members of the class." Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 406 (D.N.J. 1990). Moreover, Plaintiffs need not state the precise number of class members, but may satisfy the numerosity requirement by providing reasonable estimates. Id. at 405.

There is no strict numerical test for determining the impracticability of joinder, Senter v. General Motors Corp., 532 F.2d 511, 523, n.24 (6th Cir.), cert. denied, 429 U.S. 870 (1976), but when "class size reaches substantial proportions. . . the impracticability requirement is usually satisfied by . . . numbers alone." In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996). "While the absolute number of class members is not the sole determining factor, generally the courts have found the numerosity requirement fulfilled where the class exceeds 100." Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992).

While Plaintiffs have not yet had the opportunity for discovery to obtain the exact number of Plan participants, the proposed class clearly includes more than one hundred members. According to AT&T's public SEC filings, it had over 148,000 employees during the class period, a substantial number of which presumably participated in the company 401(k) plan (Complaint, § 13). Furthermore, according to the Plan's IRS Form 5500, the Plan had over $9 billion in assets in 1999. It is reasonable to conclude these assets were shared by more than 100 participants, otherwise each of their individual accounts would average in excess of $90 million.

2. Common Questions of Law and Fact Exist

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." (emphasis added). Despite the Rule's use of the plural form of the term "question," the commonality requirement is satisfied if the Plaintiffs share at least "one question of fact or law with the grievances of the prospective class." In re Baby Neal, 43 F.3d 48, 56 (3d Cir. 1994). As one court has noted, for purposes of commonality, "[t]he question at this stage is whether any common issues exist at all." Blair v. Equifax Check Services, 1999 WL 116225, *2 (N.D. Ill., Feb. 26, 1999), aff'd, 181 F.3d 832 (7th Cir. 1999). The commonality requirement is thus "easily met." In re The Prudential Insurance Company of America Sales Practices Litigation, 962 F. Supp. 450, 510, aff'd as to class certification, 148 F.3d 283 (3d Cir. 1998), cert. denied, 119 S.Ct. 890 (1999) (citing 1 H. Newberg & A. Conte, Newberg on Class Actions, § 3.10 at 3-50 (3d ed. 1992)).

Here, there are numerous questions of law and fact common to the proposed class. These questions include:

a. whether defendants were fiduciaries of the Plan and/or the participants;

b. whether defendants breached their fiduciary duties;

c. whether the Plan and the participants were injured by such breaches; and

d. whether the class is entitled to damages and injunctive relief.

(Complaint, ¶14). Because Plaintiffs and all class members are similarly situated in their need and desire to establish answers to these questions, the commonality requirement of Rule 23(a)(2) is satisfied.

3. The Claims Of The Plaintiffs Are Typical of The Claims Of The Class

The typicality inquiry under Rule 23(a)(3) "assesses whether the action can be efficiently maintained as a class action and whether the named plaintiffs have incentives aligned with those of absent class members to ensure that the absentees' interests are protected." Prudential, 962 F.Supp. at 518. The essence of the typicality requirement is whether the named plaintiffs' factual or legal stance is characteristic of that of other class members. Weiss v. York Hospital, 745 F.2d 786, 809-810 & n. 36 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

Typical, however, is not identical, Eisenberg, 766 F.2d at 785-786, and even "relatively pronounced" factual differences between class members will not preclude a finding of typicality where there is a strong similarity of legal theories, Baby Neal, 43 F.3d at 57-58, or where the claims of the class representatives and the class members arise from the same course of conduct by the defendant. Eisenberg, 766 F.2d at 786. The only requirement is that the named plaintiffs' claims not be "markedly different" from those of the class. Baby Neal, 43 F.3d at 57, *citing* Hassine v. Jeffes, 846 F.2d 169, 177 (3d Cir. 1986).

Here, the named plaintiffs' claims are typical of, and precisely aligned with, those of the class. The claims of the Plaintiffs and each class member are based on the same legal theory, namely, that the defendants breached their ERISA fiduciary duties in regard to the AT&T Stock Fund and the AT&T Wireless Stock Fund. Plaintiffs bring two claims - one for breach of

fiduciary duty based on negligent misrepresentations, and the other for imprudent investments by the Plan fiduciaries. For both claims, Plaintiffs' claims are typical of those of other members of the proposed class.

4. Plaintiffs Will Adequately Protect The Interests Of The Class

Pursuant to Rule 23(a)(4), a court will not allow a suit to proceed as a class action unless it is convinced that the representative parties will "fairly and adequately protect the interests of the class." The "adequacy" requirement is satisfied if: (1) the Plaintiffs' interests are not antagonistic to those of other members of the class they seek to represent, and (2) Plaintiffs' attorneys are qualified, experienced and generally able to conduct the litigation. *See*, *e.g.*, Prudential, 148 F.3d at 312 (citations omitted); Lewis v. Curtis, 671 F.2d 779, 788 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982). *See also* Sosna v. Iowa, 419 U.S. 393, 403 (1975) (basic factors that will satisfy Rule 23(a)(4) are the absence of potential conflicts between the class representatives and the class and the assurance that the action will be vigorously prosecuted.) Defendants bear the burden of proving that the proposed representation would be inadequate. *E.g.*, In re Data Access Systems Securities Litigation, 103 F.R.D. 130, 140 (D.N.J. 1984).

Both prongs of the "adequacy" test are met here. First, as set forth above in the discussion regarding "typicality," Plaintiffs' claims and interests are coincident with those of the other class members and Plaintiffs have no interests antagonistic to those of the other class members. All class members seek to prove the defendants' liability for damages for Plan losses on the basis of common factual and legal theories.

Second, Plaintiffs have retained counsel highly experienced in this type of litigation and eminently able to conduct this litigation and protect the interests of the class. *See* firm resumes

of Schatz & Nobel, P.C. and Trujillo Rodriguez & Richards, LLC., Rodriguez Affid., Exhibits A and B. Thus, the adequacy element is satisfied.

B. THE PREREQUISITES OF RULE 23(b)(1) ARE SATISFIED

This litigation will affect all Participants in the Plan. Success will bring Plan-wide relief while failure would likely preclude actions by other Plan Participants. Class action treatment is the best way to manage this litigation and ensure that the rights of all Plan Participants are protected. Rule 23(b)(1) was designed for this purpose:

> (A) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and, in addition:
>
> (B) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (C) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (D) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests

The legal claims and issues in this case are materially identical to those in Ikon which was certified as a Rule 23(b)(1) class. Ikon, 191 F.R.D. 457 at 468. This action is also ideally suited for treatment under Rule 23(b)(1). While an adverse decision in an individual ERISA breach of fiduciary duty action might not technically preclude actions by other potential members of the class, it would likely do so as a practical matter. *See* Ikon, 191 F.R.D., 466 (recognizing that difficulty would be imposed by contradictory dispositions); *see also* Specialty Cabinets & Fixtures, Inc., 140 F.R.D. at 478-79 (certifying ERISA breach of fiduciary duty case under 23(b)(1)). Indeed, as set forth above this type of case was specifically contemplated by the drafters of this subsection, as evidenced by the Rule 23 advisory committee notes.

Certification as a class action under Rule 23(b)(1) is appropriate because these ERISA enforcement claims must be brought in a representative capacity on behalf of the Plan and the relief granted by the Court to remedy a breach of fiduciary duty would "inure[ ] to the plan as a whole" rather than to the individual plaintiffs. Massachusetts Mut. Life Ins. Co., 473 U.S. at 140. Because these claims must brought in a representative capacity for the benefit of the plan as a whole, certification under Rule 23(b)(1) is appropriate. *See* Ikon, 191 F.R.D. 457, 466 ("given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief"); Kane v. United Independent Union Welfare Fund, 1998 WL 78985 (E.D. Pa.) (certifying class under Rule 23(b)(1)), *citing* Massachusetts Mut. Life Ins. Co., 473 U.S., 140; Specialty Cabinets & Fixtures, Inc., 140 F.R.D. at 478 (same).

IV. CONCLUSION

As Plaintiffs have demonstrated, this action meets the requirements of Fed. R. Civ. P. 23(a) and 23(b)(1). Accordingly, Plaintiffs respectfully request that their Motion for Class Certification be granted.

Dated: April 4, 2003

Respectfully Submitted,

TRUJILLO RODRIGUEZ & RICHARDS, LLC

By: _____

Donna Siegel Moffa (DSM4634)
Lisa J. Rodriguez (LR6767)
3 Kings Highway East
Haddonfield, NJ 08033
(856) 795-9002

SCHATZ & NOBEL, PC
Robert A. Izard
Andrew M. Schatz
Wayne T. Boulton
330 Main Street, 2nd Floor
Hartford, Connecticut 06106-1851
(860) 493-6292